1/14

OAL DKT. NO. EDU 16058-12
AGENCY DKT. NO. 329-11/12

SILVIA MEDRANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/07/14

Date of Mailing: 1/07/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 16058-12
AGENCY DKT. NO. 329-11/12

SILVIA MEDRANO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Alan S. Porwich, Esq., for petitioner
(Feintuch, Porwich & Feintuch, attorneys)

Lester E. Taylor, Esq., for respondent
(Florio Perrucci Steinhardt & Fader, attorneys)

Record Closed: November 27, 2013 Decided: December 2, 2013

BEFORE **RICHARD McGILL**, ALJ:

Silvia Medrano filed a petition with the Commissioner of Education challenging a determination by the Board of Education of the City of Jersey City to withhold her increment for the 2012-2013 school year. The matter was transmitted to the Office of Administrative Law on December 5, 2012, for determination as a contested case.

On the hearing day, the parties agreed to an amicable resolution of the matter and submitted a written Stipulation of Settlement. Having reviewed the record and the terms of settlement, I **FIND** as follows:

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

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

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

Dec. 2, 2013
DATE

Richard McGill
RICHARD McGILL, ALJ

Date Received at Agency: 12-4-13

Mailed to Parties:

DEC - 4 2013
DATE

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

ljb

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Attorneys for Petitioner

SILVIA MEDRANO, Petitioner vs. JERSEY CITY PUBLIC SCHOOLS, Respondent	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO EDU 6058-2014 AGENCY REF NO. 329-11/12 STIPULATION OF SETTLEMENT

THIS MATTER having come before the Office of Administrative Law for hearing on November 27, 2013, with Alan S. Porwich, Esq., of Feintuch, Porwich & Feintuch, appearing for Petitioner and Lester E. Taylor, III, Esq. of Florio, Perrucci, Steinhardt & Fader, LLC, appearing for Respondent, and the parties having reached an amicable resolution of the issues in dispute,

IT IS HEREBY STIPULATED AS FOLLOWS:

1. Respondent, Jersey City Public Schools, shall restore Petitioner's employment status which was withheld in the 2012-2013 school year, retroactive to September 1, 2013.

2. Petitioner agrees to the withholding of her ~~increment~~ experimental adjustment for the 2012-2013 school year.

3. Petitioner acknowledges that the increment for 2013-2014 can not be adjusted to her salary at the present time as the salary guide for 2013-2014 is not fixed as the Respondent has not yet agreed to a Collection Bargaining Agreement with Petitioner's bargaining unit, Jersey City Education Association.

~~PETITIONER'S~~ FLORIO PERRUCCI STEINHARDT & FADER LLC
~~Attorneys for~~ Petitioner

ALAN S. FLORIO

SILVIA MEDRANO, Petitioner

FLORIO PERRUCCI STEINHARDT & FADER LLC

LESTER E. TAYLOR, III

DATED: November 27, 2013

15/14

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES LANG,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
TOWNSHIP OF WOODBRIDGE,	:	
MIDDLESEX COUNTY.	:	

SYNOPSIS

The Board certified four tenure charges of conduct unbecoming against James Lang – a tenured teacher employed by the school district since 2003 – for alleged unprofessional and inappropriate comments toward students and fellow staff members over the course of several school years. The Board alleged, *inter alia*, that respondent exhibited unbecoming conduct when he: referred to a female student as "Jo-Jo the Ho-Ho" and yelled "tap that" when she bent down; referred to another female student as "Jizzman"; and repeatedly made unwanted advances toward a female co-worker, subjecting her to distasteful sexual innuendos. The Board sought removal of the respondent from his tenured position.

The ALJ found, *inter alia*, that: the testimony of the respondent was less credible than that of the students and teachers presented by the Board; the honest and forthright testimony of the student witnesses revealed consistent stories of a raucous classroom environment rife with name-calling, sarcasm, and sexual innuendo; respondent's references to several female students as prostitutes and whores disrespected and demeaned these students in a personal way, and violated all standards of decency in relating to his students; the preponderance of credible evidence established that the respondent's conduct toward one of his co-workers, a female teacher, included sexual innuendo and direct sexual references to his desire to view her kissing another female staff member, as well as repeated unwanted invitations on Facebook and in person; teachers are required to exercise a high degree of self-restraint and controlled behavior as they are entrusted with the custody and care of children; respondent in this matter failed to uphold the implicit standards of good behavior expected of a teacher, as his remarks offended publicly accepted standards of decency. The ALJ concluded that the preponderance of the credible evidence established that the respondent committed unbecoming conduct and insubordination, and that the appropriate penalty is termination from his tenured employment.

Upon consideration and review of the full record of this matter, the Assistant Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34 – adopted the Initial Decision of the OAL as the final decision in this matter. Accordingly, the respondent was dismissed from his tenured position and a copy of this decision was forwarded to the State Board of Examiners for action as that body may deem appropriate.

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

Issued 1/13/14

The respondent's inappropriate conduct was not only directed at the students; his conduct towards another staff member, Valerie Joao, was similarly unacceptable, and culminated with an email that was sent to Ms. Joao after the administration specifically directed him to cease from having any contact with her. Further, the record as a whole indicates that respondent maintained a classroom atmosphere that was rampant with sexual innuendo and disrespect toward students, which is clearly not conducive to a productive learning environment. Although respondent appeared to express remorse concerning his treatment of Ms. Joao, he never admitted to the actual statements that he made to her or the distasteful sexual innuendos. In light of the respondent's failure to adequately accept responsibility for any of the problems described herein, it cannot be reasonably predicted that respondent will significantly change his attitude or style. As a result, the Commissioner finds that the respondent is unfit to discharge the duties and functions of his position as a teacher.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Respondent is hereby dismissed from his tenured position with the Woodbridge Township School District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.[4]

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 1/13/14

Date of Mailing: 1/14/14

[4] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5643-12
AGENCY DKT. NO. 108-4/12

IN THE MATTER OF THE TENURE HEARING OF JAMES LANG, SCHOOL DISTRICT OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY.

Nicholas Celso III, Esq., for petitioner (Schwartz, Simon, Edelstein & Celso, attorneys)

Edward Cridge, Esq., for respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: October 28, 2013 Decided: November 29, 2013

BEFORE **TIFFANY M. WILLIAMS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about March 27, 2012, Dr. John A. Crowe, the superintendent of the Woodbridge Township School District, filed Sworn Tenure Charges and a Sworn Statement of Evidence against respondent, James Lang. The charges alleged that Lang, on multiple occasions, had engaged in unprofessional and inappropriate comments towards staff members Valerie Jaoa and Dr. Maria Pereira, as well as towards several students, including J.C., B.C., J.T., C.A., H.A., Y.C., A.S., K.M., J.K.,

M.B. and M.G. The charges allege that several of the comments to teachers and students were sexual in nature and unwanted. In summary form, the charges allege the following:

CHARGE I—Unbecoming and insubordinate conduct towards students

- Count 1—alleges that Lang made inappropriate comments to J.C., including calling her "Jo-Jo the Ho-Ho" and a "dirty ho," and uttering the words "tap that" when she bent over to pick up a piece of paper.

- Count 2—alleges that Lang referred to J.T. as a prostitute and called her "Jizzman."

- Count 3—alleges that Lang told B.C. after she kicked another student that she was "giving him a show," and that Lang asked her to perform cartwheels in class and remarked, "Oh yeah," afterwards. Lang is also alleged to have failed to inform B.C. of the proper spelling of a website, which resulted in her accessing a pornographic site. Lang is alleged to have laughed when B.C. reported the site's content and to have repeatedly referenced the incident.

- Count 4—alleges that Lang referred to C.A. as a "ho."

- Count 5—alleges that Lang told H.A. that "her mouth was fast and on the weekends it runs extra fast."

- Count 6—alleges that Lang flirtatiously said to Y.C., "Oh, behave," after she danced excitedly in the class.

- Count 7—alleges that Lang used derogatory language in referring to A.S. as "slow."

- Count 8—alleges that Lang told K.M. that another student, J.L., would be "better off working the streets."

- Count 9—alleges that Lang referred to J.K. as a "kitty cat."

- Count 10—alleges that Lang referred to M.B. as a whore and suggested that she should wear less clothing on dress-down day.

- Count 11—alleges that Lang told M.G. that he wished that she were older, and that she "looked like she could work the corner."

- Count 12—alleges that Lang asked students during class whether they would be afraid if his snake were in their bed.

- Count 13—alleges that Lang told his students that he used to watch students shower at a former job at a community center.

CHARGE II—Unbecoming and insubordinate conduct towards staff (Dr. Pereira)

- Count 1—alleges that Lang told students that he saw Dr. Pereira out drinking and dancing.

- Count 2—alleges that Lang told students that something was wrong with Dr. Pereira's bladder because she went to the bathroom often.

CHARGE III—Unbecoming and insubordinate conduct towards staff (Valerie Joao)

- Count 1—alleges that Lang made comments expressing a desire to see Joao in her bathing suit because "her body must be so hot," and that Lang wished she was like Lady Gaga so that he could watch her "hook up" with another female teacher. Lang is alleged to have also referred to Joao as a "b*tch."

- Count 2—alleges that Lang made numerous unwanted advances, including sending Facebook friend requests and repeatedly asking Joao to go dancing.

CHARGE IV—Unbecoming and insubordinate conduct

- Lang is alleged to be unfit to serve in a position of educational leadership.

On March 28, 2012, the Board secretary served the respondent with the charges, through his legal representative. On April 19, 2012, the Board determined that the charges were sufficient to warrant Lang's dismissal. On or about April 23, 2012, the Sworn Tenure Charges were certified to the Commissioner of Education, together with a Certificate of Determination. Lang was suspended without pay for 120 days. On or about April 25, 2012, Lang filed an Answer to the Sworn Tenure Charges denying the allegations. The matter was transmitted to the Office of Administrative Law, where it was filed as a contested case on April 26, 2012. A hearing was conducted over the course of six days and concluded on June 18, 2013[1]. After receiving post-hearing briefs and re-opening the record to receive several additional exhibits, I closed the record on October 28, 2013.

FACTUAL DISCUSSION

James Lang is a graduate of Seton Hall University with a degree in education. He holds two State licenses in K–12 and certified elementary education K–8. Lang has been employed as a teacher in the Woodbridge Township school district since September 2003. He began his career as an English teacher at the Colonia Middle School and moved to the Woodbridge Middle School from 2004–2011. He has been at the Fords Middle School since the 2011–2012 school year. His performance evaluations have consistently been satisfactory.

[1] Hearings were conducted on January 23, 2013, January 24, 2013, May 8, 2013, June 18, 2013 and August 14, 2013

Allegations of Lang's inappropriate conduct towards students

The following testimony was presented regarding the Board's allegations of Lang's inappropriate conduct towards various students.

Glenn Lottman

Glenn Lottman is the principal at the Fords Middle School. In or around December 2011 he was made aware of complaints regarding James Lang. One of Lang's students, J.T., reported that Lang had called her inappropriate names. J.T. had reported the complaint to another teacher, as well. Another student, Y.C., met with Lottman for an unrelated meeting and shared that he was aware that several girls were going to make up stories about Lang. Y.C. indicated that the girls were upset that Lang was going to call their parents regarding their classroom behavior. Lottman advised Lang of the allegations later the same day, and Lang admitted that he had called several of the parents of students who had been misbehaving.

As Lottman returned to his office from a monthly leadership team meeting, he encountered two students, J.C. and B.C., who were waiting to see him. J.C. and B.C. complained that they were afraid to go to Lang's class because he was inappropriate. Vice principal Doug Sealander was present as well. The next day, Lottman interviewed several students from the class, including D.P. and Y.C., who both confirmed that they heard Lang say "dirty whore" and "Jizzman." Lottman also interviewed another student, D.C., whose story coincided with the other four students' version of the events. Lottman met with Y.C. again and asked about Y.C.'s former statement in which he indicated that he was aware that girls were going to make up allegations against Lang. Y.C. began to cry and admitted that he had lied previously about the girls fabricating stories about Lang.

On January 11, 2012, Lottman separated each student and asked them to make written statements regarding the allegations against Lang. Based on Lottman's review of the statements, he found that the statements were consistent with the oral versions that had been previously reported to him.

John Blasena

John Blasena is a social studies teacher at the Woodbridge Middle School. Near the end of the first marking period of the 2011–2012 school year, Blasena had a discussion with a student, K.M., about her grades in his class. During the discussion, Blasena asked K.M. about her grades in her other classes. K.M. revealed that she was struggling in language arts and that her teacher, Mr. Lang, had told her that she would be "better off working the streets." The next day, Blasena reported the incident to the school's guidance counselor, Mrs. Torrella, who in turn directed him to speak with Principal McLaughlin. Blasena drafted a memorandum memorializing the conversation with K.M. (P-1.)

M.G.

M.G. was a seventh-grade female student at the Woodbridge Middle School during the 2010–2011 school year, where she was Lang's student. M.G. received a "B" in Lang's class. She testified that close to the end of the 2011–2012 school year, students were signing her shirt during class. When Lang went to sign the back of her shirt he placed his hand on her stomach, which caused her to back away from him. M.G. described that Lang was seated at his desk and that she had been standing in front of him when he placed his hand on her abdomen area. M.G. also testified about comments that she heard Lang say in the classroom about another student, M.B. Lang said that M.B. was a "whore, thirteen and pregnant," and should wear less clothing on dress-down day. M.G. remembered that Lang made the comment when M.B. stopped by the classroom on her way to the bathroom, which she had done in the past on a regular basis. M.G. recalled that the incident occurred near the end of the school year, in approximately May or June. M.G. recalled that Lang was seated at his desk, which was approximately ten feet away from the doorway, when he made the comment.

M.G. testified to comments that Lang made about her in the classroom. Specifically, he said that she looked like she "could work on the corner." She recalled that Lang made the comment while she was at her desk, approximately halfway across

the classroom from where his desk was located. She recalled that the tone of his voice was projected, but not loud. She did not respond to his comment. Other students tried to talk to her about the comment, but she did not report it initially. After speaking with other students, M.G. became uncomfortable with Lang's comments.

Finally, M.G. described that after she presented Lang with a birthday cake on behalf of the class, he indicated that he wished that she were older. M.G. reported the events after Principal McLaughlin approached her in February 2012. She had been reticent to report each incident as it occurred because she did not want to become involved in reporting them. She was aware that a classmate had spoken to McLaughlin about the events with Mr. Lang. M.G. drafted a written statement at McLaughlin's request. (P-3.)

J.C.

J.C. was a female student in Lang's class at the Fords Middle School during the 2011–2012 school year. J.C. testified that during class, she went to pick up trash that had missed the garbage can. The garbage can was located in the front of the room, in close proximity to where Lang stood. As she bent down, she heard Lang say, "tap that," which she interpreted to refer to "tapping" her backside. J.C. recalled that Lang was standing behind her as she bent over to pick up the trash. J.C. testified that she was disgusted and told Lang, "Don't say that to me." Lang replied that he didn't care how she felt, and then whispered, "Jo-Jo the Ho-Ho." J.C. could not recall the exact date of the incident, but estimated it to have taken place between Thanksgiving and Christmas break. J.C. told two other students, B.C. and Y.C., about the incident, but was nervous about telling an adult. B.C. accompanied J.C. to report the incident to Mr. Lottman. J.C. wrote a statement memorializing her recollection of Lang's conduct. (P-4.) J.C. has never been disciplined by Lang in class. On cross-examination, J.C. explained that she had written Lang an apology note during the school year because she had called him an unpleasant name after he asked her, "Why do you look so ugly that way?" (P-4.)

J.T.

J.T. is a fourteen-year-old female student who had previously been a student in Lang's reading and writing class at Fords Middle School. J.T. testified that on several occasions throughout the year, Lang referred to her as "Jizzman," and had called her a "prostitute." Other students in the class had also referred to her as "Jizzman" in front of Lang. When Lang referred to J.T. as a prostitute, some boys in the class laughed and made jokes. J.T. believed that other students in the class heard, including N.M., N.L., S.S., H.A. and C.A. J.T. also recalled Lang telling another student, H.A., that her "mouth runs extra fast on the weekends." J.T. reported the incident to her parents and her homeroom teacher, Mrs. Bobel. (R-2.) She disclosed that she was uncomfortable telling her parents and went directly to her room afterwards because of the awkward nature of the subject. J.T. reported the incident to Mr. Lottman and drafted a statement memorializing her version of the events. (P-5.)

H.A.

H.A. is a fourteen-year-old ninth-grade female student who had been a student in Lang's class at Fords Middle School. H.A. testified that during class, Lang made a comment that her mouth runs faster on the weekends. She also heard Lang refer to J.T. as "Jizzman." H.A. described that Lang would often make inappropriate comments in class, and she became uncomfortable going to him for teaching assistance. H.A. reported the incident to Mr. Lottman and drafted a written statement. (P-6.) H.A. had never been disciplined by Lang in class.

B.C.

B.C. is a fourteen-year-old female who had previously been a student in Lang's language arts class at the Fords Middle School. B.C. testified that during class she asked Lang if she could do a cartwheel. Lang agreed and remarked, "Oooh, [B.]." The next day, Lang requested that B.C. perform another cartwheel. B.C. also mentioned that Lang told her about a website called NetZero that provided free internet access. B.C. did not know the correct spelling, and typed the numeral "0" rather than spelling out

the word "zero." As a result, an inappropriate pornographic website appeared on her computer screen. B.C. closed her laptop upon seeing the website. B.C. also recalled on several occasions hearing Lang refer to another student as "Jo-Jo the Ho-Ho," in front of the entire class. B.C. also recalled that during one class she jokingly lifted her leg to pretend to kick another student at the front of the room, and Lang remarked, "Oooh, [B.], you are giving me a show." B.C. later reported both incidents to Mr. Lottman and drafted a written statement. (P-7.) B.C. is friends with J.T., H.A. and J.C. B.C. had spoken with J.C. and another student in the bathroom on one occasion about reporting one of the incidents to Mr. Lottman prior to writing her statement. On cross-examination, B.C. revealed that she and another classmate had made a sign for Lang that was hanging in the classroom that stated, "Mr. Lang, Block 2, is awesome."

D.P.

D.P. is a male student who had been in the same class and heard Lang call J.C. a "dirty ho," and "Jo-Jo the Ho-Ho." D.P. was angry and uncomfortable at hearing Lang's remarks. D.P. described what he perceived to be sexual tension in the classroom. D.P. also observed B.C.'s cartwheel and Lang's response of "Oooh, [B.]." Lang also asked B.C. to perform another cartwheel. D.P. heard Lang jokingly bring up the fact that H.A. had accessed a pornographic internet site accidentally when trying to access the NetZero website. Lang also referred to a female student as "slow," and referred to a male student as a "kitty." D.P. spoke up and told Lang that he should refrain from calling the female student "slow." In January 2012, D.P. reported his observations to Mr. Lottman. (P-10.) Prior to speaking to Mr. Lottman, D.P. had a discussion with several students in the class about reporting Lang's behavior. D.P. had been disciplined by Lang in December 2011 because Lang thought that D.P. was too interested in guns, and he had brought in a gun magazine to class. (R-4.) (R-25.) D.P. had told his mother about the "Jo-Jo the Ho-Ho" comments and the cartwheel incidents.

Robert McLaughlin

Robert McLaughlin is the principal of the Woodbridge Middle School and was Lang's supervisor. Prior to becoming principal, he served as a teacher, athletic director,

administrative assistant and vice principal. McLaughlin recalled meeting with John Blasena regarding Blasena's meetings with K.M. and M.G. Blasena disclosed that the students reported inappropriate comments made by Lang. In approximately February 2012, McLaughlin met with K.M. and M.G. separately and asked each to give written statements, which included specifics about what had occurred. McLaughlin also spoke with parents of each student. McLaughlin then submitted the students' statements to the Office of Personnel Services. He also confirmed that he was previously unaware of any complaints against Lang while serving at the Woodbridge Middle School.

Lang's denial of the allegations

Lang denied calling J.T. a prostitute or "Jizzman." He acknowledged having spoken with J.T.'s father about his concerns that she was disruptive, unprepared, always talking in class and not demonstrating her potential. Lang indicated that he heard other students in the class refer to her as Jizzman and that J.T. admitted that it was her nickname. Lang researched the word "Jizzman" in the urban dictionary and discovered that it refers to a male secretion.

Lang also denied referring to J.K. as a "kitty," but explained that J.K. would make purring noises in class. On one occasion, Lang asked sarcastically, "Is there a cat in the room?" Lang denied calling C.A. a "ho" and denied referring to J.C. as a "ho-ho." Lang denied that he said to H.A. that her "mouth runs fast and must run faster on the weekends." He explained that H.A. had been continually talking to J.T. during class and he warned her several times that he wanted to start class. Lang admitted that he sarcastically commented that she "talks so much here, she must talk twice as much on the weekend." Lang also denied asking B.C. to do cartwheels in class. Lang admitted that he wrote a reference to the website NetZero.com on the homework board and told B.C. verbally about the site, but denied knowing that the students would access anything inappropriate until B.C. told him.

Similarly, Lang denied referring to M.B. as "thirteen and pregnant," or stating that she should wear less clothing during dress-down day. Lang recalled that M.B. would

stop by often, and that at times he had difficulty getting her to leave. He believes that it was possible that she wore a hoodie one day, and he asked her to take it off.

Lang denied telling M.G. that he wished that she were older, or that she looked like she could "work the corner." He denied touching her inappropriately while signing her t-shirt. Lang recalled signing the shirt in the back center while he was seated at his desk. The only physical contact that he recalled was putting his hand on the back of her shirt to secure it so that he could sign it.

N.V.G.

N.V.G. was a student in Lang's third-block English class at the Fords Middle School, where he was classmates with J.T. N.V.G. testified that he did not hear Lang call J.T. a prostitute or use the term "Jizzman."

N.N.

N.N. was a student in Lang's second-block English class at the Fords Middle School and was classmates with J.C. Similarly, N.N. did not hear Lang refer to J.C. as "Jo-Jo the Ho-Ho" or a "ho." N.N. admitted that the classroom was typically rowdy and students did not typically do their work, but instead were using their cell phones. N.N. only missed a few days of school, and was otherwise regularly present in class.

A.A.

A.A. was a student in Lang's language arts class at the Woodbridge Middle School, where he was classmates with M.G. He was present when the birthday cake was brought in for Lang, and he did not hear Lang say that he wished M.G. were older. A.A. also indicated that he never heard Lang say that M.G. should wear less clothing or that she looked like she could work the corner. A.A.'s desk was in the back of the class, while M.G.'s desk was in the front of the class. From A.A.'s vantage point in the classroom, he was not able to hear Lang if Lang were seated at his desk in the front of the room. A.A. knows M.B. and had observed her outside of Lang's classroom. A.A.

did not hear Lang refer to M.B. or any student as a whore, or say that she was pregnant.

A review of Lang's performance evaluations revealed that his performance was satisfactory and he was recommended for reappointment annually. However, his 2005-2006 evaluation noted that he should broaden his student management skills. (R-6.) In 2007-2008, Pricipal James Sullivan again recommended that Lang become a more affective student manager and continue to improve his skills in the area. (R-8.)

Allegations of Lang's inappropriate conduct towards staff members

Valerie Joao has been a French teacher in the District since 2009. Initially, Joao shared a classroom with Lang. During the course of the year, Joao received several emails from Lang on her personal email account and several Facebook "friend requests," which she declined. In June 2010, Joao requested of the vice principal, Ms. Balog, that she not be required to share a classroom with Lang in the future because he had made several comments that made her uncomfortable. Specifically, Lang had said that he would "love to see her in a bikini," and that he wished that she were like Lady Gaga because he wanted to see her "make out" with the art teacher. Joao also reported these comments to Principal Sullivan and Patricia Rock, the District's affirmative action chair. Upon receipt of the complaint, Vice Principal Balog immediately moved Joao's classroom. After changing classrooms, Joao did not receive any further comments from Lang, but did receive an email from him on July 4, 2010, with an apology and other explanatory statements regarding his conduct. (P-27.)

Several members of the administration testified as to their conversations with Joao about her complaint against Lang. Vice principal Barbara Balog testified that Joao had requested not to share a room with Lang because he had made inappropriate comments about her clothing, called her a "daddy's girl," and pursued her as a friend on Facebook. Balog had requested that Sullivan and Rock be notified as well. She described Joao as uncomfortable to have to make the complaint, and said that she wanted to try to minimize the incident if possible. As a result of an investigation, Balog was aware that an affirmative action grievance was filed and that Lang was advised that

he should have no further contact with Joao. (P-25.) Balog believed that Lang complied with all directives.

Principal James Sullivan testified that Balog had reported the complaint made by Joao. He interviewed Joao, who appeared nervous but reiterated that she did not want to share a room with Lang in the future because his comments had made her uncomfortable. Sullivan directed Lang not to contact Joao and to specifically refrain from making any similar comments in the future. Lang denied making the comments, but indicated that he understood the directive. Additionally, Glenn Lottman, the principal of the Fords Middle School, testified that he recalled that Joao's teaching schedule required her to split her time between Fords Middle School and Woodbridge Middle School. Accordingly, she had requested of him that she not interact with or cross paths with Lang during their schedules because she felt uncomfortable around him.

At the hearing, Lang denied making the comments to which Joao had testified. Specifically, he denied saying that she was a "daddy's girl," making any lesbian or Lady Gaga comments, or making any reference to how she would look in a bikini. Lang explained that in his interactions with Joao he had never gotten the impression that she was uncomfortable, and she had never requested that he leave her alone. He believed that their interactions had evolved into a professional friendship. He admitted sending her a Facebook friend request repeatedly because he thought that perhaps there had been a technological glitch after she had not initially responded. He also explained that he had sent her emails from his personal email account after having exchanged email addresses in the event that questions arose about the location of materials in their shared classroom. Lang explained that on a day that Joao had called out sick prior to a holiday weekend during which she travelled to Las Vegas, they had an email exchange in which Joao provided her cell phone number in order for Lang to vouch for her.

Lang described several other interactions with Joao. Lang admitted that he had asked Joao whether she was interested in hanging out socially, and specifically suggested going to a nightclub. Joao responded that she would be open to it, but that her schedule was very busy. On another occasion, Joao had invited him to a dinner,

but he declined because he was unavailable. Lang acknowledged that he wanted Joao to be more responsive to his desire to further their friendship through his outreach.

On or about June 9, 2010, Lang had a confrontation with Joao in which Joao described another teacher as "a slutty b*tch," and indicated that she "hated her." Joao also mentioned that she hated Ms. Neary and asked if she was a "dyke." Lang felt uncomfortable, but revealed to Joao that Neary had made a comment about another teacher, whom he described as smelling like "dirty diapers."

Later in his testimony, Lang described that he had mentioned Lady Gaga to Joao in conversation because he was aware that she liked Lady Gaga. He also admitted having complimented her as she sang along with music that played during her prep time. Lang admitted that he complimented her on swimwear when she brought up the fact that she had brought "a new cute swim outfit." Lang also described having told Joao that he wrote her a poem, although he admitted that he had not, but he wanted to see her reaction upon hearing that he had written her a poem.

On June 14, 2010, Lang was advised of Joao's complaints during a meeting with Sullivan and Rock. He was aware that he was not supposed to have any further contact with Joao, but admitted contacting her by email on July 4, 2010. (P-27.) He described that he was very emotionally distraught about the incident because it should not have escalated. He sent the email because he needed a spiritual catharsis and closure because he is very religious. He recalled mentioning in the email that he had said many hurtful things that he regretted.

On cross-examination, Lang explained several aspects of his statements in the email. First, he explained that when he apologized, "if I judged you in any way," he meant that he believed that Joao felt judged that he did not permit her to use all of his belongings in the classroom and that he had made a negative comment about her friend (i.e., the "dirty diapers" comment). Next, Lang explained that when he "apologized for not treating her with dignity," he was referring to the fact that she wanted to occasionally use his classroom materials and he had been very protective of them, often asking her to meticulously replace them. Lang further explained that his reference to "apologiz[ing]

for intruding on her personal life" was a reference to the fact that she had initiated several discussions about her personal life. Lang added that his reference to acting in an "irrational and "aggressive" manner was a reference to both his overreaction to the use of his classroom materials and his hyperactivity due to the diabetic medication that he had been taking during that time period. The medication made him jittery and caused irrational thoughts during that time period, and he had lost forty pounds due to stress. Lang admitted that during that time he had been emotionally unstable and sought treatment for depression. He confirmed that he took steps to avoid Joao as much as possible.

Dr. Maria Pereira is currently the principal of Woodbine Avenue elementary school in the township of Woodbridge. Prior to serving as principal, she served as the language arts supervisor for the District. During the 2003–2004 school year, Dr. Pereira served as a language arts teacher in the Woodbridge Middle School with Lang. Lang and Dr. Pereira shared a reading/writing workshop block of students. During Dr. Pereira's professional period she would pass Lang's classroom to go to the ladies restroom. A group of students inquired as to whether Dr. Pereira had a bladder infection. Upon further inquiry, the students revealed that Lang had told them that she had a bladder problem and should see a doctor because she used the bathroom at the same time every day. On another occasion, the students reported that Lang had told them that he had seen Dr. Pereira out dancing at a bar. The students also reported that they had heard from their peers that Lang asked the class whether they would be afraid if his snake were in their bed.

Dr. Pereira reported the incidents to her principal, James Sullivan, and expressed that she no longer wanted to share a block with him. Sullivan granted her request. Dr. Pereira also confronted Lang personally and requested that he not mention her name in his class again. Lang responded that he did not know what Dr. Pereira was talking about.

Credibility Findings

The relevant factual disputes that must be resolved with respect to this incident involve whether Lang made the comments alleged by Joao, Pereira and the students who testified. In order to resolve the inconsistencies, the credibility of the witnesses must be determined. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F. 2d 718, 749 (9th Cir. 1963). Inferences may be drawn concerning the witness's expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transp. Co., 100 N.J. Super. 103 (App. Div. 1968). Additionally, the witness's interest in the outcome, motive or bias should be considered. A fact finder "is free to weigh the evidence and to reject the testimony of the witness . . . when it is contrary to circumstances given in evidence or contains inherent improbabilities or contradictions which alone or in connection with other circumstances in evidence excite suspicion as to its truth." In re Perrone, 5 N.J. 514, 521–22 (1950). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

Having examined the evidence and observed the demeanor of all of the witnesses, I **FIND** that Joao's version of the events is more credible than Lang's version. First, I found Joao's demeanor and presentation as a witness to be credible and forthcoming. Her recitation of the incident was detailed, yet poignant, and did not deviate from the recollections of corroborating witnesses Sullivan, Balog and Lottman. Moreover, I found no credible evidence that Joao had any motive to lie or that she exhibited any bias. While Lang described an interaction days prior to her complaint where she made negative comments about other teachers, I do not conclude that this was sufficient to demonstrate bias—particularly where Lang admitted offering a listening ear and adding a negative comment about a teacher himself.

Additionally, Lang admitted that he had mentioned Lady Gaga and had complimented Joao about her swimwear. His version of the context of these comments is not believable. It defies logic that Joao would bring up the subject of swimwear and

that Lang would blanketly compliment her swimwear, sight unseen, as he described. Based on my observations of the witnesses, Joao's vivid and detailed descriptions of Lang's comments, which were remarkable, were accurately and consistently repeated over the course of the investigation and these proceedings. I found no evidence of bias or contradiction.

Student Allegations

Further, I credit the testimony of students M.G., J.C., J.T., H.A., B.C. and D.P. regarding their observations of Lang and the comments that he made in the classroom. In evaluating each student's credibility individually, I found each student to be confident, cogent and credible. Their individual testimony was detailed and consistent with prior statements and corroborated by other witnesses. Overall, I found no evidence that would otherwise convince me that each student individually would fabricate the denigrating and offensive comments about themselves that were alleged. No compelling evidence of motive or bias was presented by Lang. In fact, the credible evidence revealed that the students liked aspects of Lang's class and Lang personally. Nonetheless, I do not find that their mixed sentiments were evidence of any improper motive in their live testimony.

Specifically, J.T. was credible and confident when she testified to Lang calling her "Jizzman" and a prostitute. Without hesitation, J.T. was able to name several other students in the class that she believed were present during times that Lang made these comments. Her credibility was bolstered by the fact that she disclosed the comments to her parents. Moreover, her statements were corroborated by H.A.'s credible testimony that she too heard Lang refer to J.T. as "Jizzman," and she was consistent when she reported the incident to Mr. Lottman. While N.V.G. testified that he did not hear these comments, I am not persuaded based on N.V.G.'s demeanor and testimony that he was confident that the statements could not have been uttered under the circumstances that J.T. and H.A. described.

Similarly, H.A.'s testimony was cogent and detailed about Lang's reference to her mouth running faster on the weekends. H.A.'s testimony was corroborated by J.T. and

was consistent with her report to Mr. Lottman. While according to Lang, H.A. talked a lot in class and had been reported for such, I did not find that this lessened her credibility to this point. Lang admitted that he made a statement that was substantially similar to the one that H.A. reported. I find H.A.'s version of the exact words to be more credible than Lang's.

J.C. was a believable witness as she described the incident where Lang made the comments "tap that" and "Jo-Jo the Ho-Ho." J.C. described in detail the attending circumstances and never wavered from her report of the nature of the statements that she heard. Two other students corroborated her testimony—D.P. and B.C.—each indicating that they personally heard the same words from Lang.[2] D.P. was very confident and forthright in his observations. He also admitted that Lang had recently called his parents because of in-class conduct. However, D.P. did not present himself as someone with a vendetta, but rather as an extremely mature student who was outraged at Lang's behavior. I credit D.P.'s observations that Lang called other students "slow" and "kitty." I specifically reject Lang's explanation that he asked whether there was a cat in the room as a denial that he called the student "kitty." Lang's statement caused me to further believe D.P.'s recollection that Lang called the same student "kitty," given Lang's proclivity towards sarcasm. I also credit D.P.'s observation of Lang coaxing B.C. to do cartwheels in class and making comments to the effect of, "Oooh, [B.]."

B.C. was very credible and cogent in her testimonial description of having elicited comments from Lang after having performed cartwheels and playfully kicked another student in class. Additionally, B.C. gave very detailed testimony about having accessed an inappropriate website after Lang directed her to a free-internet-access site. B.C. was consistent in her report of the incident to Mr. Lottman. The fact that B.C. also made a sign for Lang expressing that his second-block class was awesome did not erode her credibility in describing the negative aspects of her experience in the class. B.C. was also credible in corroborating that she heard Lang refer to J.C. as "Jo-Jo the Ho-Ho."

[2] Although N.N. testified on Lang's behalf that he did not hear these comments, I do not find N.N. persuasive, in that he also described that the room was often rowdy and noisy.

Finally, M.G. exhibited excellent demeanor in relaying that Lang had told her that she looked like she could work the corner, and that he had touched her stomach while signing her shirt. M.G. gave details as to where she was standing and where Lang was positioned in the classroom, as well as the volume of his voice. In describing the comments that she heard Lang utter about M.B. and her recitation of Lang's comments after being presented the birthday cake, M.G. was equally confident, detailed and consistent. Her testimony was consistent with the prior report that she had made to Mr. McLaughlin. Her honesty at her initial reticence to report her teacher bolstered her credibility. I did not find A.A.'s testimony of not hearing the comments to undermine M.G.'s credibility. Although A.A. was credible, A.A. admitted that he sat in the back of the classroom and was not able to hear Lang if he were seated at his desk.

With respect to the totality of his testimony, I do not find Lang to be credible in his account of any of the incidents alleged, nor his denials of the allegations. Lang's overall demeanor was unusual, in that at times his demeanor appeared as if he were detached from reality and fabricating as each question progressed. He was often evasive, and at other times presented unresponsive dramatizations. The culmination of Lang's demeanor was demonstrated during cross-examination when he began to explain the meaning of the email statements that he had drafted to Joao on July 4, 2010. Lang's explanation as to why he was contacting Joao after having been forbidden by the school's administration was farcical. Based on my observations of his demeanor and my evaluation of the explanations that he gave, I determined that his testimony was untruthful. Specifically, I found that Lang's explanation that his references in the email to aggressive, intrusive and irrational behavior were based on interactions about classroom materials was fabricated. To the contrary, I credit the content of the email in its context to the credible allegations made by Joao—that Lang had been, in his own words, aggressive, irrational and intrusive into her personal life in an inappropriate manner as a professional colleague. Taking into account Lang's statements about his medical condition and mental state during the time period at issue as having been jittery, aggressive, and irrational, I am further inclined to discredit his version of the events with respect to each allegation against him. I am concerned that he never reported his medical difficulties to the administration during the time in which he was educating students—particularly where he described depression and irrational thoughts.

Moreover, in his denials of the allegations of the inappropriate student comments, I found the students' versions of the events to be more credible than his. In the instances of the most egregious name-calling, Lang denies using any of the language alleged. He does acknowledge making sarcastic remarks in several instances, including regarding H.A. "running her mouth," B.C. raising her leg and "giving a show," and the student who was making cat-like sounds. Lang acknowledges that several of these circumstances occurred, but his description was of sarcastic comments, while the students' descriptions were of offensive comments. Weighing Lang's credibility versus that of the students, when he has an interest in the outcome, I find the students to be more credible because they have no reason to fabricate the recitation of detailed derogatory language about themselves.

Accordingly, based on my evaluation of the credibility of the witnesses and my evaluation of the evidence, I resolve the inconsistent testimony[3] and **FIND** the following as **FACT**:

1. During a conversation with Joao, Lang commented that he would "love to see her in a bikini," and that he wished that she were like Lady Gaga because he wanted to see her "make out" with the art teacher.

2. Lang contacted Joao via email on July 4, 2010, after having been advised in the affirmative-action investigation not to have any further contact with her. (P-27.)

3. During class, Lang referred to M.G. as looking like she could "work the corner."

4. During class, Lang referred to a student who passed by his classroom, M.B., as a "whore, thirteen and pregnant."

5. During class, Lang referred to J.C. as "Jo-Jo the Ho-Ho," and said "tap that" as she bent over to pick up a trash item.

[3] The portion of the factual recitation that is not disputed is **FOUND** as undisputed **FACT**.

6. During class, Lang referred to J.T. as "Jizzman," which he knows from the urban dictionary refers to a male secretion. Lang also called J.T. a prostitute during class.

7. During class, Lang told H.A. that her mouth "runs faster on the weekends."

8. During class, Lang encouraged B.C. to do cartwheels and commented, "Oooh, [B.]!" During another in-class incident, Lang remarked to B.C., after she playfully kicked a classmate, "Oooh, [B.], you are giving me a show."

9. During class, Lang told B.C. about a website that offered free internet access—NetZero. After attempting to access the site, B.C. accidentally accessed a pornographic site with a similar spelling and reported it to Lang. On several occasions afterwards, Lang jokingly referred to the incident.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

In the State of New Jersey, a tenured teacher shall not be dismissed from his or her position or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. In tenure cases in which a teacher is alleged to have committed unbecoming conduct, the Board of Education has the burden of establishing the allegations supporting the charges by a preponderance of the evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Tenure Hearing of Tyler, 236 N.J. Super. 478 (App. Div. 1989); In re Tenure Hearing of Marrero, 97 N.J.A.R.2d (EDU) 104. The term "preponderance of the evidence" means "the greater weight of credible evidence in the case. It does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to our minds." State v. Lewis, 67 N.J. 47, 49 (1975).

In the New Jersey Supreme Court case of Karins v. Atlantic City, 152 N.J. 532, 554 (1998), the term "unbecoming conduct" is found to be a broadly defined, elastic

term encompassing any conduct which has a tendency to destroy public respect for government employees and competence in the operation of public services. Indeed, in Laba v. Newark Board of Education, 23 N.J. 364, 384 (1957), the Court established that the touchstone of unbecoming conduct is the teaching staff member's fitness to discharge the duties and functions of his or her office or position. Moreover, it has been held that a finding of unbecoming conduct does not require a violation of any specific rule or regulation, but, rather, may be based primarily on an implicit standard of good behavior "which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

According to the Commissioner of Education, teachers are professional employees "to whom the people have entrusted the care and custody of . . . school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." In re Tenure Hearing of Thomas, OAL Dkt. No. EDU 2908-07 (October 11, 2007) (quoting In re Tenure Hearing of Sammons, 1972 S.L.D. 302).

Based on the preponderance of the credible evidence, I **CONCLUDE** that Lang committed unbecoming and insubordinate conduct as alleged in Charge I by making inappropriate comments to students. The honest and forthright testimony of the student witnesses revealed consistent stories about the raucous classroom environment rife with sarcasm, name-calling and sexual innuendo. His particular references to several female students as prostitutes and whores disrespected and demeaned those students in the most personal way. Specifically, in commenting that M.G. could "work the corner," commenting that J.T. was a prostitute and calling her "Jizzman"—which he admitted can mean a male secretion—and referring to J.C. as "Jo-Jo the Ho-Ho" and a "dirty ho," and uttering "tap that" after she bent over, Lang violated all standards of decency in relating to his students. The reference to "tap that" constituted an inapproapriate refereance particulary becaous of the context of J.C. bending over and his comments following. As their teacher, Lang should have provided them with

educational enrichment, academic support and confidence to pursue their life goals. Instead, his conduct contributed to a sexually demeaning environment.

Additionally, the preponderance of the evidence revealed that Lang made sarcastic references to students that were unbecoming and insubordinate. In referring to A.S. as "slow," and to J.K. as "kitty," Lang demeaned each student. As a professional and a leader in the classroom, Lang should have called each student by their proper names at all times. Similarly, Lang demeaned J.C. by commenting, after her in-class cartwheel, that she was "giving him a show" and "Oh yeah." While Lang may have merely intended to demonstrate sarcasm, the impact of his actions was to demean each student through his sarcastic commentary. Lang's sarcasm was misplaced in an educational environment designed to empower students.

While I believe that Lang's sarcasm reared its head in his comment that H.A.'s mouth "runs faster on the weekends," I do not find this remark to be demeaning or constitute unbecoming conduct absent corroborating evidence to support that it was meant as a sexual innuendo. Similarly, I did not find sufficient credible evidence to conclude that Lang made the comments from 2003–2004 regarding his snake in their beds or watching students at a prior job shower. Accordingly, those aforementioned comments do not form the basis of the conclusions that Lang's conduct was unbecoming and insubordinate.

Further, I **CONCLUDE** that the preponderance of the credible evidence established that Lang's conduct towards staff member Valerie Joao was unbecoming and insubordinate, as alleged in Charge III. Joao credibly testified to the course of conversations between her and Lang, which contained sexual innuendo and direct sexual references to his desire to view her kissing another female staff member. Lang's references to Joao's body coupled with his repeated unwanted invitations on Facebook and in person created a tense and uncomfortable environment for Joao, as evidenced by her request to no longer share a room block with Lang.

However, the preponderance of the credible evidence did not establish that Lang's conduct was unbecoming towards Dr. Pereira because of the lack of direct

witness testimony to that point. Dr. Pereira credibly testified to what her students told her in 2003–2004, but her testimony constituted uncorroborated hearsay, which cannot be relied upon to make a finding. Nonetheless, I found Dr. Pereira credible in her testimony that the report of the comments prompted her to request not to share a room block with Lang. Despite her credible testimony that she had seen Lang out the prior Friday at a bar and that she used the ladies room daily, the ultimate determination as to whether Lang made the elleged comment rests upon uncorrobated hearsay. N.J.A.C.1:1-15.5(b). Accordingly, I **CONCLUDE** that the allegations in Charge II cannot be sustained.

Having found Lang to have committed insubordinate and unbecoming conduct, I further **CONCLUDE** that the appropriate penalty is termination of his employment as a teacher, because of the nature of the violations and the pattern of misconduct that they established. Based on the content and nature of the demeaning remarks that Lang made to numerous students, he is not fit to lead in an educational institution among moldable young minds. The grotesque and sexual nature of referring to middle school students as whores is inexcusable. The totality of the sexually inappropriate comments and the sarcastic comments that were not sexually tinged compels the result that Lang cease teaching students.

In evaluating the appropriateness of dismissal, the teacher's lack of a prior disciplinary record, present attitude, and the effect of such conduct on the maintenance of discipline among students and staff are prevailing factors. In re King, EDU 4241-00, Final Decision (February 25, 2002), <http://njlaw.rutgers.edu/collections/oal/>. Admittedly, Lang has no prior disciplinary record and a generally positive reputation. Lang's students that testified against him had some positive things to say about certain aspects of the class—as evidenced by having him sign their shirts at the end of the year, making him signs and bringing him a birthday cake. However, popularity alone cannot save Lang's position. His missteps were grave and detrimental to the development of the students who were the recipients of his remarks, as well as the students who overheard the remarks. I find it compelling that several of the student witnesses corroborated the comments that were made against other students. Lang's comments were not made in a vacuum and will have an impact that will continue

beyond this case. The only just and fair mitigation of the damaging legacy that Lang has left is to terminate his employment as a teacher in the District.

ORDER

Based on the foregoing, it is hereby **ORDERED** that James Lang be **DISMISSED** from his tenured position of employment with the school district of the Township of Woodbridge.

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

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

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

11/29/13
DATE November 29, 2013

Tiffany M. Williams
TIFFANY M. WILLIAMS, ALJ

Date Received at Agency: November 29, 2013

Date Mailed to Parties: DEC - 2 2013

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

rr

LIST OF WITNESSES

For petitioner:

Valerie Joao
Barbara Balog
James Sullivan
Glenn Lottman
John Blasena
Robert McLaughlin
Maria Pereira
M.G.
J.C.
J.T.
H.A.
B.C.
D.P.

For respondent:

James Lang
A.A.
N.N.
N.V.G.

LIST OF EXHIBITS

Joint:

J-1 Stipulation of facts

For petitioner:

P-1 Signed statement from John Blasena dated February 24, 2012

P-2 Handwritten statement dated February 21, 2012, from K.M.

P-3 Handwritten statement (not dated) from M.G.

P-4 Handwritten statement dated January 11, 2012, from J.C.

P-5 Handwritten statement dated January 11, 2012, from J.T.

P-6 Handwritten statement dated January 11, 2012, from H.A.

P-7 Handwritten statement dated January 12, 2012, from B.C.

P-8 Handwritten statement dated January 11, 2012, from Y.C.C.

P-9 Handwritten statement dated January 11, 2012, from F.E.

P-10 Handwritten statement dated January 11, 2012, from D.P.

P-11 Handwritten statement dated January 11, 2012, from N.L.

P-12 Handwritten statement dated January 12, 2012, from A.A.

P-13 Handwritten statement dated January 13, 2012, from D.C.

P-14 Glenn Lottman's transcribed notes re: student interviews

P-15 Glenn Lottman's statement dated February 6, 2012

P-16 Maria A. Pereira (LoGrande) statement dated January 31, 2012

P-17 No Exhibit

P-18a Emails from February 24, 2010, to February 25, 2010, between Lang and Joao

P-18b Email dated May 14, 2010

P-19 Email dated February 25, 2010

P-20 Email dated February 26, 2010

P-21 Email dated March 31, 2010

P-22 Email dated April 12, 2011

P-23 Email dated May 14, 2010

P-24a Handwritten meeting notes from James B. Sullivan

P-24b Transcribed meeting notes from James B. Sullivan

P-25 Affirmative Action Grievance Report with statement from Barbara Balog

P-25 No Exhibit

P-26 No Exhibit

P-27 Email dated July 4, 2010

For respondent:

R-1 Message from J.C. to Lang

R-2 Email from Lang to Amy Volpe dated December 12, 2011

R-3 Sign prepared by B.C.

R-4 Email from Lang to Amy Volpe dated December 8, 2011

R-5 Disciplinary report dated January 6, 2011

R-6 Annual performance review dated March 21, 2005

R-7 Annual performance review dated March 28, 2006

R-8 Annual performance review dated May 24, 2007

R-9 Annual performance review dated May 20, 2008

R-10 Annual performance review dated May 21, 2009

R-11 Annual performance review dated May 20, 2010

R-12 Annual performance review dated May 9, 2011

R-13 Email to Lang dated June 22, 2011

R-14 No Exhibit

R-15 No Exhibit

R-16 No Exhibit

R-17 No Exhibit

R-18 No Exhibit

R-19 Photograph of sign made for Lang

R-20 No Exhibit

R-21 No Exhibit

R-22 No Exhibit

R-23 No Exhibit

R-24 Grade posting status report for Lang dated November 16, 2011

R-25 Grade posting status report for Lang dated December 15, 2011

R-26 No Exhibit

R-27 Grade posting status report for Lang dated December 16, 2011

R-28 Email from Joao dated May 19, 2010

R-29 No Exhibit

R-30 No Exhibit

R-31 Grading summary for the year 2010–2011

1/8/14

OAL DKT. NO. EDU11669-13
AGENCY DKT. NO. 156-7/13

VINCENT STASIO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner observes that the Agreement is neither executed by the Board's attorney, who is the Board's duly authorized representative in litigation, nor authorized by an attached Board resolution as required by *N.J.A.C.* 6A:3-1.13(d). The Commissioner consequently cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating who may sign it on behalf of respondent. If the parties are unwilling or unable to effectuate the requested revision, the matter shall proceed to hearing.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/15/14
Date of Mailing: 1/15/14

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11669-13

AGENCY DKT. NO. 156-7/13

VINCENT STASIO,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,

Respondent.

Marissa A. McAleer, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Kim C. Belin, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: December 5, 2013 Decided: December 9, 2013

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

Petitioner, Vincent Stasio alleges that his tenure and seniority rights were violated when his vice principal position was abolished and he was reassigned as a teacher. This matter was transmitted to the Office of Administrative Law on August 19,

2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On the date of the December 3, 2013, the parties negotiated a settlement, and an executed a settlement agreement indicating the terms of the settlement which is attached.

Accordingly, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the parties' signatures on the Settlement Agreement.

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

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

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

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

December 9, 2013
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency 12/11/13

Date Mailed to Parties: 12/11/13

Attachment

SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT is made by and between Vincent Stasio (hereinafter referred to as "Petitioner"), residing at 20 ½ Parker Avenue, Manasquan, New Jersey 08736, and the Asbury Park Board of Education, a body corporate and politic responsible for the governance of the public schools in the City of Asbury Park, whose principal place of business is located at 603 Mattison Avenue, Third Floor, Asbury Park, New Jersey 07712, its predecessors, employees, attorneys, agents and assigns, individually, jointly and severally (hereinafter collectively referred to as "Board") pursuant to the following terms and conditions:

WHEREAS, Petitioner filed a Petition with the Commissioner of Education under Agency Docket No.: 156-7/13, asserting that the Board violated his tenure and seniority rights by assigning, hiring and/or retaining persons who were not tenured and/or less senior than him in positions to which he was entitled; and

WHEREAS, the Board filed an Answer denying the charges; and

WHEREAS, the Board voted on August 14, 2013, to rescind its prior action which went into effect in July 2013 and appointed another person to the position to which Petitioner asserted he was entitled, and also voted to abolish said position; and

WHEREAS, the Board has agreed to pay Petitioner back pay representing the prorated salary for the month of July and two weeks in August, 2013, during which another person was employed in the position to which Petitioner claimed he was entitled; and

WHEREAS, the parties agreed this resolves the underlying controversy between them in an amicable manner;

THEREFORE IT IS HEREBY AGREED by and between the parties as follows:

1. The Board has rescinded its prior action of creating a vice principal position at the Middle School.

2. The Board will submit a check payable to Petitioner in the amount of $10,419.83 which includes all tax and benefit deductions required by law as back pay within 30 days of the final signature to this Agreement.

3. In return for the Board's compliance with the above provisions, Petitioner agrees that the Petition filed in the matter captioned Vincent Stasio v. Bd. of Ed of the Asbury Park School District, under Agency Docket No.: 156-7/13, is to be withdrawn with prejudice by Petitioner within seven (7) days of the Board making the payment described in Paragraph 2 above.

4. Both the Petitioner and Board for and in consideration of the undertakings as set forth herein, and intending to be legally bound, do hereby remise, release and forever discharge each other (inclusive of their respective past, present and future

11. All parties to this Agreement acknowledge that they have read this Agreement in its entirety, have had the assistance of counsel in reviewing its terms, entered into it voluntarily or he has knowingly and voluntarily chosen not to seek such advice and fully understand the Agreement in all respects.

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

13. The parties agree that facsimiles of signatures will have the same force and effect as original signatures.

14. This Agreement is contingent upon Board approval.

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

WITNESS:

Attorney for Mr. Stasio

V. Stasio 12/02/13
Vincent Stasio Date

WITNESS:

Geoffrey Hastings
Board Secretary

11/13/13
Angela Ahbez-Anderson Date
Board President

CLAC 2277337.1

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17-14

DELANO LOPEZ,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured physical education teacher employed in respondent's school district since 2002 – appealed the determination of the respondent Board to withhold his 2010-2011 salary increment, alleging that the respondent denied him the increment to which he was entitled pursuant to the negotiated salary guide between the Jersey City Education Association and the Board. Petitioner argued that the Board's decision to withhold his increment was arbitrary and capricious because the Board did not have information sufficient to permit an informed decision, and never allowed him the opportunity to demonstrate improvement. Respondent contended that petitioner's 2010-2011 increment was withheld for good cause pursuant to *N.J.S.A.* 18A:29-14.

The ALJ found, *inter alia*, that: the petitioner bears the burden of proving that the withholding of his increment was arbitrary, capricious or unreasonable; petitioner's increment was withheld based on several performance evaluations; credible testimony at hearing supported the respondent's determination that petitioner's classroom instruction during the year in question was lacking, particularly in pedagogical skills; and petitioner's contention that his problems stemmed in part from a lack of curriculum materials was without merit. The ALJ concluded that the Board's action in withholding petitioner's 2010-2011 increment was reasonable given his classroom performance during the period in question. Accordingly, the petition was dismissed.

Upon independent review and consideration, the Commissioner concurred with the ALJ that the Board's decision to withhold petitioner's increment was not arbitrary, capricious and unreasonable; accordingly, the Commissioner adopted the Initial Decision as the final decision in this matter.

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

January 15, 2014

OAL DKT. NO. EDU 12389-11
AGENCY DKT. NO. 293-9/11

DELANO LOPEZ,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is a challenge to the respondent Board of Education's decision to withhold petitioner's increment for the 2011-2012 school year. Petitioner claims that the withholding of his increment was improper because respondent did not have sufficient information to make an informed decision about his performance, because he was not given an opportunity to make progress, and because the respondent did not follow up to see if his performance had improved. Upon review of the record and Initial Decision of the Office of Administrative Law, the Commissioner adopts the Initial Decision as the final decision in this case.

Petitioner's supervisor, Jacalyn Kaszuba – who served as respondent's district health education supervisor during the relevant time period – testified for respondent; petitioner testified on his own behalf. Reports of classroom observations of petitioner by Kaszuba, and by the principal and vice-principal of the school in which petitioner teaches, were entered into evidence, as well as written evaluations and other documents identifying the efforts of petitioner's supervisors to help him with his teaching skills.

The referenced documents and Kaszuba's testimony indicate that multiple school administrators observed deficiencies, not in petitioner's knowledge of subject matter, but in his pedagogical skills. Those skills are crucial to the delivery to students of the knowledge a teacher is employed to impart. While three different supervisors met periodically with petitioner throughout the 2010-2011 school year and discussed the pedagogical issues with him, the same deficiencies continued through the end of the year.

The documents and testimony also make it clear that: respondent had sufficient information to draw conclusions about petitioner's performance in the 2010-2011 school year; petitioner received regular consultations, feedback and advice from various school administrators; and that it was petitioner who did not take the opportunity to improve. Thus, the Commissioner concludes that in the year in question, petitioner did not earn an increment – which has been defined as a "reward only [for] those who have contributed to the educational process thereby encouraging high standards of performance." *Bd. Of Educ. v. Bernards Twp. Educ. Ass'n,* , 79 *N.J.* 311, 321 (1979). Accordingly, the Commissioner concurs with the ALJ's finding that petitioner failed to meet his burden to show that respondent acted arbitrarily or capriciously in withholding an increment, and adopts the Initial Decision as the final decision in this case. The petition is dismissed.

IT IS SO ORDERED.•

COMMISSIONER OF EDUCATION

Date of Decision: 1/15/14

Date of Mailing: 1/16/14

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12389-11
AGENCY DKT. NO. 293-9/11

DELANO LOPEZ,
Petitioner,
v.
CITY OF JERSEY CITY
BOARD OF EDUCATION,
Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Lester E. Taylor, III, Esq., for respondent (Florio, Perrucci, Steinhardt & Fader, attorneys)

Record Closed: October 28, 2013 Decided: December 11, 2013

BEFORE **LELAND S. McGEE**, ALJ:

STATEMENT OF THE CASE

Petitioner, Delano Lopez, appeals the decision of respondent, Jersey City Board of Education, to withhold his salary increment in violation of N.J.S.A. 18A:29-14.

PROCEDURAL HISTORY

On or about September 28, 2011, Lopez filed a Petition of Appeal of respondent's decision to withhold his salary increment for the 2011-2012 school year. On or about October 14, 2011, respondent filed an Answer to the Petition of Appeal. On October 14, 2011, the Commissioner of Education (Commissioner) transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On December 28, 2011, the undersigned issued a Prehearing Order with a hearing scheduled for May 9, and 10, 2012. Respondent requested an adjournment due its witness's unavailability. The hearing was rescheduled for October 22, 2012. Respondent requested an adjournment due to counsel's travel out of the country. The matter was rescheduled for November 7, 2012, which was adjourned due to Hurricane Sandy. The matter was rescheduled for March 18, 2013. The hearing was adjourned at the request of petitioner's counsel due to a conflict with a trial in Superior Court and was rescheduled and held on September 30, 2013.

STIPULATION OF FACTS

On May 10, 2012, counsel for both parties filed a Joint Stipulation of Facts. Therefore, I **FIND** the following to be the undisputed **FACTS** of this case:

1. The Jersey City Public School District is a duly constituted body corporate, organized pursuant to N.J.S.A. 18A:10-1, which operates a kindergarten through twelfth-grade school district for the residents of the City of Jersey City.

2. Delano Lopez (Lopez), the petitioner, is a ten-month, tenured physical education teacher, at Dickinson High School (Dickinson) of the Jersey City Public School District (hereinafter District).

3. Lopez was hired by the District, as a physical education teacher, effective September 1, 2002.

4. On or about October 29, 2010, Lopez received a Formative Observation report dated October 25, 2010, wherein the evaluator, Jacalyn Kaszuba, health education supervisor, gave Lopez an overall rating of "NI" or "Needs Improvement" in Planning and Preparation, Students and Learning, Instruction, and the Classroom Environment. (R-5).

5. On or about February 28, 2011, Lopez received a Formative Observation report dated February 24, 2011, wherein the evaluator, Doris Fuentes, vice principal of Dickinson High School, gave Lopez an overall rating of "U" or "Unsatisfactory" in the Classroom Environment. Ms. Fuentes also gave Lopez an overall rating of "NI" or "Needs Improvement" in Planning and Preparation, Students and Learning, and Instruction. (R-8.)

6. On or about June 16, 2011, Lopez received a Formative Observation Report dated June 9, 2011, wherein the evaluator, Arlene Farrell, principal of Dickinson High School, gave Lopez an overall rating of "U" or "Unsatisfactory" in Planning and Preparation and Instruction. Ms. Farrell also gave Lopez an overall rating of "NI" or "Needs Improvement" in Students and Learning and the Classroom Environment. (R-9.)

7. On or about June 16, 2011, Lopez received a Summative Evaluation and Professional Development Plan dated June 9, 2011, wherein the evaluator, Arlene Farrell, principal of Dickinson High School, gave Lopez an overall rating of "NI" or "Needs Improvement" in Planning and Preparation, Students and Learning, Instruction, and the Classroom Environment. (R-10.)

8. In the June 9, 2011, Professional Development Plan, Ms. Farrell recommended the withholding of Lopez's increment. (Ibid.)

9. By letter dated August 24, 2011, Lopez received notification from the District that his increment was being withheld for the 2011-2012 school year based on performance. (R-11.)

SUMMARY OF TESTIMONY

Jacalyn Kaszuba

Jackalyn Kaszuba worked for the Jersey City Board of Education for thirty-seven years. She retired in September 2012, after spending the last seven years as the District Supervisor of Health Education. In that capacity, she was responsible for ensuring that the curriculum was written according to State standards, supervising teachers from kindergarten to the twelfth grade, professional development, and mini-workshops/morning meetings. Supervising teachers includes providing "support" through 10-20 minute in-class observations. The amount of time that she can spend in a classroom is limited by the union contract. Kaszuba was also responsible for writing teacher-improvement plans. Kaszuba testified that Lopez was placed in Dickinson High School which is one of forty-two schools that she supervises. In 2010, she supervised him when he taught health education.

Kaszuba testified that the District's evaluation process includes her giving teachers three "supports" per year. A "support" is a meeting with the teacher before the formal evaluation which gives the teacher an idea of what will be expected during the evaluation–the Pre-Observation Conference Form (R-9) is reviewed. A "support" is also provided when an evaluator provides their comments of their evaluation through the Record of Support Activities. Kaszuba conducted one such "support" on September 9, 2010. (R-1.) This activity was the result of her observing Lopez in the classroom for 25 minutes.

Kaszuba testified that she observed Lopez in class for 20 minutes and provided another "support" on September 23, 2010. (R-2.) Kaszuba observed Lopez for "a couple of minutes" and provided a "support" on October 22, 2010. (R-4.) On March 17,

2011, she observed Lopez for an hour and provided another "support." (R-7.) In three of the four Record of Support Activities, Kaszuba noted in the "Suggestions for Teacher" section that Lopez needs to improve his use of the curriculum. Also, poor classroom management was a common theme in her "observations" or in the "suggestions" sections of the reports. In the March 17, 2011, report, the only "observation" that Kaszuba made was "teacher has received 2 unsatisfactory evaluations."

Kaszuba testified about other deficiencies in Lopez's performance, including, but was not limited to: failure to engage all of the students in the class activity; lack of planning; and no differentiation for student's learning style. She noted that Lopez could have used certain teaching techniques such as: "classroom rules" (general classroom rules developed by both the students and teacher); "1-mic" (a rule that only one person speaks at a time); "word wall" (placing new words on a "wall" for students to define); use of "facilitating questions" (a tool used to engage student participation); and use of teacher comments on work kept in students' folders – Kaszuba noted the absence of teacher comments but acknowledged that she did not review more than 3 or 4 student folders. She stated that Lopez did attempt to refocus students who were not fully engaged in classroom activities. Kaszuba noted that Lopez did not offer any rebuttal or challenge any of his evaluations.

Kaszuba also provided "supports" through group meetings with the entire health staff from 8:00 a.m. to 8:30 a.m. These "supports" were considered "mini-workshops" or professional development meetings. Kaszuba conducted one such mini-workshop on October 22, 2010, which Lopez attended. (R-3.) The second and last mini-workshop for the 2010-2011 school year was held on January 6, 2011, which Lopez did not attend. (R-6.) Kaszuba noted that the last agenda item for each of these meetings is "Comments/Questions" and Lopez never asked any questions or made comments. It should also be noted that Lopez's supervisor did not attend either of the mini-workshops.

Kaszuba worked with Lopez in his former school, Public School 39. He was a physical education teacher and Kaszuba was the acting principal. At the time that Lopez was transferred to Dickinson, she was aware that Lopez was a P.E. teacher and that he had no classroom experience. They discussed this during the first "support" meeting.

Kaszuba testified that the curriculum was completed before the school year began. The high school health education coordinator, Ms. Murdan, had responsibility for distributing it. Murdan also had support materials in her office that could have assisted Lopez. Kaszuba did not recall whether she instructed Murdan to provide those materials to Lopez. Kaszuba did not recall ever giving a copy of the curriculum to Lopez. She did not recall instructing anyone else to provide the materials to Lopez. Kaszuba did not know whether Lopez ever received the curriculum during the 2010-2011 school year.

Kaszuba testified that Lopez asked her if he was allowed to observe another health teacher in the high school. She advised Lopez that it was fine with her but that he had to get permission from his vice principal.

Delano A. Lopez

Delano Lopez received a Bachelor's Degree in education from Montclair State University. He has been employed by the Jersey City Board of Education since September 2002. He became certified as a teacher in 2003. He became tenured in 2005.

Lopez began his teaching career at P.S. 39 Elementary School (grades K-8). He was a physical education teacher in the gym. There was no health course offered at the elementary school level. As such, Lopez did not have any classroom experience until he was assigned to teach at Dickinson High School for the 2010-2011 school year.

Lopez testified that he had not requested the transfer but that he received a letter in August advising him of the transfer to Dickinson High School. The letter also advised him that he would be teaching P.E. but he learned that he would be teaching health on the first day of school when Department Supervisor Susan Murdan gave him his schedule. His schedule included ninth grade health I, tenth grade health careers I, and twelfth grade health IV; however, he did not receive any course materials or the curriculum on the first day of his assignment. On the second day of school he received textbooks, and the students arrived on the third day. Lopez testified that when he asked Murdan for course materials, she stated that she did not have materials for him and that she would have to contact Kaszuba.

Lopez testified that he used lesson ideas from his colleagues to get through the first few days. He said that he asked for copies of the curriculum from his colleagues, however, he does not recall which teachers he asked. He never received the curriculum materials from any of his colleagues. He did not have the curriculum for any of his classes on September 9, 2010, the date of "introductory" meeting before students came into the building. Lopez stated that he advised Kaszuba during the meeting that he did not have the curriculum. During the meeting she told him that if Murdan did not have it Kaszuba would make it available. He also sent several emails to Kaszuba requesting the curriculum.

Lopez testified that, during the September 9 meeting, when he asked Kaszuba why he was assigned to teach health, she stated that "if you're in the building you are certified to do it so that's what you'll do." Kaszuba further stated that she would provide "Blooms Taxonomy" to Lopez before the October mini-workshop. She did give him some ideas about how to write lesson plans. Lopez testified that he disagreed with Kaszuba's observations of his classroom management; he used the text books to plan class activities but he did not have the curriculum.

Lopez testified that on September 23, 2010, he still did not have the curriculum for any of his courses. He did not receive the curriculum for the ninth and twelfth grade classes until the end of the second marking period in January 2011. He used the same

text book for both grades and attempted to simplify it for the ninth grade. He never received the curriculum for the tenth grade class.

Lopez testified that the health department met every Tuesday. Sometimes there were general discussions about school but not about support. He stated that Kaszuba told him about videos that were in the gym that he could use; however, he stated that they were not relevant to the lessons or activities in the textbook.

Lopez testified that he did not recall anything about the October 22, 2010, health department meeting.

Lopez testified that he asked Kaszuba if it was permissible for him to observe "excellent" teachers as a part of his "professional development." She agreed that this was a good idea. However, his principal did not allow him to do this. Lopez asked one of his colleagues to observe him in his classes during a period that she had off. The principal came into his classroom while the teacher was there and Lopez explained why the teacher was in his classroom. However, the principal "made the teacher leave."

Lopez testified that he disagreed with Kaszuba's observations on October 22, 2010. He felt that his students were engaged and believed that she doesn't understand the "modern student." He disagreed with the criticism about students talking in class; he did have classroom rules that were not initially posted.

Lopez testified that during the 20-30 minute meeting with Kaszuba on October 25, 2010, he advised her that he still did not have the curricula for his courses. She advised him to speak with his supervisor about it.

Lopez testified about the meeting that he had with Kaszuba on February 24, 2011. He opined that differences of opinion could result from him being new to teaching health in the high school and still "getting my feet under me." Lopez also acknowledged and conceded Kaszuba's comments about him not using a rubric. He stated that the reason was that he had not received a rubric to use. He stated that he

asked two of his colleagues, including Ms. Costello, for help with developing a scoring rubric. He did not ask his supervisor or Kaszuba.

LEGAL ANALYSIS AND DISCUSSION

Pursuant to N.J.S.A. 18A:29-14, "[a]ny board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education." Over fifty years ago, the Appellate Division explained that pursuant to this standard, "[t]he only question open for review by the Commissioner would be whether the Board had a reasonable basis for its factual conclusion." Kopera v. Bd. of Educ. of W. Orange, 60 N.J. Super. 288, 295 (App. Div. 1960). Specifically, the Commissioner must determine

> (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene; and that the burden of proving unreasonableness is upon the appellant.
>
> [Id. at 296-97.]

Furthermore, a board of education's decision to award a salary increment is "dependent upon an evaluation of the quality of the services which the teacher has rendered. The purpose of the statute is thus to reward only those who have contributed to the educational process thereby encouraging high standards of performance." Bd. of Educ. v. Bernards Twp. Educ. Ass'n, 79 N.J. 311, 321 (1979).

In the present case, Lopez concedes that "[t]here are not too many cases where a board's decision to withhold an increment was reversed by the Commissioner." (Pet'r's Br. at 11.)[1] However, the Commissioner has repeatedly rejected Initial Decisions that restore increments. See Andino v. State-Operated Sch. Dist. of Jersey

[1] All references to "Pet'r's Br." herein refer to petitioner's post-hearing brief filed on October 28, 20123. All references to "Resp't's Br." herein refer to respondent's post-hearing brief filed on October 23, 2013.

objective, organizing activities to match the objective of the lesson, and motivating and engaging students in the classroom activities." Id. at *30. The Commissioner agreed, and concluded that "it is undeniable that, on two separate occasions during the school year, petitioner's performance was found to be below that considered acceptable for an elementary teacher in the District." Id. at *31. The Commissioner explained that her negative evaluations "go to the very core of her job as a teacher, irrespective of the grade she is responsible for instructing." Ibid. Finally, the Commissioner concluded that the record did not support the ALJ's conclusion that the "evaluation was based on criteria, standards, or 'new techniques' of which [the teacher] was unaware." Ibid.

In that same case, the ALJ rejected similar arguments by another teacher, and the Commissioner adopted that part of the Initial Decision. See Id. at *30. The teacher argued "that she had been a Basic Skills reading teacher for ten years. She also had taught the second grade about twelve or fourteen years prior to becoming a Basic Skills teacher." Andino, supra, EDU 9801-95, Initial Decision at *18. However, "due to budget cuts and her experience as a regular second grade classroom teacher, Principal Walker advised her that she would be assigned to a regular second-grade class in September 1994." Ibid. The teacher "claimed that she was not given any instructional materials until two days after school started. She admitted, however, that she did not ask for the curriculum guide when she left for the summer." Id. at *18-19. Moreover, the teacher "blamed the problems noted in Principal Walker's evaluation on the classified students whom she claimed were disruptive." Id. at *19. The ALJ rejected these arguments, and reasoned that the teacher "knew in June 1994 that she would be teaching the second grade in September 1994. She made no effort whatsoever to prepare herself over the summer to teach this class." Ibid. Finally, as a basic skills teacher, she "should have known how to handle classified students and students who were below grade level." Ibid.

In Moore, the Commissioner rejected the ALJ's decision to restore an increment, and noted "that in reaching her conclusion, the ALJ effectively shifted the burden of proof from petitioner to the District." Moore, supra, EDU 9909-00 at *3. Specifically the ALJ

> 1) faulted District evaluators for failing to support their statements regarding Core Curriculum Content Standards and State mandates with documents at hearing, while making no comparable demand on petitioner; 2) required the District to present affirmative evidence that it had given individual teachers specific instruction as to what was expected of them by way of lesson plans, while ignoring undisputed evidence that general instructions and models were available to all teachers in the district; 3) sought proof from the District that, prior to the evaluations in question, petitioner had been specifically instructed to change her lesson plan format and had further been offered suggestions for improvement, ignoring the fact that the areas of need identified in petitioner's January 2000 evaluation remained uncorrected at the time of her subsequent evaluation in May; 4) expected the District to explicate precisely how and by whom the final decision to withhold petitioner's increment was made, notwithstanding the signatures of the Principal and Vice Principal - both of whom had evaluated petitioner - on the summative evaluation document recommending withholding (R-3) and the recognition that any withholding must ultimately be directed by the State District Superintendent, as it was in this instance (R-4); and 5) favored petitioner in matters where her testimony was deemed as credible as that of District's witnesses, rather than giving the benefit of equipoise to the District, as the burden of proof properly demanded. In short, the ALJ's analysis required the District to justify its action, rather than requiring petitioner to prove its arbitrariness.
>
> [Id. at *3-4.]

Moreover, the Commission rejected the Initial Decision because "the ALJ made numerous substitutions of her own judgment for that of District evaluators and the State Superintendent." Id. at *4. Such impermissible opinions included in the ALJ's conclusion that "contrary to the opinion of evaluators, petitioner's lesson plans were sufficiently detailed, and that they comported with District requirements because the District offered no evidence of a specific written mandate for use of particular techniques on a daily or other time-specific basis." Ibid. Similarly, the ALJ impermissibly concluded "that because petitioner's ratings overall were generally satisfactory or 'needing some improvement,' withholding of increment was not

City, EDU 9801-95, Initial Decision, (November 17, 2005), modified, Comm'r (July 12, 2006), <http://njlaw.rutgers.edu/collections/oal/>; Moore v. State-Operated Sch. Dist. of Jersey City, EDU 9909-00, Initial Decision, (November 17, 2005), rejected, Comm'r (July 12, 2006), <http://njlaw.rutgers.edu/collections/oal/>.

In Andino, one teacher argued that

> she had been transferred to the first grade only a few days before Supervisor Ricci evaluated her on March 16, 1995. The students in this class were disruptive, they had low comprehension and they were behind other first graders. In fact, the Principal assigned [the teacher] to this class because of her experience in teaching the first grade and because he knew that she could get these students to grade level. The problem was, however, that Supervisor Ricci had given a workshop on new techniques to be used by the first grade teachers and [the teacher] had not attended it because she was still teaching the third grade. Thus, [the teacher] was unfamiliar with those techniques at the time Supervisor Ricci evaluated her. [The teacher] later attended workshops and changed her teaching methods.
>
> [Andino, supra, EDU 9801-95 at *14-15.]

In support of her position, the ALJ concluded that

> Although the District has the authority to establish the criteria by which it evaluates the performance of a teacher, it is unreasonable to use criteria with which the teacher is unfamiliar and has received no training. In Ms. Stoney's case, Supervisor Ricci evaluated her using techniques with which Ms. Stoney was unfamiliar. After the evaluation, Ms. Stoney attended workshops and changed her teaching methods. However, she was never re-evaluated to see if her performance thereafter was satisfactory.
>
> [Id. at *15.]

However, the Commissioner reversed that portion of the Initial Decision. Andino, supra, EDU 9801-95, Final Decision at *31. In exceptions, the District argued that "change in elementary grade — from third to first grade should not affect the basic elements rightfully expected of any teacher, such as, planning a lesson with an

warranted on balance, preferring [the teacher's] mechanistic approach to the District's individualized weighing of factors and contexts." Ibid.

In Gnatt v. Board of Education of the Manalapan-Englishtown Regional School District, 92 N.J.A.R.2d (EDU) 589, 592-94, ALJ Law and the Commissioner rejected a teacher's argument that her increment should be restored because the district did not timely provide a curriculum. There, a veteran teacher who had previously taught elementary grades requested a transfer to another school after an extended leave of absence. Id. at 590. She appealed the denial of her increment at the end of that school year, and contended, inter alia, that while she had previously taught second grade, "when she was assigned as a reading teacher at the Pine Brook School commencing in September 1990, she was assigned to teach seventh and eighth grade pupils." Id. at 592. She asserted that "[w]hen she arrived at Pine Brook prior to the opening of the school year, petitioner located the textbooks in the classroom, however, there was no information about the reading curriculum provided nor was there a class list of pupils assigned to her various classes." Ibid. Notably, ALJ Law did not address this argument in his findings of fact or his conclusion of law. See Id. at 593-94. However, he concluded that "[t]he facts in the instant matter clearly demonstrate that [the teacher] had, among other things, difficulty with classroom management which interfered with the teaching-learning process." Id. at 594. Moreover, "[t]he overall assessment of [the teacher's] performance for the 1990-91 school year demonstrates that petitioner did not meet the expectations or standards of excellence required by the Board in her assignment as reading teacher for the 1990-91 school year." Ibid. Accordingly, ALJ Law concluded that "the Board had a reasonable basis for its action to withhold petitioner's employment and/or adjustment increment for the 1991-92 school year," and that the teacher "failed to meet her burden of proof, by a preponderance of the credible evidence, that the Board's action was unreasonable, arbitrary and/or capricious." Ibid.

Lopez only cites two unpublished administrative cases, both nearly thirty years old, which are distinguishable. (See Pet'r's Br. at 11-12.) First, Lopez cites Carney v. Freehold Regional High School Board of Education, EDU 6356-83, Initial Decision,

(June 14, 1984), adopted, Comm'r. (July 25, 1984), affirmed, State Board (February 6, 1984), affirmed, Appellate Division (November 8, 1985).[2] However, the undersigned disagrees with Lopez mischaracterization of the ALJ's conclusions. (See Pet'r's Br. at 12.) Lopez writes that ALJ Duncan "determined that an increment can be withheld only when the board has information sufficient enough to permit an informed decision and the employee has been given advance notice of his or her deficiencies and an opportunity to correct them." Ibid. In fact, ALJ Duncan articulated the proper test to determine whether increment withholding is proper as: "1) whether the underlying facts were as those who made the evaluation claimed, and 2) whether it was unreasonable for them to conclude as they did based upon those facts." Carney, supra, EDU 6356-83, Initial Decision at *15 (quoting Kopera, supra, 60 N.J. Super. at 295.)) ALJ Duncan determined that "[t]he ultimate problem herein, and the one which finally precludes a determination that the Board had a reasonable basis for its factual conclusions lies in the contents of the written evaluations which were presented to it." Carney, supra, EDU 6356-83 at *17. Specifically, the Board considered only two evaluations and a professional improvement plan, all written in the same month. Ibid. ALJ Duncan concluded that a "reasonably prudent reader" could not interpret the evaluations negatively and that "it was unreasonable for the Board to conclude from what was before them that the withholding of petitioner's increment was warranted." Id. at *17-18.

After reaching such conclusions, ALJ Duncan, admittedly, opines that an increment should not be withheld without fair notice to an employee, and the opportunity to improve. Ibid. However, she cites no authority for this proposition, and her conclusions are not predicated on such comments. See Ibid.; but see Rexach v. State-Operated Sch. Dist. of Newark, EDU 12304-07, Initial Decision, (Januray 7, 2009), adopted, Comm'r. (February 23, 2009) <http://njlaw.rutgers.edu/collections/oal/>

[2] The Initial Decision, Commissioner's decision, State Board's Decision, and Appellate Division decisions are all unpublished and unavailable online. See Ibid. The OAL library retained copies of the Initial Decision, Commissioner's decision, and Appellate Division decision, but does not have a copy of the State Board decision. See Ibid. Lopez did not attach a copy of either unpublished decision. (See Pet'r's Br.) Counsel may be reminded that citations to unpublished decision is governed by R. 1:36-3, which provides "[n]o unpublished opinion shall be cited to any court by counsel unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel." Ibid. The Appellate Decision notes that the State Board affirmed the Commission, but does not provide a date or citation. Carney, supra, A-3190-84 (slip op. at 2). The date of the State Board decision included herein is taken from Lopez's brief. (See Pet'r's Br. at 11.)

(board's decision is arbitrary and capricious because contrary to the collective bargaining agreement, teacher was only evaluated once, her supervisor did not conduct that evaluation, the teacher was not given an opportunity to correct her deficiencies, the teacher's properly documented disability absences were counted against her, and the board's own witnesses conceded the teacher was treated unfairly).

In further reference to Carney, Lopez argues that "[t]here was evidence that the counselor's performance was unsatisfactory, but the board's action had been based solely on a single evaluation report, and the plain language of that report indicated that the counselor's performance was adequate." (Pet'r's Br. at 12.) However, while ALJ Duncan noted that a rational fact finder could "determine from all of the evidence presented at the hearing that [the counselor's] performance was unsatisfactory," she further noted that such determination was irrelevant, because "the Commissioner cannot properly redetermine herein for himself whether [the counselor] had, in fact, been unsatisfactory as a teaching staff member." Carney, supra, EDU 6356-83, Initial Decision at *17. Rather, the only question is whether the Board had a reasonable basis to withhold an increment. Ibid.

Lopez also cites D'Amico v. Board of Education of East Brunswick, EDU 5145-83, Initial Decision (June 18, 1984), adopted, Commissioner (July 31, 1984).[3] In D'Amico, ALJ Duncan reasoned

> [t]he cumulative effect of the extreme contrast between [the counselor's] evaluations from his previous principal and from [his current principal], the somewhat hostile and sarcastic manner in which [his current principal] testified about [the counselor], the vast differences between [a former supervisor's] perception of the [counselor's] professional performance for [the previous school year] and [his current principal's] perception, and [the current principal's inability to articulate exactly what specific things he had expected [the counselor] to do as an elementary guidance person that he wasn't doing, lead me to the distinct impression that a serious personality conflict existed between [his current principal] and [the counselor], and I conclude that that

[3] Again, the Initial Decision and Commissioner's decision are unpublished and unavailable online. See Ibid. The OAL library retained copies of the Initial Decision and the Commissioner's decision. See Ibid. Lopez did not attach a copy of either unpublished decision. (See Pet'r's Br.)

> conflict impaired [his current principal's] ability to fairly assess the petitioner's performance.
>
> [Id. at *18.]

Accordingly, she concluded "that the underlying facts were not as [the current principal] claimed them to be and since the Kopera test is two-pronged and the second part of the test requires an affirmative answer on the first part, there is no need to proceed with any further determination." Id. at *19. Specifically, "[s]ince the evaluator's conclusions upon which the Board relied are not supported by the evidence, [ALJ Duncan] concluded that [the Board] did not have a reasonable basis for withholding [the counselor's] increment . . . ." Ibid.

In the present case, Lopez argues that the District's decision was arbitrary, because

> the purpose of a formal evaluation is an instrument by which a teacher can be guided as to what of his/her performance administration has concerns. Here there was absolutely no follow up by administration. [Lopez] submits to the [ALJ] that [the District] did not have information sufficient enough to permit an informed decision and the employee has been given an opportunity to correct them. In the instant matter, [Lopez] may very well have corrected the deficiencies but administration had no interest in determining whether or not such was the case and in any event never afforded him the opportunity to show his improvement.
>
> [Pet'r's Br. at 12.]

To the extent Lopez suggests he was not given notice of his deficiencies, this argument is not supported by the facts, and irrelevant as a matter of law. As a matter of fact, Lopez received four informal "Supports" from Kaszuba, on September 9, 2010, September 23, 2010, October 22, 2010, and March 17, 2011, which clearly indicate deficiencies in his classroom management and lesson planning. (R-1, R-2, R-4, R-7.) He received three formal evaluations on October 25, 2010, February 24, 2011, and June 9, 2011, which further indicate problems with classroom management and lesson planning. (R-5, R-8, R-9.) Moreover, these formal evaluations are almost entirely

negative and progressively worse, though addressing the very same issues. Unlike the Board in D'Amico, there is no evidence that a supervisor had a personality conflict with Lopez; here, three different administrators reached markedly similar conclusions. D'Amico, supra, EDU 5145-83, Initial Decision at *18. Unlike the Board in Carney, the District had an ample, and certainly reasonable, basis to reasonably conclude that Lopez's service did not merit the reward of an increment. See Carney, supra, EDU 6356-83, Initial Decision at *15. Finally, as a matter of law, whether Lopez had adequate notice is of questionable significance. Kopera, supra, 60 N.J. Super. at 295.

Alternatively, Lopez argues the District's decision was arbitrary because

> Lopez was certified by the State to teach Health Education. He holds a joint certification in Physical Education and Health Education. However, in all of his experience as a teacher he never taught a Health Education course. When he was assigned to teach Health Education at [Dickenson] it is akin to having a lawyer who is certified by his license to practice in any field of the law but who had experience only in criminal defense to be asked to start practicing bankruptcy law, or securities law, or probate law. Certainly such a lawyer would be, as Lopez is [sic] in this instance, scored a needing improvement. Lopez did not receive an inordinate, or even many, unsatisfactory ratings. It is reasonable to surmise that such a lawyer would not be punished by a supervisor. It is equally reasonable to determine that Lopez should not be punished.
>
> [Pet'r's Br. at 13.]

To the extent Lopez suggests he was unqualified to teach health because he had not taught health before, he undermines his own argument by conceding he is certified to teach this class. See Ibid. Despite his degree in education, his formal evaluations focus on his lack of pedagogical skills. (R-5, R-8, R-9.) In fact, his latter two evaluations begin by noting that Lopez "exhibited knowledge of the facts being presented but he demonstrated a lack of pedagogical skills," and "Lopez demonstrates knowledge of the curriculum content, but exhibits little knowledge of effective instructional techniques." (R-8, R-9.) Moreover, like the teacher in Andino, these deficiencies "go to the very core of [Lopez's] job as a teacher, irrespective of the grade

[or subject he] is responsible for instructing." See Andino, supra, EDU 9801-95, Final Decision at *31.

These arguments do not address the relevant considerations in increment withholding cases. Specifically, "(1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts . . . " See Kopera, supra, 60 N.J. Super. at 295. Lopez does not appear to dispute the facts underlying the conclusions of the evaluations, or whether such facts warranted such conclusions. (See Pet'r's Br. at 11-14.) Rather, Lopez blames his negative performance on his purported inexperience and the failure of the District to properly support him. See Ibid. Indeed, his characterization of an increment withholding as "punishment" mischaracterizes the nature of an increment as a "reward only [for] those who have contributed to the educational process thereby encouraging high standards of performance." Bernards Twp. Educ. Ass'n, supra, 79 N.J. at 321.

Finally, to the extent that Lopez suggests that his deficiencies were predicated on his alleged failure to receive a curriculum, his argument fails as a matter of fact and law. See Andino, supra, EDU 9909-00, Initial Decision at *18. First, he concedes he received a curriculum in January, and does not explain why his deficiencies persisted after January. (Cf. Pet'r's Br. at 5; R-8, R-9.) Second, as a veteran teacher, Lopez should have been able to prepare himself for his change in assignment, and cannot merely blame the District's failure to promptly provide a curriculum for his numerous deficiencies. See Andino, supra, EDU 9909-00, Initial Decision at *18; Final Decision at *31.

CONCLUSION

After hearing the testimony and considering the other evidence submitted, I **CONCLUDE** that the District's decision to withhold Lopez's increment was not arbitrary, capricious or unreasonable due to its failure to provide a curriculum, because the only relevant inquiry is to determine (1) whether the underlying facts were as those who

made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts. I **CONCLUDE** that there were sufficient underlying facts on which to base its determination. Even after petitioner received the curriculum materials in January 2011, his evaluations did not improve.

ORDER

Accordingly, I **ORDER** that respondent's decision to withhold petitioner's salary increment was proper and is hereby **AFFIRMED**.

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

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

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

December 11, 2013
DATE

LELAND S. MCGEE, ALJ

Date Received at Agency: December 11, 2013

Date Mailed to Parties: DEC 12 2013

LSM/lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner:

Delano Lopez

For Respondent:

Jacalyn Kaszuba

EXHIBITS

Joint:

J-1 Joint Stipulation of Facts

For Petitioner:

None

For Respondent:

R-1 Record of Support Activities dated September 9, 2010

R-2 Record of Support Activities dated September 23, 2010

R-3 Health Department Meeting Agenda and Attendance dated October 22, 2010

R-4 Record of Support Activities dated October 22, 2010

R-5 Formative Observation Report dated October 25, 2010

R-6 Health Department Professional Development Agenda and Attendance dated January 6, 2011

R-7 Record of Support Activities dated March 17, 2011

R-8 Formative Observation Report dated February 24, 2011

R-9 Formative Observation Report dated June 9, 2011

R-10 Summative Evaluation and Professional Development Plan dated June 9, 2011

R-11 Letter to Lopez dated August 24, 2011

18-14

ERIK TRACY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
THOMAS DEMAIO, PRINCIPAL OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL, BERGEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner filed an appeal in July 2013 which sought to impose disciplinary action and mandatory policy education training on Thomas DeMaio, the principal of petitioner's former high school, in connection with DeMaio's actions which barred the petitioner from attending his senior prom on June 1, 2012. Petitioner had been among a group of approximately 25 students who arrived at the prom location in a mini-bus, and who were denied admission to the prom after DeMaio determined that the bus occupants had been using alcohol prior to arriving at the prom. Petitioner also sought reimbursement for his expenses related to the prom. The respondent filed a motion for summary decision, arguing that the petition was untimely filed and that the relief sought cannot be granted by the Commissioner.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the matter is ripe for summary decision; the within dispute is now moot because the petitioner's prom occurred in June 2012; further, the relief sought by the petitioner is not within the jurisdiction of the Commissioner to order. Accordingly, the ALJ concluded that the petition should be dismissed.

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

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

OAL DKT. NO. EDU 11189-13
AGENCY DKT. NO. 160-7/13

ERIK TRACY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
THOMAS DEMAIO, PRINCIPAL OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL, BERGEN COUNTY,	:	
RESPONDENT.	:	

The instant appeal was precipitated by respondent's actions in barring petitioner from attending the June 1, 2012 school prom. The disciplinary action was, in turn, the result of respondent's discovery of evidence of alcohol usage by students on a minibus in which petitioner and others arrived for the prom. As it is undisputed that the experience of attending the prom cannot be restored, petitioner asks for reimbursement of prom expenses, and for training and discipline of respondent.

In the Initial Decision of the Office of Administrative Law (OAL) the Administrative Law Judge (ALJ) recommends dismissal of the petition on jurisdictional grounds. First, the ALJ points out that petitioner filed his appeal on July 19, 2013. This was over a year after the prom incident and, consequently, far outside the time allowed by *N.J.A.C.* 6A:3-1.3(i) for the filing of appeals to the Commissioner of Education. Second, the ALJ correctly advises that the Commissioner does not have jurisdiction to award consequential money damages of the nature that petitioner requests. Third, the ALJ rightly asserts that the Commissioner does not impose upon local school administrators the type of discipline which petitioner demands. A

request for discipline or training of a school administrator is, rather, properly made to the superintendent or board of education of the relevant school district, *i.e.* the administrator's employer.

In sum, the Commissioner adopts the Initial Decision as the final decision in this case. Accordingly, the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision 1/15/14

Date of Mailing 1/16/14

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING
SUMMARY DECISION
OAL DKT. NO. EDU 11189-13
AGENCY DKT. NO. 160-7/13

ERIK TRACY,

Petitioner,

v.

THOMAS DE MAIO, PRINCIPAL, PASCACK VALLEY REGIONAL HIGH SCHOOL, BERGEN COUNTY,

Respondent.

Erik Tracy, petitioner, pro se

Rodney T. Hara, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: October 23, 2013 Decided: December 11, 2013

BEFORE **TIFFANY M. WILLIAMS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Erik Tracy, filed an appeal seeking to impose disciplinary action and mandatory policy education training on Thomas DeMaio, principal of Pascack Valley Regional High School, in connection with DeMaio's actions in barring Tracy from his senior prom. The appeal was filed on July 19, 2013, and filed as a contested case with

the Office of Administrative Law (OAL) on August 12, 2013. Prehearing status conferences were conducted on September 24, 2013, and October 8, 2013. During the October 8, 2013, conference, the petitioner, through his father, asked for an opportunity to obtain legal counsel prior to the scheduling of a hearing. To date, petitioner has not secured legal counsel and proceeds pro se. On September 30, 2013, DeMaio filed a motion for summary decision to which the petitioner filed a response on October 23, 2013.

FACTUAL DISCUSSION

The facts in this matter are undisputed. Accordingly, pursuant to N.J.A.C. 1:1-12.5(b) and Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995), I **CONCLUDE** that there are no genuine issues of material fact and that this matter is ripe for summary decision.

On June 1, 2012, Tracy was a senior at Pascack Valley Regional High School. He prepared for his senior prom and arrived at the location at approximately 7:55 p.m., along with approximately twenty-five other students in a mini-bus. Tracy, along with other students on the bus, were denied admission to the prom because DeMaio had detected the smell of alcohol on the students and in several bottles discarded in the vehicle. DeMaio determined that Tracy and the other students on the bus had possessed and consumed alcohol prior to arriving at the prom. Tracy was not tested or medically treated for the consumption of alcohol. Tracy's parents were notified of the incident at approximately 9:00 p.m.

In support of summary decision, DeMaio argues that the matter was filed untimely and that the relief sought cannot be granted by the Commissioner of the Department of Education. DeMaio does not dispute Tracy's version of the events but argues that notwithstanding a determination of whether DeMaio followed policy, the matter must be dismissed because it is untimely and jurisdiction lacks to afford the remedy requested.

In opposition, Tracy argues that DeMaio failed to follow State law and the school's policy in handling instances of suspected alcohol use at school-sponsored events. Specifically, Tracy cited several policy citations and State statutes which uniformly require school officials to notify parents and seek medical treatment immediately for any students that are suspected to have consumed alcohol. Tracy contends that had DeMaio properly followed the policy, he may have discovered earlier that Tracy had not consumed alcohol—resulting in him not having missed his prom. Accordingly, Tracy demands that DeMaio be subject to discipline and training. Additionally, Tracy requests that his prom expenses be reimbursed.

CONCLUSIONS OF LAW

Preliminarily, I am sensitive to the fact that this matter involves Tracy's concern that the unique experience of participating in his high school prom was taken away from him because DeMaio casted a wide net of accusation and did not follow required policies for suspected student alcohol use. Nonetheless, I **CONCLUDE** that this matter must be dismissed. As an initial matter, the locus of the dispute is moot because the petitioner's prom occurred in June 2012. As the petitioner acknowledged, the experience cannot be returned to him. It is unfortunate that the circumstances occurred in a manner that prevented him from seeking emergent relief prior to the prom, as customarily occurs in these matters. Nonetheless, the matter is now moot and is not ripe for adjudication.

Additionally, the relief sought by the petitioner is not within the jurisdiction of this court to order, nor in the power of the Commissioner himself to order. In the context of this administrative matter, the Commissioner, lacking equitable jurisdiction, does not afford the reimbursement of prom expenses nor direct the discipline of school administrators. Typically, in a matter involving denial to the prom, the Commissioner would afford the petitioner an opportunity to be heard on an emergent basis to determine whether the denial to the prom was just. Therefore, the allowable remedy would be a decision prior to the occurrence of the prom, that a petitioner is allowed admission. However, on these facts, the issue is moot since the prom occurred over a

year ago. Accordingly, where resolution would not afford the remedy sought, it is only appropriate to summarily dismiss this matter for lack of jurisdiction.

ORDER

Based on the aforementioned, the matter is **DISMISSED**. It is so **ORDERED**.

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

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

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

December 11, 2013
DATE

Tiffany M. Williams
TIFFANY M. WILLIAMS, ALJ

Date Received at Agency: December 11, 2013

Date Mailed to Parties: DEC 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

rr

20-14

OAL DKT. NO. EDU 17654-13
AGENCY DKT. NO. 300-12/13

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
CAROL MORRIS, STATE MONITOR,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1] Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This case shall proceed at the OAL to a plenary hearing to determine the underlying claim on the merits.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/16/14

Date of Mailing: 1/16/14

[1] On December 26, 2013, petitioner submitted Exceptions to the recommended Order of the ALJ. Respondent submitted a reply thereto on December 30, 2013. Since operative procedural rules make no provision for such submissions, neither petitioner's exceptions nor respondent's reply were considered herein.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 17654-13
AGENCY DKT. NO. 300-12/13

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,
Petitioner,
v.
CAROL MORRIS, STATE MONITOR,
Respondent.

William S. Donio, Esq., for petitioner (Cooper, Levenson, attorneys)

Sidney A. Sayovitz, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner City of Asbury Park Board of Education challenges the decision of respondent Carol Morris, State monitor, that overrode the petitioner's decision to award a contract to Gregory Allen to serve as the district's superintendent of schools for the 2013–2014 school year. On December 6, 2013, petitioner filed a petition of appeal requesting emergent relief. The emergent-relief application was

transmitted to the Office of Administrative Law (OAL), where it was filed on December 10, 2013. Oral argument was held on the emergent-relief application on December 18, 2013.

DISCUSSION

The authority to grant emergent relief is governed by the seminal case of Crowe v. DeGioia, 90 N.J. 126 (1982). That case sets forth the standards that must be met for emergency relief to be granted. In order to prevail, the petitioner must demonstrate all of the following: (1) the petitioner will suffer irreparable harm if the requested relief is not granted; (2) the legal right underlying the petitioner's claim is settled; (3) the petitioner has the likelihood of prevailing on the merits of the underlying claim; and (4) when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

At issue in this case is the award of a contract to Gregory Allen to serve as superintendent of schools in Asbury Park, and the decision of the State monitor to override the Board's decision. The position of the Board is that the State monitor has no authority to question the authority of the Board in its hiring practices, if the State monitor's concern is not related to a fiscal issue that she was appointed to monitor, and that it is solely the Board's prerogative to choose an individual to fill the superintendent's position without interference from the State monitor.

Petitioner cites N.J.S.A. 18A:7A-54, and asserts that the salary of the superintendent had already been decided upon and approved, and all that was left was the ministerial act of the Board, as a representative of the community, to select the applicant perceived to be the best qualified to be superintendent of schools.

Respondent also cites N.J.S.A. 18A:7A-54, as well as case law, in support of her position that the appointment of a superintendent was certainly fiscal in

nature because of the salary concerns, as well as benefits and merit bonuses, and that she, as State monitor, exercised her duty to ensure that the superintendent position was well filled.

Morris's certification is replete with her concerns that the Board was not fulfilling its obligation to appoint the best candidate. For example, she pointed out that a superintendent search committee, which was paid $15,000, put forth a different candidate, who was ignored by the Board in favor of Mr. Allen, whom the search committee had placed low on its recommended list. Also, her own interview of Mr. Allen did not result in a conclusion on her part that he was the best candidate for the job.

It appears to me that the law may not be settled in this area, and that each party may be correct under certain factual scenarios. Testimony must be taken in order to arrive at findings of fact to which the applicable law may be applied. This cannot be done at this early state, and, accordingly, the request for emergent relief must be denied.

Petitioner claims that it will suffer irreparable harm if the emergent relief is not granted. However, other than an assertion that the Board's independence is somehow usurped by not allowing the immediate appointment, nothing has been presented showing that the quality of the education of the student body is somehow in peril, or that the Board is facing financial sanctions or other immediate similar problems if relief is not granted at this time. My review of the submissions by both parties reveals that an experienced and well respected acting superintendent has been serving without any complaints from the parties. Therefore, this argument must fail.

Petitioner's argument that the legal right underlying petitioner's claim is settled, in that N.J.S.A. 18A:11-1(d) and N.J.S.A. 18A:17-15 indicate that the Board has the right to "carry out all acts" for the proper conduct and maintenance of the public schools in the district, including appointment of the superintendent, has been challenged by the appointment of the State monitor and its statutory

powers, and, therefore, as previously stated, the law is not settled and must be addressed in a full plenary hearing.

As to the requirement that the petitioner must demonstrate that it has a likelihood of prevailing on the merits on the underlying claim, petitioner argues that the fiscal monitor cannot interfere with matters that do not have a direct or substantial fiscal consequence. It continues that the State monitor's position is based on a flawed analysis of the authority to override the Board's decisions in personnel matters, such as the appointment of a superintendent. Regarding this position, I note that the State monitor has expressed great concerns over what can only be described as a very generous superintendent contract containing merit bonuses being awarded to a candidate that the search committee, as well as the State monitor, did not put at the top of the qualified-applicants list. It is argued by respondent that fiscal responsibility must be considered in the awarding of such a contract. N.J.S.A. 18A:7A-54, the statute that provides for the appointment of a State monitor, clearly allows the monitor to intercede if, in her opinion, fiscal responsibility is not being exercised. Therefore, under what has been presented so far, I cannot find that petitioner would most likely prevail on the merits of its claim, and this argument must also fail at this juncture.

In discussing the last prong of the Crowe v. DeGioia test, N.J.S.A. 18A:7A-55(b)(4) and (5) give the State monitor the authority and power to oversee all district staffing, including the ability to hire, promote and terminate employees, as well as the authority to override the Board of Education on any matter set forth in this subsection. Respondent argues that based on that law, she has total authority to oversee personnel matters, and petitioner is incorrect when it says that her oversight is limited to matters having direct or substantial fiscal consequences. She asserts that there is nothing in the enabling statute that limits her authority to matters having direct or substantial fiscal consequences.

Respondent further argues that as to the equities involved, it is a monitor's obligation to consider fiscal consequences, and disagreements with her decisions must be resolved in her favor. Granting of the relief requested by petitioner under

the circumstances could cause a greater harm, because the action could result in a fiscal deficiency, which she is charged with preventing.

At this stage of the proceeding, I must agree that the appointment of an unqualified candidate to a long-term contract would not be in the best interest of Asbury Park and its educational system, and the potential harm of the appointment of the candidate chosen by the Board outweighs whatever harm the Board may suffer from being denied its choice.

For all of the reasons set forth above, I **CONCLUDE** that petitioner has not met the burden of demonstrating its entitlement to emergent relief.

ORDER

I **ORDER** that petitioner's application for emergent relief is **DENIED**.

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

December 19, 2013

Ronald W. Reba

DATE

RONALD W. REBA, ALJ

26-14

OAL DKT. NO. EDU 855-11
AGENCY DKT. NO. 715-12/10

MARY KATE CULLINAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/14
Date of Mailing: 1/23/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00855-11
AGENCY DKT. NO. 715-12/10

MARY KATE CULLINAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Jason E. Sokolowski, Esq. for petitioner (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 10, 2013 Decided: December 10, 2013

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

This matter was transmitted to the Office of Administrative Law on January 14, 2011, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 10, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

MARY KATE CULLINAN,	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL DKT. NO. EDU 10228-2010 N AGENCY REF. No.: 715-12/10
v.	
ELIZABETH BOARD OF EDUCATION, UNION COUNTY,	
Respondent.	**SETTLEMENT AND RELEASE**

RECEIVED
2013 NOV 32 P 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

RECEIVED
2013 DEC -2 P 5:30
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Mary Kate Cullinan, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Mary Kate Cullinan v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:715-12/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ 34,108.80, for the period from September 1, 2010 through February 2, 2011. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $ 12,000.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $ 22,108.80.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through February 2, 2011. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back salary due to Petitioner is $ 19,897.92. Said amount shall be paid to Petitioner, subject to all applicable

payroll taxes and normal payroll deductions, in the form of a check made payable to "Mary Kate Cullinan."

5. In addition to back salary, the Board shall pay Petitioner the sum of $ 8,902.00 as money damages based on amounts paid by Petitioner for medical bills during the period from September 1, 2010 to February 2, 2011 that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "Mary Kate Cullinan" and will not be subject to income tax withholding or payroll deduction since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September, 2010 to February 2, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

8. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 3/11/13

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

27-14

OAL DKT. NO. EDU 10189-10
AGENCY DKT. NO. 339-8/10

LAUREN HERRMANN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/21/14
Date of Mailing: 1/23/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10189-10
AGENCY DKT. NO. 339-8/10

LAUREN HERRMANN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on September 17, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

Laura Sachs
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 DEC -2 P 5:37

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

LAUREN BETH HERMANN,	:	BEFORE THE COMMISSIONER OF EDUCATION/ OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
vs.	:	OAL DOCKET NO. EDU-10189-2010N AGENCY REFERENCE NO. 339-8/10
ELIZABETH BOARD OF EDUCATION,	:	
	:	**SETTLEMENT AND RELEASE**
Respondent.		

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Lauren Beth Hermann ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Lauren Beth Hermann vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No. EDU-10189-2010N, Agency Reference No. 339-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner is entitled to gross back salary in the amount of **$19,610.00**, for the period from **September 1, 2010 through December 7, 2010**. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through December 7, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an option from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through December 7, 2010 was **$7,800.00.**

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is **$11,810.00.**

4. The Parties agree that Petitioner has no earnings from other employment during the period from September 1, 2010 through December 7, 2010. The parties further agree that this Final Gross Amount shall be reduced by 10%. **Thus, the Final Gross Amount of back salary due to Petitioner is $9,849.00.** Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Lauren Beth Hermann".

5. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the educations and deductions specified above) for the period from September 1, 2010 to

December 7, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within

controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present, or future employee of the Board regarding any school years subsequent to the 2010-2011 school year.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material.

This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER LAUREN BETH HERMANN

Date: 12/27/12 Lauren Beth Hermann

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 1/15/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010

Petitioner	OAL Docket #
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

#28-14

28-14

OAL DKT. NO. EDU 10571-10
AGENCY DKT. NO. 392-8/10

MARIA BARTOLOMEO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/21/14
Date of Mailing: 1/23/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10571-10
AGENCY DKT. NO. 392-8/10

MARIA BARTOLOMEO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

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

Marvin Lehman, Esq. for respondent

Record Closed: December 9, 2013 Decided: December 9, 2013

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

This matter was transmitted to the Office of Administrative Law on September 28, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 9, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

BERGMAN & BARRETT
BY: MICHAEL T. BARRETT, ESQUIRE
9 TAMARACK CIRCLE
SKILLMAN, NJ 08558
(609) 921-1502
Attorney for Petitioner, Maria Bartolomeo

MARIA BARTOLOMEO, Petitioner	: BEFORE THE COMMISSIONER : OF EDUCATION - OFFICE OF : ADMINISTRATIVE LAW
v	:
ELIZABETH BOARD OF EDUCATION, Respondent	: OAL Dkt. No.: **EDU-10571-10N** : Agency Ref. No.: **392-8/10** : : **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Maria Bartolomeo ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Bartolomeo v Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No.: EDU-10571-10N, Agency Docket No: 392-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the Parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the Parties agree as follows.

1. The Parties mutually agree that the Petitioner, a tenured teacher, is entitled to gross back salary in the amount of $15,797.10, for the period from 09/01/2010 through 11/21/2010. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefits reimbursed due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from 09/01/2010 through 11/21/2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The Parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from 09/01/2010 to 11/22/2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from 09/01/2010 through 11/21/2010 was $5,940.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of

Unemployment Benefits is $8,871.39.

4. The Parties agree that Petitioner had no earnings from other employment during the period from 09/01/2010 through 11/21/2010. This the final gross amount of back salary due to Petitioner is $8,871.39. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to Maria Bartolomeo.

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from 09/01/2010 to 11/22/2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to, as applicable, sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was

allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising our of the subject matter of the within controversy, except to enforce the terms of this Agreement. This Release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulations of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of his/her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights he/she may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the Parties, and all terms of the Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the Parties.

10. This Agreement is to be construed in accordance with laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the Sate or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of the Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

Petitioner

Dated: 2/9/13

Maria Bartolomeo

MARIA BARTOLOMEO

Respondent

Dated: 1/15/2013

ELIZABETH BOARD OF EDUCATION

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

#29-14

29-14

OAL DKT. NO. EDU 13881-10
AGENCY DKT. NO. 664-11/10

LARRY MORGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/21/14
Date of Mailing: 1/23/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13881-10
AGENCY DKT. NO. 664-11/10

LARRY MORGAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Jason E. Sokolowski, Esq. for petitioner (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 10, 2013 Decided: December 10, 2013

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

This matter was transmitted to the Office of Administrative Law on December 13, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 10, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 DEC -2 P 5:30
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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2013 NOV 5 P 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

LARRY MORGAN,	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL DKT. NO. EDU 10228-2010 N
v.	AGENCY REF. No.: 664-11/10
ELIZABETH BOARD OF EDUCATION, UNION COUNTY,	
Respondent.	**SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Larry Morgan, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Larry Morgan v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:664-11/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ 15,468.83, for the period from September 1, 2010 through November 19, 2010.

This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $ 6,000.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $ 9,468.83.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 19, 2010. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back salary due to Petitioner is $ 8,521.95. Said amount shall be paid to Petitioner, subject to all applicable

payroll taxes and normal payroll deductions, in the form of a check made payable to "Larry Morgan."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September, 2010 to November 19, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to

Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education

and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: February 18, 2013

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

ELIZABETH PUBLIC SCHOOLS
THINK • LEARN • ACHIEVE • CARE

Olga Hugelmeyer
Interim Superintendent of Schools

Marvin Lehman
Interim Board Counsel

Vito A. Mazza
Heather Savage-Ford
Associate Counsel

2013 NOV 32 P 5:22
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

November 27, 2013

Honorable Ellen S. Bass A.L.J.
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark NJ 07102

RECEIVED
2013 DEC -2 P 5:29
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Re: Elizabeth Seniority Litigation
Our File No.: ML/EM/54-251

Dear Honorable Judge Bass:

Enclosed please find the following:

1. Resolution of the Elizabeth Board of Education approving Settlements.
2. Individual Settlement Agreements for each Petitioner listed in the Resolution.

Thank you for all of your consideration in this matter

Restpecfully yours,

Marvin Lehman
Interim Board Counsel

cc: Harold E. Kennedy, Jr., School Business Administrator/Board Secretary (via fax only w/out encl.)
Bergman & Barrett (via fax only, S/A's being sent by separate cover)
Detzky & Hunter, LLC (via fax only, S/A's being sent by separate cover)
Oxfeld Cohen (via fax only, S/A's being sent by separate cover)
Zazzali Fagella Nowak Kleinbaum & Friedman (via fax only, S/A's being sent by separate cover)
Bucceri & Pincus (via fax only, S/A's being sent by separate cover)

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
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Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
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Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
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Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
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Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
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Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
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Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

30-14

OAL DKT. NO. EDU 10237-10
AGENCY DKT. NO. 384-8/10

HELEN BUFIS, et al.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/14
Date of Mailing: 1/23/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT, WITHDRAWAL AND
FAILURE TO APPEAR
OAL DKT. NO. EDU 10237-10
AGENCY DKT. NO. 384-8/10

HELEN BUFIS, ET AL,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH,
UNION COUNTY
Respondent.

Jason Sokolowski, Esq. for petitioner (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 9, 2013 Decided: December 9, 2013

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

This matter was transmitted to the Office of Administrative Law on September 21, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The petition was filed on behalf of sixteen school district teaching staff members.

As to nine of those petitioners, the parties have agreed to settlements and have prepared Settlement Agreements indicating the terms thereof, which are attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlements as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlements, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlements are thus the culmination of years of discussion and negotiation, and are consistent with an agreed upon global approach to the resolution of these cases. These settlements fairly, reasonably, and efficiently resolve the claims raised in the petition and are in the best interest of the parties and the taxpayers of Elizabeth.

4. The settlements fully dispose of all issues in controversy and are consistent with the law.

5. The following petitioners have executed settlement agreements: Jane Colford, Adriana DeLaRosa, Nicole Kovacs, Janil Llano, Allison Mutchler, Diana Oviedo-Cruz, Catherine Simon, Kimberly Waugh, and James Villarino.

Six petitioners withdrew their claims, as reflected in letters forwarded by counsel. These petitioners include Theresa Mazza, Carla Borges, Melissa Floczak, Susan Kania, Anthony Santo, and Lorraine Gilbert.

The claims of the remaining petitioner, Helen Bufis, were dismissed via order dated August 1, 2012, after she failed to appear at a duly noticed hearing date.

I **CONCLUDE** that the settlement agreements meet the requirements of N.J.A.C. 1:1-19.1 and that the settlements should be approved. I approve the settlements and therefore **ORDER** that the parties comply with the settlement terms. In view of the withdrawal of the remaining claims, and the dismissal of the claims filed by Ms. Bufis, these proceedings are hereby concluded.

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

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

December 9, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr



ELIZABETH PUBLIC SCHOOLS

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Olga Hugelmeyer
Interim Superintendent of Schools

Marvin Lehman
Interim Board Counsel

Facsimile Transmission

NUMBER OF PAGES, INCLUDING THIS: 2

TO: The Honorable Ellen S. Bass, A.L.J.

CC: Harold E. Kennedy, Jr., School Business Administrator/Board Secretary

FAX #: 973-648-2358

FROM : Marvin Lehman, Esq.

DATE: December 9, 2013

RE: **Elizabeth Seniority Litigation**
Our File No.: 251

MESSAGE: Enclosed please find certified true copy of Board Resolution dated November 21, 2013 approving settlement agreements.

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individuals or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the above address via the U.S. Postal Service. Thank you.

IF THERE IS A PROBLEM WITH THIS TRANSMISSION,
PLEASE CALL (908) 436-5072

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
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Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
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Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#	Petitioner	OAL Docket #
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Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

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2013 NOV 22 P 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

RECEIVED
2013 DEC -2 P 5:30
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JANE COLFORD, Petitioner,	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
	OAL DKT. NO. EDU 10228-2010 N
	AGENCY REF. No.: 384-8/10
v.	
ELIZABETH BOARD OF EDUCATION, UNION COUNTY,	
	SETTLEMENT AND RELEASE
Respondent.	

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Jane Colford, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Jane Colford v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:384-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ 141,328.00, for the period from September 1, 2010 through June 30, 2011 and

September 1, 2011 through June 30, 2012. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 and 2011-2012 school years. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $ 3,240.00. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2011-2012 school year was $ 0.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $ 138,088.00.

4. The Parties agree that Petitioner earned $105,829.00 from other employment during the period from September 1, 2010 through June 30, 2012 and that this amount shall be

subtracted from the remaining gross amount of back pay due to the Petitioner so that the remaining gross amount of back pay due to Petitioner is $32,259.00. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back salary due to Petitioner is $ 29,033.10. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Jane Colford."

5. In addition to back salary, the Board shall pay Petitioner the sum of $ 1,146.52 as money damages based on amounts paid by Petitioner for medical bills during the period from September 1, 2010 to October 30, 2010 that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "Jane Colford" and will not be subject to income tax withholding or payroll deduction since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 and 2011-2012 school years. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to June 30, 2012. In addition, Petitioner's seniority will be credited for two full years for the entire 2010-2011 and 2011-2012 school year and that those years shall be treated as two full years of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of

service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year and 2011-2012 school years, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 and 2011-2012 school years. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

8. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 and 2011-2012 school years. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: February 2013

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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ADRIANA DeLaROSA,	: BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	: OAL DKT. NO. EDU 10228-2010 N : AGENCY REF. No.: 384-8/10
v.	:
ELIZABETH BOARD OF EDUCATION, UNION COUNTY,	:
Respondent.	: **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Adriana De LaRosa, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Adriana De LaRosa v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:384-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ 30,881.46 for the period from September 1, 2010 through February 18, 2011. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $ 0.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $ 30,881.46.

4. The Parties agree that Petitioner earned $20,529.20 from other employment during the period from September 1, 2010 through February 18, 2011 and that this amount shall be subtracted from the remaining gross amount of back pay due to the Petitioner so that remaining gross amount of back pay due to the Petitioner is $10,253.66. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back

salary due to Petitioner is $ 9,228.29. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Adriana De LaRosa."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September, 2010 to February 18, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the

within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any

approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 2/11/13

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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NICOLE KOVACS,	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL DKT. NO. EDU 10228-2010 N AGENCY REF. No.: 384-8/10
v.	
ELIZABETH BOARD OF EDUCATION, UNION COUNTY,	
Respondent.	**SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Nicole Kovacs, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Nicole Kovacs v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:384-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $18,251.20, for the period from September 1, 2010 through November 19, 2010. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $7,200.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $11,051.20.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 19, 2010. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back salary due to Petitioner is $9,946.08. Said amount shall be paid to Petitioner, subject to all applicable

payroll taxes and normal payroll deductions, in the form of a check made payable to "Nicole Kovacs."

5. In addition to back salary, the Board shall pay Petitioner the sum of $676.00 as money damages based on amounts paid by Petitioner for medical bills during the period from September 1, 2010 to November 1, 2010 that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "Nicole Kovacs" and will not be subject to income tax withholding or payroll deduction since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September, 2010 to November 19, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

8. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 2/11/13 Nicole Kraes

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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JANIL LIANO,	: BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	: OAL DKT. NO. EDU 10228-2010 N : AGENCY REF. No.: 384-8/10
v.	:
ELIZABETH BOARD OF EDUCATION, UNION COUNTY,	:
Respondent.	: **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Janil Llano, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Janil Llano v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:384-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ 36,299.26 for the period from September 1, 2010 through March 17, 2011. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $ 14,580.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $ 21,719.26.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through March 17, 2011. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back salary due to Petitioner is $ 19,547.33. Said amount shall be paid to Petitioner, subject to all applicable

payroll taxes and normal payroll deductions, in the form of a check made payable to "Janil Llano."

5. In addition to back salary, the Board shall pay Petitioner the sum of $ 2,420.00 as money damages based on amounts paid by Petitioner for medical bills during the period from September 1, 2010 to November 1, 2010 that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "Janil Llano" and will not be subject to income tax withholding or payroll deduction since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September, 2010 to March 17, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

8. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 2/10/13

Janil Llano

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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ALLISON MUTCHLER (POST),	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL DKT. NO. EDU 10228-2010 N AGENCY REF. NO.: 384-8/10
v.	
ELIZABETH BOARD OF EDUCATION, UNION COUNTY,	
Respondent.	**SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Allison Mutchler (Post), ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Allison Mutchler v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:384-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $14,898.95, for the period from September 1, 2010 through November 19, 2010. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $6,325.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $8,573.95.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 19, 2010. The parties further agree that the Final Gross Amount Shall be reduced by 10%. Thus, the Final Gross Amount of back salary due to Petitioner is $7,716.55. Said amount shall be paid to Petitioner, subject to all applicable

payroll taxes and normal payroll deductions, in the form of a check made payable to "Allison Post."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September, 2010 to November 19, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to

Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall not affect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing. And that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education

and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This Settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 2-14-13 Allison Mutellier Post

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

DIANA M. OVIEDO-CRUZ,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL DKT. NO. EDU 10228-2010 N AGENCY REF. No.: 384-8/10
v.	:	
ELIZABETH BOARD OF EDUCATION, UNION COUNTY,	:	
Respondent.	:	**SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Diana M. Oviedo-Cruz, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Diana M. Oviedo-Cruz v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:384-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ 500.00, for the period from September 1, 2010 through September 17, 2010. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $ 0.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $ 500.00.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through September 17, 2010. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back salary due to Petitioner is $ 450.00. Said amount shall be paid to Petitioner, subject to all applicable

payroll taxes and normal payroll deductions, in the form of a check made payable to "Diana M. Oviedo-Cruz."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to September 17, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to

Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education

and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

Date: 2/20/13 **FOR PETITIONER**

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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2013 NOV 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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2013 DEC -2 P 5:31
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

CATHERINE SIMON, Petitioner, v. ELIZABETH BOARD OF EDUCATION, UNION COUNTY, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL DKT. NO. EDU 10228-2010 N AGENCY REF. No.: 384-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Catherine Simon, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Catherine Simon v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:384-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ 35,233.70 for the period from September 1, 2010 through February 21, 2011. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $ 14,400.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $ 20,833.70.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through February 21, 2011. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back salary due to Petitioner is $ 18,750.33. Said amount shall be paid to Petitioner, subject to all applicable

payroll taxes and normal payroll deductions, in the form of a check made payable to "Catherine Simon."

5. In addition to back salary, the Board shall pay Petitioner the sum of $ 700.00 as money damages based on amounts paid by Petitioner for medical bills during the period from September 1, 2010 to February 21, 2011 that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "Catherine Simon" and will not be subject to income tax withholding or payroll deduction since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September, 2010 to February 21, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

8. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 2/7/13

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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2013 NOV 12 P 5:20
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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2013 DEC -2 P 5:31
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

KIMBERLY WAUGH,	: BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	: OAL DKT. NO. EDU 10228-2010 N : AGENCY REF. No.: 384-8/10
v.	:
ELIZABETH BOARD OF EDUCATION, UNION COUNTY,	:
	: **SETTLEMENT AND RELEASE**
Respondent.	:

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Kimberly Waugh, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Kimberly Waugh v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:384-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ 24,129.20 for the period from September 1, 2010 through January 2, 2011. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $ 3,600.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $ 20,529.20.

4. The Parties agree that Petitioner earned $ 14,935.51 from other employment during the period from September 1, 2010 through January 2, 2011 and that this amount shall be subtracted from the remaining gross amount of back pay due to the Petitioner so that remaining gross amount of back pay due to the Petitioner is $ 5,593.69. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back salary due

to Petitioner is $ 5,034.32. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Kimberly Waugh."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September, 2010 to January 2, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the

within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any

approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 2/09/2013 Kimberly Waugh

Kimberly Waugh

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

JAMES VILLARINO, Petitioner,	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
v.	OAL DKT. NO. EDU 10228-2010 N AGENCY REF. No.: 384-8/10
ELIZABETH BOARD OF EDUCATION, UNION COUNTY, Respondent.	**SETTLEMENT AND RELEASE**

RECEIVED 2013 NOV -2 P 5:24 STATE OF NEW JERSEY OFFICE OF ADMIN. LAW
RECEIVED 2013 DEC -2 P 5:31 STATE OF NEW JERSEY OFFICE OF ADMIN. LAW

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, James Villarino, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned James Villarino v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:384-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ 16,093.83, for the period from September 1, 2010 through November 19, 2010.

This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $ 6,600.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $ 9,493.83.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 19, 2010. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back salary due to Petitioner is $ 8,544.45. Said amount shall be paid to Petitioner, subject to all applicable

payroll taxes and normal payroll deductions, in the form of a check made payable to "James Villarino."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September, 2010 to November 19, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to

Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education

and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 2/12/13 James Villarino 2/12/13

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

#31-14

OAL DKT. NO. EDU 10565-10
AGENCY DKT. NO. 389-8/10

SHANTEL F. DABADY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/21/14
Date of Mailing: 1/23/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10565-10
AGENCY DKT. NO. 389-8/10

SHANTEL F. DABADY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

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

Marvin Lehman, Esq. for respondent

Record Closed: December 9, 2013 Decided: December 9, 2013

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

This matter was transmitted to the Office of Administrative Law on September 28, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 9, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

Laura Stridiron
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

BERGMAN & BARRETT
BY: MICHAEL T. BARRETT, ESQUIRE
9 TAMARACK CIRCLE
SKILLMAN, NJ 08558
(609) 921-1502
Attorney for Petitioner, Shantel F. Dabady

SHANTEL F. DABADY, Petitioner	: BEFORE THE COMMISSIONER : OF EDUCATION - OFFICE OF : ADMINISTRATIVE LAW
v	:
ELIZABETH BOARD OF EDUCATION, Respondent	: OAL Dkt. No.:**EDU 10565-2010N** : Agency Ref. No.: **389-8/10** : : **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Shantel F. Dabady ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Dabady v Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No.: EDU 10565-2010N, Agency Docket No: 389-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the Parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the Parties agree as follows.

1. The Parties mutually agree that the Petitioner is entitled to gross back salary in the amount of $19,748.80, for the period from 09/01/2010 through 12/31/2010. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefits reimbursed due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from 09/01/2010 through 12/31/2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The Parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from 09/01/2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from 09/01/2010 through 12/31/2010 was $8,640.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of

Unemployment Benefits is $9,997.92.

4. The Parties agree that Petitioner had no earnings from other employment during the period from 09/01/2010 through 12/31/2010. This the final gross amount of back salary due to Petitioner is $9,997.92. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to Shantel F. Dabady.

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from 09/01/2010 to 01/01/2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to, as applicable, sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was

allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising our of the subject matter of the within controversy, except to enforce the terms of this Agreement. This Release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulations of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of his/her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights he/she may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the Parties, and all terms of the Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the Parties.

10. This Agreement is to be construed in accordance with laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the Sate or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of the Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

Petitioner

Dated: 7/30/13

SHANTEL F. DABADY

Respondent

Dated: 11/25/2013

ELIZABETH BOARD OF EDUCATION

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

#32-14

OAL DKT. NO. EDU 13961-11
AGENCY DKT. NO. 326-10/11

MARGHERITA MARTINO-AVELLA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/21/14
Date of Mailing: 1/23/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13961-11
AGENCY DKT. NO. 326-10/11

MARGHERITA MARTINO-AVELLA,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Jason E. Sokolowski, Esq. for petitioner (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 10, 2013 Decided: December 10, 2013

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

This matter was transmitted to the Office of Administrative Law on November 22, 2011, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 10, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

RECEIVED
2013 DEC 2 P 5:30
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

RECEIVED
2013 NOV 22 P 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MARGHERITA MARTINO-AVELLA, Petitioner,	: BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
	: OAL DKT. NO. EDU 10228-2010 N
	: AGENCY REF. No.: 326-10/11
v.	:
ELIZABETH BOARD OF EDUCATION, UNION COUNTY,	:
	: **SETTLEMENT AND RELEASE**
Respondent.	:

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Margherita Martino-Avella, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Marghertia Martino-Avella v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:326-10/11 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $3,538.92, for the period from September 1, 2011 through September 12, 2011. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2011-2012 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2011, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2011 at that time and the back pay due to Petitioner runs from September 1, 2011.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2011-2012 school year was $0.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $3,538.92.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2011 through September 12, 2011. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back salary due to Petitioner is $3,185.03. Said amount shall be paid to Petitioner, subject to all applicable

payroll taxes and normal payroll deductions, in the form of a check made payable to "Margherita Martino-Avella."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2011-2012 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2011 to September 12, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2011-2012 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2011-2012 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to

Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2011-2012 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2011-2012 school year or thereafter.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2011-2012 school year. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that if has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education

and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 2/16/13 Margherita Martino-Avella
Margherita Martino-Avella

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

13-63

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010

Petitioner	OAL Docket #
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

33-14

OAL DKT. NO. EDU 3850-13
AGENCY DKT. NO. 38-2/13

M.C. and O.C., on behalf of minor child, I.C.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/21/14
Date of Mailing: 1/24/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03850-13
AGENCY DKT. NO. 38-2/13

M.C. AND O.C. ON BEHALF OF I.C.,
Petitioners,

v.

FORT LEE BOARD OF EDUCATION,
Respondent.

Beth a. Callahan, Esq., for petitioners (Callahan & Fusco, LLC)

Athina L. Cornell, Esq., for respondent (Lindabury, McCormick, Estabrook & Cooper, P.C.)

Record Closed: December 9, 2013 Decided: December 9, 2013

BEFORE **JOANN LASALA CANDIDO**, ALJ:

This matter was transmitted to and filed with the Office of Administrative Law ("OAL") on January 31, 2012, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The parties have voluntarily

agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached document.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached document, and as evidenced by the attached Board resolution.

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

Therefore, I **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

December 9, 2013
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency: 12-11-13

Date Mailed to Parties: DEC 11 2013
ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

CALLAHAN & FUSCO, LLC
72 Eagle Rock Avenue, Suite 320
East Hanover, NJ 07936
(973) 618-9770
Attorneys for Petitioners

OFFICE OF ADMINISTRATIVE LAW
AGENCY REFERENCE NO.
OAL Docket: EDU 03850-13

MC AND OC O/B/O IC, Petitioner, v. FORT LEE BOARD OF EDUCATION, Respondent.	- ADMINISTRATIVE ACTION - **STIPULATION OF SETTLEMENT**

WHEREAS, IC is an 8 year old student residing within the Fort Lee School District (hereinafter referred to as the "District"); and

WHEREAS, MC and OC (hereinafter referred to as the "Parents") and the Fort Lee Board of Education (hereinafter referred to as the "Board") have engaged in a dispute regarding alleged incidents where IC was bullied within the District; and

WHEREAS, the Parents and the Board have agreed to resolve the issues as follows:

1. The Board agrees that IC shall be permitted to enroll in and attend Fort Lee School No. 1 as of August, 2013.

2. The Board agrees to reimburse the Parents an amount not to exceed ten thousand dollars ($10,000) for IC's educational costs of tutoring, online educational instruction through Laurel Springs Online from December 2012 through June 2013, and

online educational instruction and self-testing through Adapted Mind from December 2012 through June 2013. The Board shall reimburse the Parents within thirty (30) days upon receipt of proof of payment, in the form of cancelled checks , paid invoices, or a certification from the Parents as to the amount spent on tutoring and educational services. The Board will accept the

3. The parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of a hearing. It is understood that the execution of this Agreement does not constitute an admission by the District. The District specifically disclaims any liability to I.C. as set forth in this Agreement.

4. In consideration of the settlement of the captioned matter, Parents waive their right to take any action against the District, including but not limited to administrative actions, civil actions, complaint investigations, due process petitions, OCR investigations, or any other action through August 31, 2013. The Parents retain all of their rights on a going forward basis.

5. In consideration of the settlement of the captioned matter, Parents shall release the District from any and all claims, rights and liability, including but not limited to any and all claims for attorney's fees, compensatory education, money damages, civil liability, or any other equitable or legal relief through August 31, 2013.

6. The terms of this Agreement shall be null and void if I.C. is no longer domiciled in the District.

7. Regardless of domicile, it is agreed that this Agreement and Release and all of its terms are and will remain confidential to the maximum extent permitted by law. However, this Agreement is admissible in any proceeding brought by either party to

enforce the terms of this Agreement. If the Parents breach this or any other provision of this Agreement, this Agreement shall be immediately rendered null and void.

8. This Agreement represents the entire Agreement between the Parties, and will not be modified in whole or in part except by a mutual subsequent written and signed Agreement. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity to consult with counsel of their choosing and option. The Parties consulted with counsel and acknowledge that they were represented by competent counsel, that they understood the contents of this Settlement Agreement and Release.

9. This Agreement shall be governed by the Laws of the State of New Jersey and constitutes a legal release of all claims that were or could have been raised as set forth herein.

10. This Agreement shall be subject to approval by the Board, and is without prejudice to all parties if the terms are not approved. In the event that the Board fails to approve the Agreement, the parties retain all rights and shall resume the hearing before the Honorable Joann LaSala Candido, ALJ.

11. This Agreement shall be incorporated into a Final Order by the Honorable Joann LaSala Candido, ALJ.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year of aforesaid.

Yusang Park, Board President

DATE: 12/4/13

WITNESS:

Mustafa Coskun, Parent

DATE: 10.11.13 DATE: 10.11.13

WITNESS:

Oya Coskun, Parent

DATE: 10.11.13 DATE: 10.11.13

BOARD

#1B RESOLUTION NO. 25913

STUDENT SETTLEMENT AGREEMENT FOR IC

BE IT RESOLVED, that upon the recommendation of the Interim Superintendent of Schools, the Fort Lee Board of Education hereby approves the execution of the **Student Settlement Agreement for IC** for the terms and conditions specified.

DATED: November 4, 2013

Motion by: Mrs. Holly Morell Seconded by: Mrs. Candace Romba

[X] Motion Passed [ ] Motion Failed

ROLL CALL	AYES	NAYS	ABSENT	ABSTAINED
MRS. ESTHER HAN SILVER	X			
MR. CARMELO LUPPINO	X			
MRS. HOLLY MORELL	X			
MRS. CANDACE ROMBA	X			
MR. DAVID SARNOFF	X			
MR. PETER SUH	X			
MR. JOSEPH SURACE			X	
MS. HELEN YOON			X	
MR. YUSANG PARK	X			

34-14

OAL DKT. NO. EDU 11158-10
AGENCY DKT. NO. 531-9/10

MARISSA FALCON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/24/14
Date of Mailing: 1/24/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11158-10
AGENCY DKT. NO. 531-9/10

MARISSA FALCON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

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

Marvin Lehman, Esq. for respondent

Record Closed: December 9, 2013 Decided: December 9, 2013

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

This matter was transmitted to the Office of Administrative Law on October 5, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 9, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

BERGMAN & BARRETT
BY: MICHAEL T. BARRETT, ESQUIRE
9 TAMARACK CIRCLE
SKILLMAN, NJ 08558
(609) 921-1502
Attorney for Petitioner, Marissa Falcon

MARISSA FALCON, Petitioner	: BEFORE THE COMMISSIONER : OF EDUCATION - OFFICE OF : ADMINISTRATIVE LAW
v	:
ELIZABETH BOARD OF EDUCATION, Respondent	: OAL Dkt. No.:**EDU-11158-10** : Agency Ref. No.: **531-9/10** : : **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Marissa Falcon ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Falcon v Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No.: EDU-11158-10, Agency Docket No: 531-9/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the Parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the Parties agree as follows.

1. The Parties mutually agree that the Petitioner, a tenured teacher, is entitled to gross back salary in the amount of $27,814.00, for the period from 09/01/2010 through 06/30/2011. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefits reimbursed due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from 09/01/2010 through 11/20/2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The Parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from 09/01/2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from 09/01/2010 through 11/20/2010 was $6,000.00.

3, The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of

1. The Parties mutually agree that the Petitioner is entitled to gross back salary in the amount of $27,814.00, for the period from 09/01/2010 through 06/30/2011. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefits reimbursed due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from 09/01/2010 through 11/20/2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The Parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from 09/01/2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from 09/01/2010 through 11/20/2010 was $6,000.00.

3, The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of

- Unemployment Benefits and mitigation is $19,632.51

4. The Parties agree that Petitioner had earnings from other employment during the period from 11/21/2010 through 06/30/2011, specifically, Jersey City Board of Education where Petitioner earned a total of $34,946.00. The final gross amount of back salary due to Petitioner, after all mitigation, is $19,632.51. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to Marissa Falcon.

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from 09/01/2010 to 06/30/2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to, as applicable, sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school

year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising our of the subject matter of the within controversy, except to enforce the terms of this Agreement. This Release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulations of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of his/her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights he/she may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and

no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the Parties, and all terms of the Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the Parties.

10. This Agreement is to be construed in accordance with laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the Sate or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of the Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

Petitioner

Dated: 1-14-13

MARISSA FALCON

Respondent

Dated: 11/25/2013

ELIZABETH BOARD OF EDUCATION

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

35-14

OAL DKT. NO. EDU 10573-10
AGENCY DKT. NO. 386-8/10

SUSAN HERNANDEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/24/14
Date of Mailing: 1/24/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10573-10
AGENCY DKT. NO. 386-8/10

SUSAN S. HERNANDEZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

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

Marvin Lehman, Esq. for respondent

Record Closed: December 9, 2013 Decided: December 9, 2013

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

This matter was transmitted to the Office of Administrative Law on September 28, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 9, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

BERGMAN & BARRETT
BY: MICHAEL T. BARRETT, ESQUIRE
9 TAMARACK CIRCLE
SKILLMAN, NJ 08558
(609) 921-1502
Attorney for Petitioner, Susan Hernandez

SUSAN HERNANDEZ, Petitioner	: BEFORE THE COMMISSIONER : OF EDUCATION - OFFICE OF : ADMINISTRATIVE LAW
v	: OAL Dkt. No.: **EDU 10573-2010N**
ELIZABETH BOARD OF EDUCATION, Respondent	: Agency Ref. No.: **386-8/10** : **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Susan Hernandez ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Hernandez v Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No.: EDU 10573-2010N, Agency Docket No: 386-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the Parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the Parties agree as follows.

1. The Parties mutually agree that the Petitioner, a tenured teacher, is entitled to gross back salary in the amount of $16,589.10, for the period from 09/01/2010 through 11/21/2010. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefits reimbursed due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from 09/01/2010 through 11/21/2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The Parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from 09/01/2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from 09/01/2010 through 11/21/2010 was $6,600.00.

3, The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of

Unemployment Benefits is $8,990.10.

4. The Parties agree that Petitioner had no earnings from other employment during the period from 09/01/2010 through 11/21/2010. This the final gross amount of back salary due to Petitioner is $8,990.10. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to Susan Hernandez.

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from 09/01/2010 to 11/22/2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to, as applicable, sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was

allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising our of the subject matter of the within controversy, except to enforce the terms of this Agreement. This Release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulations of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of his/her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights he/she may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the Parties, and all terms of the Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the Parties.

10. This Agreement is to be construed in accordance with laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the Sate or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of the Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

Petitioner

Dated: 2/11/13

Susan S. Hernandez

SUSAN HERNANDEZ

Respondent

Dated: 11/25/2013

ELIZABETH BOARD OF EDUCATION

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

36-14

OAL DKT. NO. EDU 10563-10
AGENCY DKT. NO. 391-8/10

GAIL BATES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/24/14
Date of Mailing: 1/24/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10563-10

AGENCY DKT. NO. 391-8/10

GAIL BATES,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Respondent.

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

Marvin Lehman, Esq. for respondent

Record Closed: December 9, 2013 Decided: December 9, 2013

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

This matter was transmitted to the Office of Administrative Law on September 28, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 9, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

DIRECTOR AND
~~CHIEF ADMINISTRATIVE LAW JUDGE~~

/rr

BERGMAN & BARRETT
BY: MICHAEL T. BARRETT, ESQUIRE
9 TAMARACK CIRCLE
SKILLMAN, NJ 08558
(609) 921-1502
Attorney for Petitioner, Gail Bates

GAIL BATES, Petitioner	: BEFORE THE COMMISSIONER : OF EDUCATION - OFFICE OF : ADMINISTRATIVE LAW
v	:
	: OAL Dkt. No.: **EDU-10563-10**
ELIZABETH BOARD OF EDUCATION, Respondent	: Agency Ref. No.: **391-8/10** : : **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Gail Bates ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Bates v Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No.: EDU-10563-100, Agency Docket No: 391-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the Parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the Parties agree as follows.

1. The Parties mutually agree that the Petitioner, a tenured teacher, is entitled to gross back salary in the amount of $15,544.10, for the period from 09/01/2010 through 11/21/2010. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefits reimbursed due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from 09/01/2012 through 11/21/2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The Parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from 09/01/2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from 09/01/2012 through 11/21/2010 was $5,940.00.

3, The Parties agree that said total gross amount of such benefits must be repaid

pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $8,643.69.

4. The Parties agree that Petitioner had no earnings from other employment during the period from 09/01/2012 through 11/21/2010. This the final gross amount of back salary due to Petitioner is $8,643.69. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to Gail Bates.

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period ~~from 09/01/2010 to 11/22/2010. In addition, Petitioner's seniority will be credited~~ for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to, as applicable, sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave

will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising our of the subject matter of the within controversy, except to enforce the terms of this Agreement. This Release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or ~~any other contractual or legal rights he/she may have as a past, present or future~~ employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

8. Petitioner, in consideration of this Stipulations of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of his/her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights he/she may have as a current or future employee of the Board.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the Parties, and all terms of the Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the Parties.

11. This Agreement is to be construed in accordance with laws of the State of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the ~~obtaining of any approval necessary from the Sate or County offices of the New~~ Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of the Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the Parties, or their duly authorized representatives, do

set forth their hands and seal as of the date(s) set forth below.

Petitioner

Dated: February 11, 2013 Gail Bates

GAIL BATES

Respondent

Dated: 1/23/2013

ELIZABETH BOARD OF EDUCATION

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

37-14

OAL DKT. NO. EDU 11409-10
AGENCY DKT. NO. 561-9/10

MINDY PISTOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/24/14
Date of Mailing: 1/24/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11409-10
AGENCY DKT. NO. 561-9/10

MINDY PISTOL,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Jason E. Sokolowski, Esq. for petitioner (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 10, 2013 Decided: December 10, 2013

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

This matter was transmitted to the Office of Administrative Law on October 18, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 10, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 NOV 12 P 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MINDY PISTOL, Petitioner, v. ELIZABETH BOARD OF EDUCATION, UNION COUNTY, Respondent.	: BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW : OAL DKT. NO. EDU 10228-2010 N : AGENCY REF. No.: 561-9/10 **SETTLEMENT AND RELEASE**

RECEIVED
2013 DEC -2 P 5:31
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Mindy Pistol, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Mindy Pistol v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.: 561-9/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ 30,805.04, for the period from September 1, 2010 through March 11, 2011. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $ 14,400.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $ 16,405.04.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through March 11, 2011. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back salary due to Petitioner is $ 14,764.54. Said amount shall be paid to Petitioner, subject to all applicable

payroll taxes and normal payroll deductions, in the form of a check made payable to "Mindy Pistol."

5. In addition to back salary, the Board shall pay Petitioner the sum of $ 5,878.76 as money damages based on amounts paid by Petitioner for medical bills during the period from September 1, 2010 to March 11, 2011 that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "Mindy Pistol" and will not be subject to income tax withholding or payroll deduction since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September, 2010 to March 11, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

8. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 2/10/13

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
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Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

38-14

OAL DKT. NO. EDU 12475-10
AGENCY DKT. NO. 592-10/10

RACHEL CELIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/24/14
Date of Mailing: 1/24/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12475-10
AGENCY DKT. NO. 592-10/10

RACHEL CEUS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

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

Marvin Lehman, Esq. for respondent

Record Closed: December 9, 2013 Decided: December 9, 2013

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

This matter was transmitted to the Office of Administrative Law on November 9, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 9, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

BERGMAN & BARRETT
BY: MICHAEL T. BARRETT, ESQUIRE
9 TAMARACK CIRCLE
SKILLMAN, NJ 08558
(609) 921-1502
Attorney for Petitioner, Rachel Ceus

RACHEL CEUS, Petitioner	: BEFORE THE COMMISSIONER : OF EDUCATION - OFFICE OF : ADMINISTRATIVE LAW
v	:
ELIZABETH BOARD OF EDUCATION, Respondent	: OAL Dkt. No.: **EDU 12475-2010N** : Agency Ref. No.: **592-10/10** : : **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Rachel Ceus ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Ceus v Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No.: EDU 12475-2010N, Agency Docket No: 592-10/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the Parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the Parties agree as follows.

1. The Parties mutually agree that the Petitioner, a tenured teacher, is entitled to gross back salary in the amount of $17,607.45, for the period from 09/10/10 through 11/21/2010. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefits reimbursed due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from 09/01/2010 through 11/21/2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The Parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from 09/01/2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from 09/01/2010 through 11/21/2010 was $6,050.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of

Unemployment Benefits is $10,401.71.

4. The Parties agree that Petitioner had no earnings from other employment during the period from 09/01/2010 through 11/21/2010. This the final gross amount of back salary due to Petitioner is $10,401.71. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to Rachel Ceus.

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from 09/01/2010 to 11/21/2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to, as applicable, sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was

allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising our of the subject matter of the within controversy, except to enforce the terms of this Agreement. This Release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulations of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of his/her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights he/she may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the Parties, and all terms of the Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the Parties.

10. This Agreement is to be construed in accordance with laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the Sate or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of the Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

Petitioner

Dated: 2.22.13

Rachel Ceus

RACHEL CEUS

Respondent

Dated: 1/25/2013

ELIZABETH BOARD OF EDUCATION

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
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Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
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Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

#39-14

J.M. on behalf of minor child T.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF TINTON FALLS, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

The petitioning parent, J.M., appealed the decision of the respondent Board that certain acts of the head cheerleader coach, Meredith McGee, did not constitute harassment, intimidation or bullying as those terms are defined under New Jersey's Anti-Bullying Bill of Rights, *N.J.S.A.* 18A:37-13.1 The petitioner sought a finding that McGee did engage in acts of harassment, intimidation, bullying and retaliation, and that the coach be relieved of her coaching duties. During the pendency of the appeal, the Board notified the Office of Administrative Law and the petitioner that McGee had been relieved of her coaching duties effective September 25, 2013. The Board subsequently moved for summary decision, contending that the case had been mooted by the removal of McGee as a coach.

The ALJ found that: there are no material facts at issue in this matter, and the case is ripe for summary decision; and the relief J.M. sought has already occurred with the removal of McGee from her position as head cheerleader coach. Accordingly, the ALJ concluded that the case is now moot, and dismissed the petition.

Upon review, the Commissioner disagreed with the ALJ's conclusion that the controversy is now moot as a result of McGee's exit from the coaching position. Petitioner's appeal clearly included the request for a finding that McGee engaged in harassment, bullying, intimidation and/or retaliation; this request for relief has not been addressed, nor has it been mooted by McGee's departure from the coaching position, and there are conflicting accounts of the facts in the record. Accordingly, the case was remanded to the OAL for proceedings to determine whether McGee's conduct constituted harassment, bullying or intimidation.

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

January 23, 2014

OAL DKT. NO. EDU 7871-13
AGENCY DKT. NO. 96-5/13

J.M. on behalf of minor child T.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWN OF TINTON FALLS, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The instant appeal flows from the petitioner's allegations that one of respondent's employees – who served as a cheerleading coach – bullied certain of the students who were or wished to be cheerleaders. Petitioner asked for 1) the removal of the cheerleading coach – Meredith McGee – from her position, and 2) a finding that McGee had engaged in acts of harassment, intimidation, bullying and/or retaliation. The petition was filed on May 13, 2013, answered on June 6, 2013, and transmitted to the Office of Administrative Law (OAL) for proceedings on June 7, 2013.

On or about September 25, 2013, during the pendency of the appeal proceedings, McGee was relieved of her coaching duties. Subsequently, respondent moved for summary dismissal of the appeal, contending that McGee's removal rendered the petition moot. The Administrative Law Judge (ALJ) found 1) that the parties' papers presented no material issues of fact, thereby allowing summary disposition, and 2) that the controversy was moot as a result of McGee's exit from the coaching position. The Commissioner disagrees.

It is undisputed that petitioner's requests for relief included both the termination of McGee's coaching privileges and a finding that she had engaged in harassment, bullying, intimidation and/or retaliation. Thus, the former request has been rendered moot. However, the latter request for relief has not.

The challenge to respondent's finding that McGee's conduct did not rise to the level of harassment or bullying has not been addressed, and the record includes conflicting accounts of the facts. Since it appears that McGee is still employed by respondent in its schools, resolution of petitioner's challenge is needed – for the sake of all of the parties. If the ALJ's fact findings support petitioner's allegations, a finding of HIB should be entered into McGee's personnel file and reported to the Department of Education, and corrective measures should be taken so that students are not exposed to inappropriate behavior by McGee or other coaches and teaching staff. If the ALJ's weighing of all the facts does not support an HIB determination, there should be an express finding of same in an Initial Decision.

Accordingly, this case is remanded to the OAL for proceedings in keeping with this decision.

IT IS SO ORDERED.°

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/14

Date of Mailing: 1/24/14

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 7871-13

AGENCY DKT. NO. 96-5/13

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

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF TINTON FALLS, MONMOUTH COUNTY,

Respondent.

J.M., petitioner, pro se

Patricia Reilly, Esq., for the respondent (Wolf, Helies, Spaeth & Lucas, attorneys)

Record Closed: November 26, 2013 Decided: December 12, 2013

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner J.M. appeals the decision of respondent Board of Education of the Town of Tinton Falls that certain acts of the head cheerleader coach, Meredith McGee, during a joint varsity and junior varsity cheerleader practice on November 19, 2012, did not constitute "harassment, intimidation or bullying" as those terms are defined under the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.1 to -37. In her petition of appeal, J.M. requests as relief a finding that Ms. McGee engaged in acts of harassment, intimidation or bullying and retaliation, and that Ms. McGee be relieved of her coaching duties. This matter was transmitted to the Office of Administrative Law (OAL) on June 7, 2013, as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Shortly thereafter, the Director of the OAL assigned the undersigned to hear the case pursuant to N.J.S.A. 52:14F-5(o).

On October 1, 2013, during the pendency of the appeal, the Board notified the OAL and J.M. that Ms. McGee had been relieved of her coaching duties effective September 25, 2013. As a result, the Board moved for summary decision on the ground that the contested case between J.M. and the Board has become moot. The Commissioner does not decide moot cases. Weehawken Educ. Ass'n v. Bd. of Educ. of Weehawken, 1978 S.L.D. 924, 925. A case is moot if, for example, "a judgment cannot grant effective relief." Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976). Here, the relief that J.M. seeks has taken place, as Ms. McGee has been removed from her position as head cheerleader coach. Therefore, the contested case has become moot.

STANDARD FOR SUMMARY DECISION

The rules governing motions for summary decision in an OAL matter are embodied in N.J.A.C. 1:1-12.5. These provisions mirror the summary-judgment language of R. 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank

and Trust Co. of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary decision should be based on the papers presented, as well as any affidavits that may have been filed with the application. The burden of persuasion rests with the moving party, and in order for the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact that can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), set the standard to be applied when deciding a motion for summary judgment:

> a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

To avoid entry of summary judgment, the non-moving party must come forward with legally competent facts essential to proving an element of its cause of action. Brill, supra, 142 N.J. at 536–37. If the non-moving party fails to do so, the moving party is entitled to summary judgment. Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary judgment if the evidence is "so one-sided that one party must prevail as a matter of law." Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106, S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). The New Jersey Supreme Court's standard for summary judgment is thus designed to "'liberalize the standards so as to permit summary judgment in a larger number of cases,'" due to the perception that we live in "'a time of great increase in litigation and one in which many meritless cases are filed.'" Brill, supra, 142 N.J. at 539 (citation omitted).

CONCLUSION

Based on the briefs and affidavits and other information presented by the parties, I **CONCLUDE** that there exists no genuine issue of material fact and this matter can be decided by summary decision. I further **CONCLUDE** that since the varsity coach has been removed, the case before me has become moot.

ORDER

For the reasons set forth above, I **ORDER** that the Board's motion for summary decision is **GRANTED** and that J.M.'s petition is **DISMISSED AS MOOT**.

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

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

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

12/12/2013
DATE

RONALD W. REBA, ALJ

Date Received at Agency: 12/12/2013

Date Mailed to Parties: 12/12/13

/cad

40-14

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OAL DKT. NO. EDU 16672-13
(On Remand EDU 02791-13)
AGENCY DKT. NO. 28-2/13

D.P. and A.P., on behalf of minor child, G.P.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Settlement Agreement (Agreement), and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On October 18, 2013, the Commissioner remanded this matter to OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge did not include the requisite signature of petitioner, A.P.

Upon review of the revised record on remand, the Commissioner finds that the Agreement now contains A.P.'s signature. According to the Agreement, payment from the petitioners was due within 30 days of the Board's approval of the settlement, which date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

IT IS SO ORDERED

COMMISSIONER OF EDUCATION

Date of Decision: 1/23/14
Date of Mailing: 1/24/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 16672-13

AGENCY DKT. NO. 28-2/13

ON REMAND

OAL DKT. NO. EDU 2791-13

D.P. and **A.P.** on behalf of minor child, **G.P.,**

Petitioners,

v.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,

Respondent.

Hillary D. Freeman, Esq., for petitioners (Freeman Law Offices, attorneys)

Jeffrey R. Merlino, Esq., for respondent (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Record Closed: August 28, 2013 Decided: December 13, 2013

BEFORE **IRENE JONES**, ALJ:

On February 26, 2013, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The matter was scheduled for hearing on July 12 and July 15, 2013, but was adjourned and rescheduled for August 8, 2013 at the request of the parties. On August 6, 2013 the parties notified the undersigned that the matter had been settled.

On September 5, 2013, an Initial Decision Settlement was issued. However, on October 21, 2013, the matter was remanded alleging that A.P. was not a signatory to the settlement. In fact, A.P. was a signatory but her signature was on a separate page as the parties signed the agreement on different dates and was inadvertently overlooked by the Department. Attached hereto is the original stipulation of settlement that was executed on August 7 and 13, 2013 and the Board Resolution approving same.

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

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

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

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

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

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

12/13/13
DATE

Irene Jones
IRENE JONES, ALJ

Date Received at Agency: 12-17-13

Date Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

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OFFICE OF ADMIN. LAW
2013 AUG 28 P 4:25

LINDABURY, McCORMICK, ESTABROOK & COOPER
A Professional Corporation
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for the Ridgewood Board of Education

D.P. and A.P. o/b/o minor child G.P.,	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL DKT. NO: EDU 02791-2013N AGENCY DKT. NO: 28-2/13
vs.	
RIDGEWOOD BOARD OF EDUCATION:	STIPULATION OF SETTLEMENT
Respondent.	

WHEREAS, on or about February 14, 2013, a residency Petition of Appeal was filed on behalf of Petitioner with the Commissioner of Education; and

WHEREAS, on or about February 22, 2013, the Respondent Ridgewood Board of Education (Board) filed an Answer to Petitioner's Petition of Appeal denying the allegations and a Counterclaim seeking $23,037 for out-of-district tuition for the 2012-13 school year ; and

WHEREAS, the matter was assigned to the Office of Administrative Law and a hearing is scheduled for August 8, 2013; and

WHEREAS, the parties having a desire to settle the above matter in an amicable way in lieu of a more costly hearing and without any admission of liability or wrongdoing, hereby agree as follows:

1. Petitioner shall withdraw the Petition of Appeal with prejudice.

2. The Superintendent will recommend for Board approval the acceptance of $5,000 from Petitioner within 30 days of the fully approved Stipulation of Settlement for full satisfaction of the Board's Counterclaim seeking out-of-district tuition for the 2012-13 school year.

3. Petitioner agrees to enroll G.P. in a district other than Ridgewood for the 2013-14 school year.

4. Petitioner will be entitled to register G.P. for enrollment in Ridgewood Public Schools if G.P.'s domicile status were to change in the future whereby Ridgewood becomes the appropriate district of G.P.'s domicile.

5. The parties waive all claims against each other, including any claim for reimbursement of attorneys' fees or other remuneration, except as provided herein.

6. The parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of a hearing.

7. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues.

8. This Agreement shall be governed by the laws of the State of New Jersey.

9. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

10. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative and fully understand its requirements and limitations. The parties acknowledge that are represented by competent counsel and that are fully satisfied with the legal representation provided by their respective counsel.

11. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.

12. This Agreement shall be incorporated as a proposed settlement agreement for review by the Office of Administrative Law and Commissioner of Education and if approved, resolves any and all claims that were raised or could have been raised in the captioned matter. If it is not approved by the Office of Administrative Law or Commissioner of Education, it is without prejudice to the parties' claims and/or defenses.

13. This Agreement is subject to ratification by the Board.

ON BEHALF OF PETITIONER

_____ Date: _7 August 2013__

D.P.

_____ Date: _____

A.P.

ON BEHALF OF THE RIDGEWOOD BOARD OF EDUCATION

_____ Date: 8-22-2013

Michael Falkowski, Board Secretary

13. This Agreement is subject to ratification by the Board.

ON BEHALF OF PETITIONER

D. [illegible]

_____ Date: _7 August 2013__

D.P.

Andrea Parker Date: August 13, 2013

A.P.

ON BEHALF OF THE RIDGEWOOD BOARD OF EDUCATION

_____ Date: _____

Michael Falkowski, Board Secretary

EXCERPT FROM THE MINUTES OF THE REGULAR PUBLIC MEETING OF THE
BOARD OF EDUCATION OF RIDGEWOOD
BERGEN COUNTY, N.J. AS RECORDED IN THE
OFFICIAL MINUTE BOOK

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2013 AUG 28 P 4:25

The Board of Education of Ridgewood, in the County of Bergen, New Jersey, convened in public session on Monday, August 26, 2013 at 5:03 p.m. in the Education Center, 49 Cottage Place, Ridgewood, New Jersey.

The following members of the Ridgewood Board of Education were present:

Ms. Christina Krauss; Ms. Michele Lenhard; Mr. James Morgan; Ms. Sheila Brogan, Board President

The following members were absent: Mr. Vincent Loncto, Vice-President

V. CONSENT ITEMS

E. FINANCE

viii. <u>Approval: Residency Settlement Agreement with the Parents of Student #902926</u>
Approval of a residency settlement agreement with the parents of Student #902926.

The Board had received background information.

Mr. Morgan moved approval of Consent Item E – Finance.

Ms. Lenhard seconded the motion, which carried by the following roll-call vote:

AYES: Ms. Krauss, Ms. Lenhard, Mr. Morgan, Ms. Brogan

NAYS: None

ABSENT: Mr. Loncto

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

8/27/13
Date

Jennifer Ulman
Assistant Board Secretary

41-14

OAL DKT. NO. EDU 10475-10
AGENCY DKT. NO. 387-8/10

GIULIANO FARINA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/27/14
Date of Mailing: 1/27/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10475-10
AGENCY DKT. NO. 387-8/10

GIULIANO A. FARINA,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

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

Marvin Lehman, Esq. for respondent

Record Closed: December 9, 2013 Decided: December 9, 2013

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

This matter was transmitted to the Office of Administrative Law on September 27, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 9, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

BERGMAN & BARRETT
BY: MICHAEL T. BARRETT, ESQUIRE
9 TAMARACK CIRCLE
SKILLMAN, NJ 08558
(609) 921-1502
Attorney for Petitioner, Giuliano Farina

GIULIANO FARINA, Petitioner	: BEFORE THE COMMISSIONER : OF EDUCATION - OFFICE OF : ADMINISTRATIVE LAW
v	:
	: OAL Dkt. No.: **EDU-10475-10**
ELIZABETH BOARD OF EDUCATION, Respondent	: Agency Ref. No.: **387-8/10** : : **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Giuliano Farina ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Farina v Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No.: EDU 10475-10, Agency Docket No: 387-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the Parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the Parties agree as follows.

1. The Parties mutually agree that the Petitioner, a tenured teacher, is entitled to gross back salary in the amount of $14,413.62, for the period from 09/01/2010 through 11/17/2010. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefits reimbursed due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from 09/01/2010 through 11/17/2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The Parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from 09/01/2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from 09/01/2010 through 11/17/2010 was $5,400.00.

3, The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of

Unemployment Benefits is $8,112.26.

4. The Parties agree that Petitioner had no earnings from other employment during the period from 09/01/2010 through 11/17/2010. This the final gross amount of back salary due to Petitioner is $8,112.26. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to Giuliano Farina.

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from 09/01/2010 to 11/18/2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to, as applicable, sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was

allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising our of the subject matter of the within controversy, except to enforce the terms of this Agreement. This Release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulations of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of his/her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights he/she may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the Parties, and all terms of the Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the Parties.

10. This Agreement is to be construed in accordance with laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the Sate or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of the Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

Petitioner

Dated: 2/10/13

GIULIANO FARINA

Respondent

Dated: 11/25/2013

ELIZABETH BOARD OF EDUCATION

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

42-14

OAL DKT. NO. EDU 12107-10
AGENCY DKT. NO. 587-10/10

ELIZABETH DRESSLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/27/14
Date of Mailing: 1/27/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12107-10
AGENCY DKT. NO. 587-10/10

ELIZABETH DRESSLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Jason E. Sokolowski, Esq. for petitioner (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 10, 2013 Decided: December 10, 2013

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

This matter was transmitted to the Office of Administrative Law on October 27, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 10, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-12-13

Mailed to Parties: DEC 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 NOV 22 P 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

ELIZABETH DRESSLER,	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL DKT. NO. EDU 10228-2010 N AGENCY REF. No.: 587-10/10
v.	
ELIZABETH BOARD OF EDUCATION, UNION COUNTY,	
Respondent.	**SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Elizabeth Dressler, ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Elizabeth Dressler v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10228-2010N, Agency Ref. No.:587-10/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows;

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ 17,599.45, for the period from September 1, 2010 through November 19, 2010.

This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations, and policies of the New Jersey Department of Labor and Workforce Development ("LWD") in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner during the 2010-2011 school year. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, if applicable, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner during the 2010-2011 school year was $ 7,200.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is $ 10,399.45.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 19, 2010. The parties further agree that this Final Gross Amount shall be reduced by 10%. Thus, the Final Gross Amount of back salary due to Petitioner is $ 9,359.50. Said amount shall be paid to Petitioner, subject to all applicable

payroll taxes and normal payroll deductions, in the form of a check made payable to "Elizabeth Dressler."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September, 2010 to November 19, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to

Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal right he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2010-2011 school year or thereafter.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the Sate of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understands the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education

and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 2-20-13 L Boesler

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

ELIZABETH PUBLIC SCHOOLS

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Olga Hugelmeyer
Interim Superintendent of Schools

Marvin Lehman
Interim Board Counsel

Facsimile Transmission

NUMBER OF PAGES, INCLUDING THIS: 2

TO: The Honorable Ellen S. Bass, A.L.J.

CC: Harold E. Kennedy, Jr., School Business Administrator/Board Secretary

FAX #: 973-648-2358

FROM : Marvin Lehman, Esq.

DATE: December 9, 2013

RE: **Elizabeth Seniority Litigation**
Our File No.: 251

MESSAGE: Enclosed please find certified true copy of Board Resolution dated November 21, 2013 approving settlement agreements.

The information contained in this facsimile message is attorney privileged and confidential information intended only for the use of the individuals or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone, and return the original message to us at the above address via the U.S. Postal Service. Thank you.

IF THERE IS A PROBLEM WITH THIS TRANSMISSION,
PLEASE CALL (908) 436-5072

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
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Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

#43-14

S.V., M.R. and G.R., on behalf of minor children, K.V., E.R. and F.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners – parents of students in the Camden School District – alleged that the respondent Board failed to provide a thorough and efficient education for their children as required under the Constitution of the State of New Jersey (Count One) and the New Jersey Civil Rights Act (Count Two). The Board filed several motions to dismiss in lieu of an answer. Subsequent to the filing of the instant petition, a full takeover of the Camden School District was initiated by the State.

The ALJ found, *inter alia*, that: the Commissioner has jurisdiction to determine whether the Board is providing petitioners with a thorough and efficient public education; as to Count Two, while the Commissioner does have jurisdiction to decide claims of discrimination when such claims arise under the school laws, he does not have jurisdiction to hear a controversy which was filed under the New Jersey Civil Rights Act, as was the case herein; and Count One of the petition – in light of the intervening State takeover of the Camden School District – should be dismissed as premature, moot and precluded by the principle of *res judicata.* The ALJ concluded that respondent's motion to dismiss for lack of jurisdiction should be denied in part as related to Count One, and granted in part as related to Count Two, but Count One should be dismissed as premature, moot and precluded by the principle of *res judicata.* The ALJ ordered the petition dismissed.

Upon a full and independent review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision, and the petition was dismissed.

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

January 21, 2014

OAL DKT. NO. EDU 13908-12
AGENCY DKT. NO. 307-10/12

S.V., M.R. and G.R., on behalf of minor children, K.V., E.R. and F.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

This matter involves a petition of appeal filed by the parents of three students enrolled in the Camden School District claiming that their children are being denied a thorough and efficient education pursuant to the Constitution of the State of New Jersey (Count One) and the New Jersey Civil Rights Act (Count Two).[1] Following oral argument on several motions filed by the Board, the Administrative Law Judge (ALJ) found that Count One of the petition should be dismissed as premature, moot and precluded by the principles of *res judicata*; and that Count Two of the petition should be dismissed for lack of jurisdiction and for failure to state a cause of action. In their exceptions, the parties reiterated all of the arguments advanced at the

[1] During the course of the litigation -- in an unrelated action – the State Board of Education issued an Administrative Order on June 5, 2013 placing the Camden City School District under full State intervention because the Camden School District was not providing a thorough and efficient system of education.

OAL, which were thoroughly considered and discussed by the ALJ in rendering the specific determinations outlined in the Initial Decision.

Upon the review of the record in this matter, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, the petition is hereby dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 1/21/14

Date of Mailing: 1/27/14

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13908-12
AGENCY DKT. NO. 307-10/12

S.V., M.R. AND G.R. ON BEHALF OF K.V., E.R. AND F.H.,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,
Respondent.

Patricia Bombelyn, Esq., for petitioners (Perez & Bombelyn, PC, attorneys)

Julio C. Gomez, Esq., for petitioners (Gomez, LLC, attorneys)

Lester Taylor, Esq., for respondent (Florio, Perrucci, Steinhardt & Fader, LLC, attorneys)

Record Closed: December 2, 2013 Decided: December 6, 2013

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

STATEMENT OF THE CASE

Petitioners, S.V., M.R. and G.R. on behalf of K.V., E.R. and F.H., allege that respondent, Board of Education of the City of Camden, Camden County (hereinafter Board or District), does not consistently or effectively provide the basic skills or knowledge necessary for the petitioner schoolchildren to achieve proficiency in the State's educational standards defined by the Core Curriculum Content Standards. (Petition ¶ 165.) As a result, petitioners allege that respondent fails to fulfill the State's constitutional obligation to educate petitioner schoolchildren and equip them to participate as informed citizens and productive members of society. (Ibid.)

Respondent counters by filing three motions in lieu of an answer to dismiss with opposition to the motions having been filed by petitioners. The undersigned having considered the moving papers in support of the motions to dismiss and exhibits submitted by the respondent, and opposition papers and exhibits submitted by petitioners, as well as the intervening full State takeover of the District, undertaken subsequent to the filing of the Petition herein, and for good cause shown, has determined from the proofs that respondent has proven that dismissal is warranted, for the reasons as more particularly set forth herein.

PROCEDURAL HISTORY

On October 15, 2012, petitioners filed the Petition with an application for emergent relief with the Commissioner of Education to consider this controversy that arose under the school law, N.J.S.A. 18A:6-9. The case was transmitted to the Office of Administrative Law (OAL), where it was filed on October 18, 2012. Following oral argument at the OAL, emergent relief was denied on October 23, 2012, on the basis that petitioners failed to show irreparable harm, or that the legal rights underlying petitioners' claims were settled in their favor, or that there was a likelihood of prevailing on the merits of their claim, or that on balance they would suffer greater harm than would the respondent if emergent relief were granted.

On November 21, 2012, the Commissioner of Education adopted and confirmed the Order denying emergent relief and mandated that the proceedings continue at the OAL for a decision on the merits. On November 15, 2012, respondent filed three motions in lieu of an answer to dismiss the Petition. The three motions are based upon allegations of a lack of jurisdiction, failure of petitioners to join indispensable parties, and failure by petitioners to advance a cause of action. On December 28, 2012, petitioners filed an omnibus answer in opposition to which respondent replied on January 30, 2013. Finally, petitioners filed an omnibus sur-reply on February 22, 2013, to respondent's reply.

On March 25, 2013, while a decision on respondent's three motions was pending, the Commissioner of Education, in a separate, independent action, issued an Order for respondent to "Show Cause why an Administrative Order placing the Camden City School District . . . under full State intervention should not be implemented . . . " (Pet. Supp. Brief of 6/26/2013, Ex. A; Resp. Supp. Brief of 6/26/2013, Ex. A.) The Commissioner issued the Order based on his findings that the "educational metrics garnered from the performance results of Camden demonstrate an unfortunate and unacceptable educational failure on the part of the Camden School District." (Pet. Supp. Brief of 6/26/2013, Ex. A, ¶ 1.) Additionally, a "[c]omprehensive review of the District pursuant to the New Jersey Quality Single Accountability Continuum Act (New Jersey's QSAC), N.J.S.A. 18A:7A-10 et seq., reveals a pervasive educational failure." (Ibid.) "Both the [respondent] and its administration have failed to implement proper policies and provide personnel to adequately educate the children of Camden." (Ibid.) "Because of these glaring and ongoing failures to properly educate the youth of Camden, the Department must immediately engage in full State intervention of the failing Camden School District pursuant to N.J.S.A. 18A:7A-10 et seq. to raise the level of educational attainment to acceptable levels." (Ibid.)

On April 30, 2013, the Commissioner and respondent entered into a Consent Order whereby respondent waived its right to a plenary hearing on the Commissioner's Order to Show Cause, and agreed to an administrative order placing respondent under full State intervention. (Pet. Supp. Brief of 6/26/2013, Ex. B; Resp. Supp. Brief of

6/26/2013, Ex. C.) On June 5, 2013, pursuant to the Consent Order, the State Board of Education issued an Administrative Order placing the Camden City School District under full State intervention pursuant to N.J.S.A. 18A:7A-15, N.J.S.A. 18A:7A-15.1, and N.J.S.A. 18A:7A-34, effective June 25, 2013, or the day after the last day of school for teachers in the 2012-2013 academic year, whichever is the later date. (Pet. Supp. Brief of 6/26/2013, Ex. C; Resp. Supp. Brief of 6/26/2013, Ex. D.)

The State Board based its decision on the same underlying allegations as petitioners, in that the respondent has failed to satisfy at least fifty percent of the quality performance indicators in the key component areas of Instruction and Program, Operations Management, Personnel and Governance. (Compare Pet. Supp. Brief of 6/26/2013, Ex. C at 1 with Petition ¶ 2, 3, 4.) The State Board further referenced the Commissioner's August 9, 2012, report upon which the petitioners also rely that confirmed severe deficiencies in the respondent's educational program. (Compare Pet. Supp. Brief of 6/26/2013, Ex. C at 1 with Petition ¶ 7.) The State Board ultimately determined that respondent "is not providing a thorough and efficient system of education". (Pet. Supp. Brief of 6/26/2013, Ex. C at 3.)

On April 4, 2013, the parties in the within matter were requested to provide supplemental briefs addressing the full State takeover of respondent's school district and its effect upon this dispute. Upon request for postponement by the parties, the requested supplemental briefs were ultimately submitted from both sides on June 26, 2013. While respondent reiterates that its three motions to dismiss remain viable, it also argues now that the State intervention renders the Petition moot. By contrast, petitioners' supplemental brief argues that the State intervention renders moot the respondent's motions and also requests summary decision in its favor. (Pet. Supp. Brief of 6/26/2013 at 6.) As a result, petitioners request a declaratory ruling that the petitioner schoolchildren attend a school district that does not provide a thorough and efficient education and that a hearing only remains necessary to determine a remedy to the petitioners' educational deprivation. (Ibid.)

The matter was orally argued on October 1, 2013. A transcript of the October 1, 2013, oral argument was requested by this tribunal and received on December 2, 2013. The record closed on that date.

STATEMENT OF FACTS

After carefully considering the arguments and documentary evidence presented, I **FIND** the following to be the relevant and credible **FACTS** in this matter: All three petitioning students are residents of Camden, New Jersey. They are assigned to public schools operated by respondent pursuant to N.J.S.A 18A:8-1 to 42, and N.J.S.A 18A:38-1 to 36, which sets school district boundaries in conformity with municipal boundaries. Petitioner K.V. is twelve years old and attends seventh grade at the respondent's Pyne Point Family School in Camden, New Jersey. (Petition ¶ 22.) K.V. is not proficient in Language Arts or Mathematics. (Id. ¶ 94.) Petitioner E.R. is eight years old and attends fourth grade at the respondent's Dudley Elementary School in Camden New Jersey. (Id. ¶ 23.) E.R. is not proficient in Language Arts or Mathematics. (Id. ¶ 95.) Petitioner F.H. is five years old and attends first grade at the respondent's Davis Elementary School in Camden, New Jersey. (Id. ¶ 24.) F.H. is not proficient in Language Arts or Mathematics. (Id. ¶ 96.)

LEGAL ANALYSIS

I. The Commissioner has jurisdiction to determine whether respondent is providing petitioners a thorough and efficient public education.

As an initial matter, the issue of jurisdiction must be determined in order for the OAL to hear and decide this case. Count One of the Petition alleges that respondent violated Article 8, § 4, ¶ 1 of the New Jersey Constitution which requires the Legislature to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." (Petition ¶ 176.) Respondent argues that the Commissioner of Education lacks jurisdiction over this claim because it alleges a constitutional violation for which the Department of Education does not have original jurisdiction.

While as a general rule, administrative agencies do not have jurisdiction to decide purely constitutional claims, "[a]dministrative agencies are clearly empowered to determine issues within their jurisdiction even though the resolution of those issues implicates constitutional claims." Desilets ex rel. Desilets v. Clearview Reg'l Bd. of Educ., 137 N.J. 585, 595 (1994) (citing Christian Bros. Inst. v. N. N.J. Interscholastic League, 86 N.J. 409, 416 (1981) (noting "[a]dministrative agencies have power to pass on constitutional issues . . . [when] relevant and necessary to resolution of a question concededly within their jurisdiction")); Hunterdon Cent. High Sch. Bd. of Educ. v. Hunterdon Cent. High Sch. Teachers' Ass'n., 174 N.J. Super. 468, 474-75 (App. Div. 1980) (ruling "administrative agencies are competent to pass upon constitutional issues germane to proceedings before them") aff'd o.b., 86 N.J. 43 (1981). Furthermore, the New Jersey Appellate Division has held that "the bare assertion or generalized allegations of infringement of a constitutional right does not create a claim of constitutional dimensions." Winston v. Bd. of Educ. of S. Plainfield, 125 N.J. Super. 131, 144 (App. Div. 1973), aff'd 64 N.J. 582 (1974).

The Commissioner of Education has "the constitutional duty . . . to assure the maintenance and support of a 'thorough and efficient system of public schools.'" M.P. and G.P., parents of R.P. v. Bd. of Educ. of Delran, Burlington County, 1985 S.L.D. 1817, 1830 (citing N.J. Const., art. 8, § 4, ¶ 1), adopted, 1985 S.L.D. 1834 (holding that Delran denied R.P. a thorough and efficient education and ordering the Board to reimburse petitioners for the unilateral placement in the Cinnaminson School District). Thus, the Commissioner has the "'affirmative obligation to see to it that the statutory objectives are met' and that local school boards and governing bodies fulfill their delegated duties." In re Upper Freehold Reg'l Sch. Dist., 86 N.J. 265, 273 (1981) (citing Robinson v. Cahill, 62 N.J. 473, 509 n.9 (1973)).

In exercising his jurisdiction, "[t]he Commissioner [of Education] is charged with the duty of supervising State schools and enforcing the rules prescribed by the State Board." In re Bd. of Educ. of the City of Trenton, 176 N.J. Super. 553, 563 (App. Div. 1980), aff'd 86 N.J. 327 (1981) (emphasis added) (citing N.J.S.A. 18A:4-23); see also

Dunellen Bd. of Educ. v. Dunellen Ed. Assoc., 64 N.J. 17, 23 (1973) ("[T]he Legislature enacted provisions entrusting school supervision and management to local school boards . . . subject to the supervisory control afforded by the Legislature to . . . the Department's chief executive and administrative officer, the State Commissioner of Education.") In performing his duties, the Commissioner must determine whether a school board's actions are violative of the law, and if so, "the proper discharge of his duty requires corrective action." Kopera v. Bd. of Educ. of the Town of W. Orange, 60 N.J. Super. 288, 296 (App. Div. 1960) (citing Masiello Jr. v. State Bd. of Exm'rs, 25 N.J. 590, 607 (1958)). It is recognized by the Supreme Court of New Jersey that the Commissioner has broad remedial powers in the administration of public education law. Balsley v. N. Hunterdon Reg'l Sch. Dist. Bd. of Educ., 117 N.J. 434, 442-43 (1990); Dunellen, supra, 64 N.J. at 23 ("in a series of decisions this Court reaffirmed the great breadth of the Commissioner's powers") (citations omitted); In re 1999-2000 Abbott v. Burke Implementing Regulations, 348 N.J. Super. 382, 390 (App. Div. 2002).

The New Jersey Supreme Court and Appellate Division have specifically upheld the Commissioner's legal authority to address claims alleging a violation of the State's constitutional obligation to provide a thorough and efficient public education. See In re Bd. of Educ. of the City of Trenton, supra, 86 N.J. 327, 330 (affirming the Commissioner's power to determine that Trenton was not providing a thorough and efficient education and his power to issue an administrative order specifying a remedial plan); Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 128-29 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996) (affirming the Commissioner's power to determine that Newark was not providing a thorough and efficient system of education and his power to remove the local school board and create a State-operated school district). As articulated by the New Jersey Supreme Court in Abbott v. Burke, 100 N.J. 269 (1985), the Commissioner has an obligation to apply his expertise to a controversy such as the present matter, where petitioners are alleging that respondent denied them a through and efficient public education, and to develop a complete and informed record reflecting determinations of the administrative issues as well as to resolve factual matters material to the ultimate constitutional issues. Id. at 303.

Abbott v. Burke involved the claim that the statutory framework as applied to the property-poor urban districts was unconstitutional. In that case, the New Jersey Supreme Court rejected the plaintiffs' assertion that the matter should not be the subject of an administrative proceeding because a constitutional issue "invokes solely the jurisdiction of the courts." Id. at 297. Rather, the Court reaffirmed its approval of administrative handling of educational controversies in the context of constitutional litigation. Id. at 300. Concluding that the case could and should be considered in the first instance by the "appropriate administrative agency," the Court therefore remanded and transferred the matter to the Commissioner of Education. Id. at 301. In doing so, the Court recognized that "although an agency may base its decision on constitutional considerations, such legal determinations do not receive even a presumption of correctness on appellate review." Id. at 299. However, the Court stressed that a court may need a factual development that will help it resolve the constitutional issue so that the New Jersey Supreme Court had at times required plaintiffs to exhaust their administrative remedies notwithstanding allegations of a constitutional violation. Ibid. In this regard, the Court pointed out that in previous education cases raising or implicating constitutional issues, the New Jersey Supreme Court had required the exhaustion of administrative remedies when administrative adjudication served "to develop a fully informed factual record and maximize the soundness of determinations through the agency's expertise." Ibid. (citations omitted).

Hence, recognizing that it is a judicial court, not the administrative agency, which has the jurisdiction ultimately to decide the constitutional claim here, nevertheless, the Commissioner has jurisdiction to hear and decide Count One of the Petition as a result of both his obligation to develop a complete and accurate factual record and his responsibility under the New Jersey Constitution to ensure that the statutory framework for public education as implemented in fact results in the provision of a thorough and efficient education. Accordingly, respondent's motion to dismiss for lack of jurisdiction should be denied in regards to Count One of the Petition.

II. The Commissioner has no jurisdiction to hear a controversy which states a claim under the New Jersey Civil Rights Act.

Count Two of the Petition alleges a violation of the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-1 to -2, because respondent, "acting under color of state law, deprived petitioner schoolchildren of their substantive right to a thorough and efficient education . . . " (Petition ¶ 179.) Respondent argues that the Commissioner of Education lacks jurisdiction over this claim because it does not constitute a dispute arising under the school laws.

As previously discussed, the Commissioner's jurisdiction is defined by statute, and is limited to "controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9; Balsley v. North Hunterdon Reg'l. School Dist. Bd. of Educ., 117 N.J. 434, 438 (1990); Bd. of Educ. of East Brunswick v. Twp. Council of East Brunswick, 48 N.J. 94, 102 (1966). It has been recognized that, "[t]he sweep of the Department's interest and the Commissioner's jurisdiction does not extend to all matters involving boards of education." Archway Programs v Pemberton Twp. Bd. of Educ., 352 N.J. Super. 420, 424-25 (App. Div. 2002). Claims against local school boards that "do not arise under the school laws but rather from statutory or common law [are] typically and appropriately adjudicated in the courts." Id. at 425.

"In 2004, the Legislature adopted the CRA for the broad purpose of assuring a state law cause of action for violations of state and federal constitutional rights and to fill any gaps in state statutory anti-discrimination protection." Owens v. Feigin, 194 N.J. 607, 611 (2008). "[T]he CRA's sole procedural component is found in N.J.S.A. 10:6-2(d), which states that CRA actions "may be filed in Superior Court," and directs a court to hold a jury trial "[u]pon application of any party." Ibid.

As a preliminary matter, the CRA does not arise under the school laws codified under Title 18A of the New Jersey statutes. Furthermore, the plain language of the CRA does not appear to grant jurisdiction to any administrative entity. Petitioners argue that the CRA does not confer exclusive jurisdiction in Superior Court and that respondent has not requested a jury trial. The Appellate Division has rejected similar

arguments in an unpublished decision where it reaffirmed the Commissioner does not have jurisdiction to hear claims under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to -14, as such a claim does not arise under school laws. Raimondi v. Bd. of Educ. of Westwood Reg'l. Sch. Dist., Docket No. A-5555-05T3 at 18-19 (N.J. App. Div., Aug. 7, 2007). The Court stated that the jurisdiction of CEPA claims is vested in the courts, even though the language does not confer exclusive jurisdiction. Id. at 19. "Furthermore, the parties to a CEPA claim have a right to trial by jury . . . and that right may not be denied merely because there might be some factual overlap between issues before the [Commissioner] and issues that belong in the courts." Ibid. Just as the Commissioner does not have jurisdiction to hear CEPA claims, the Commissioner does not have jurisdiction to hear CRA claims, if for no other reason than because the CRA does not arise under the school laws of Title 18A.

In addition, like in Raimondi, petitioners here argue that as long as the matter is before the Commissioner on an issue appropriately before him, he must exercise additional incidental jurisdiction over all aspects of the matter, relying on Sukin v. Northfield Bd. of Educ., 171 N.J. Super. 184, 187 (App. Div. 1979). In Sukin, the Court relied on the Commissioner's jurisdiction over school law-related disputes to find that the Commissioner had incidental jurisdiction over school-law controversies arising under the Open Public Meetings Act (OPMA). Ibid. Thus while Sukin establishes the Commissioner's jurisdiction to determine claims arising under the OPMA as they relate to school law controversies, this case is simply not broad enough to also encompass a CRA claim such as in the present matter.

To clarify, the Commissioner unquestionably has jurisdiction to decide claims of discrimination when such claims arise under the school laws. Hinfey v. Matawan Reg. Bd. of Educ., 77 N.J. 514, 525 (1978) ("[T]he Commissioner of Education has not only the power to decide controversies under the school law which entail invidious discrimination practices, but indeed he may be regarded as having an affirmative duty to do so."). The Supreme Court has later reiterated that "discrimination complaints involving the subject matter of public school curricula and courses of study should be handled by the Commissioner . . . and that such complaints, though filed originally in the

Division [on Civil Rights] . . . should be transferred to the Commissioner of Education . . . " Balsley v. N. Hunterdon Reg'l Sch. Dist. Bd. of Educ., 117 N.J. 434, 439 (1990). However, in both Hinfey and Balsley, the petitioners brought the discrimination claims under the school law providing that "[n]o pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin." N.J.S.A. 18A:36-20. Such is not the case here as petitioners do not bring their discrimination claim under the school laws, but have instead, filed a claim under CRA. Finding no Superior Court decision determining that the Commissioner has jurisdiction over a CRA claim, and because the CRA does not arise under the school laws of Title 18A, jurisdiction in the administrative forum is not proper over Count Two of the Petition.

Therefore, as to respondent's motion to dismiss for lack of jurisdiction, it should be denied in part relative to Count One of the Petition. However, I **CONCLUDE** that respondent's motion to dismiss for lack of jurisdiction is granted in part relative to Count Two of the Petition.

III. Count One of the Petition should be dismissed as premature, moot, and precluded by the principle of res judica.

As a result of the aforementioned analysis, Count One of the Petition contains the only surviving claim. By virtue of the State Board of Education expressly finding that respondent did not provide a thorough and efficient education in its school district, the factual dispute alleged in the Petition is resolved and petitioners' request for declaratory judgment is moot[1]. In light of the findings by the State Board and Commissioner, the issue of whether respondent has denied petitioner schoolchildren a thorough and efficient education is moot and should not be addressed unless there is some overriding

[1] In regards to count one, a word must be said about the effort to bring this petition as a class action on behalf of "all children attending public school in Camden." (Petition ¶ 17.) As a non-judicial tribunal in the OAL tasked with adjudicating individual disputes, the uniform rules for administrative practice contain no counterpart to the New Jersey court rule authorizing class actions. More importantly, N.J.A.C. 1:1-1.3(a) expressly states that "court rules regarding third party practices and class action designations may not be applied unless such procedures are specifically statutorily authorized in administrative hearings." This limitation is acknowledged by petitioners who withdrew allegations in support of class certification. See Pet. Omnibus Answer of 12/28/2012 at 26, n.13. Therefore, consideration of count one and any possibility for relief is limited to the three named petitioner schoolchildren.

public interest in doing so. The doctrine of mootness is a judicially-created tool utilized for reasons of judicial economy and restraint as well as the fundamental principle that courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interests. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976). An issue is moot when the decision sought in a matter, when rendered, "can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corrections., 382 N.J. Super. 254, 257-58 (App. Div. 2006). Therefore, a case will be deemed moot only when the determination sought cannot have any practical effect on the existing controversy and where the conflict between the parties has become merely hypothetical. In re Conroy, 190 N.J. Super. 453, 458 (App. Div. 1983). Finally, the New Jersey Supreme Court has recognized that court-fashioned doctrines for handling litigation are applicable to administrative proceedings. City of Hackensack v. Winner, 82 N.J. 1, 29 (1980).

Here, as noted by petitioners in their supplemental brief, it is admitted that it "is beyond dispute that the Commissioner and the State Board of Education have resolved this issue [of whether or not respondent is providing a thorough and efficient system of education]." (Pet. Supp. Brief of 6/26/2013 at 5.) "That determination is a final decision of the State on the matter, binding upon all parties, including the Office of Administrative Law." (Ibid. (citation omitted).) The decision by the Commissioner and State Board therefore renders moot any need for the OAL to conduct an evidentiary hearing as there are no adjudicatory facts that can be disputed. The circumstances between petitioners and respondent have dramatically changed since the filing of the Petition, and granting a declaratory judgment in this matter would be duplicative of the findings by the Commissioner and State Board. In addition, such a declaratory judgment would have no practical effect on the existing controversy. Therefore, Count One of the Petition should be dismissed as moot.

There are exceptions to this general rule that courts should not decide a moot issue. A moot question may be adjudicated when "there is a reasonable likelihood that the parties or those in privity with them, will be involved in a suit on the same issues in the future." Klein v. Califano, 586 F.2d 250, 256 (3d Cir. 1978). Moot questions may

also be adjudicated when their determination is necessary to the disposition of an actually pending controversy. Patrolman's Benevolent Assoc. v. Montclair, 70 N.J. 130, 135 (1976). Furthermore, an exception to the mootness doctrine exists when the case presents an issue of public importance, Transamerica Insurance Co. v. Nat'l. Roofing, Inc., 108 N.J. 59, 64 (1987), and when the wrong alleged is one capable of repetition yet evading review. See Resnick v. E. Brunswick Twp. Bd. of Educ., 77 N.J. 88, 95, n.4 (1978). None of these exceptions apply in this case.

Assuming, arguendo, that Count One of the Petition is not moot, the principle of res judicata also warrants dismissal. Res judicata "refers broadly to the common-law doctrine barring relitigation of claims or issues that have already been adjudicated." Velasquez v. Franz, 123 N.J. 498, 505 (1991). Res judicata, like its close relative collateral estoppel, serves "important policy goals" of "'finality and repose; prevention of needless litigation; avoidance of duplication; reduction of unnecessary burdens of time and expenses; elimination of conflicts, confusion and uncertainty; and basic fairness.'" Hennessey v. Winslow Twp., 183 N.J. 593, 599 (2005) (quoting City of Hackensack v. Winner, 82 N.J. 1, 31-33 (1980)). The Velasquez Court noted:

> The doctrine evolved in response to the specific policy concerns of providing finality and repose for the litigating parties; avoiding the burdens of relitigation for the parties and the court . . . and maintaining judicial integrity by minimizing the possibility of inconsistent decisions regarding the same matter.
>
> [Velasquez, supra, 123 N.J. at 505 (citations omitted).]

Here, under res judicata, the decision of the Commissioner and State Board precludes relitigating the question of whether respondent's system of public education is in violation of the "thorough and efficient" clause of the New Jersey Constitution. Res judicata requires (1) that a judgment in a prior action must be valid, final and on the merits; (2) the parties in the later action must be identical or in privity with those in the prior action; and (3) the claim in the prior action must grow out of the same transaction or occurrence as the claim in the earlier one. Watkins v. Resorts. Intern. Hotel and Casino, Inc., 124 N.J. 398, 412 (1991) (citing Federated Dep't Stores v. Moitie, 452 U.S.

393, 398 (1981)). Here, there is no dispute that the first and third factors are clearly satisfied between the present matter and the Order of the State Board. It is acknowledged that the specific petitioners in this matter were not a party to the action between respondent and the Department of Education. Nonetheless, they are in privity as determined by the United States Supreme Court which "recognized the 'familiar doctrine . . . that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or . . . the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.'" Richards v. Jefferson County, Ala., 517 U.S. 793, 800-01 (1996) (quoting Hansberry v. Lee, 311 U.S. 32, 42-43 (1940)). Here, it is unquestionable that the petitioners were adequately represented by the Commissioner and State Board in their action to assume State intervention of the Camden School District by finding exactly what petitioners seek here, i.e. that respondent did not provide a thorough and efficient education. Under Richards, despite the fact that the petitioners were not a party to the State Board action, the decision of the Commissioner and State Board is binding and conclusive as res judicata on all residents and citizens and precludes the ability of petitioners to litigate an issue that has already been addressed in a separate action[2]. See McNeil v. Legislative Apportionment Comm'n, 177 N.J. 364, 393-400 (2003) ("because of the potentially large number of plaintiffs with standing in public law cases, were they allowed to raise issues continually, public law claims 'would assume immortality.'")

In addition to being moot and precluded by the principle of res judicata, the Petition must also be dismissed because it would be premature to grant any of the requested relief in light of the State intervention. See Crawford v. Davy, Docket No. A-1297-07T2 (N.J. App. Div., Nov. 23, 2009). In Crawford, like here, plaintiffs sought an injunction requiring failing defendant school districts to permit students in their districts to withdraw from the district's schools and attend other schools of their choice, whether public or private, at the district's expense. Id. at 5. However, at the time of the lawsuit, there was recent action by the legislative and executive branches to achieve a thorough

[2] It is noted that it is the intervening action of the Commissioner and State Board susbsequent to the filing of the Petition that now renders it barred by res judicata. At the time of the filing, res judicata was not applicable to this case.

and efficient education for every child, regardless of where he or she lives through the School Funding Reform Act of 2008 (SFRA). Id. at 14-15. The Appellate Division affirmed dismissal of the plaintiffs' lawsuit on the grounds that it was premature until "SFRA has had the opportunity to operate [and] supply a factual record of testing results and corresponding remedial measures at the local and State level to facilitate an evaluation of SFRA's performance in constitutional terms." Id. at 37. Under virtually identical circumstances here, the Petition should be dismissed as premature until the State intervention has had an opportunity to operate under its plan to improve the key component areas of Instruction and Program, Operations Management, Personnel, Governance, and Finance, and thus make meaningful change in the educational future of Camden's more than 13,000 students. (See Dep't of Ed. Amended District Improvement Plan, Resp. Supp. Brief of 6/26/2013, Ex. B.) Just as in Crawford where plaintiffs could not pursue their claim until the SFRA had an opportunity to operate, petitioners here cannot pursue their claim at this moment until the State intervention is given an opportunity to operate. As such, I agree with respondent, and **CONCLUDE** that Count One of the Petition should be dismissed as premature, moot, and precluded by the principle of res judicata.

IV. The present controversy is between petitioners and the Camden Board of Education and they are the only indispensible parties to resolve that dispute.

The foregoing conclusions render unnecessary a decision on respondent's additional motions to dismiss for failure to join indispensible parties and failure to state a cause of action. However, they will be analyzed so that a complete record is available.

As to respondent's motion to dismiss for failure to join indispensible parties, the Department of Education's Controversies and Disputes regulations require that a "petitioner shall name as a party any person or entity indispensable to the hearing of a contested case." N.J.A.C. 6A:3-1.3(b). "Failure to name an indispensable party may be grounds for dismissal of the petition pursuant to N.J.A.C. 6A:3-1.10." Ibid. (emphasis added). Title 6A defines an "indispensable party" as one "without whose inclusion a matter cannot proceed or adequate judgment cannot be entered." N.J.A.C. 6A:3-1.2.

The Supreme Court has described an indispensable party as a party having 'an interest inevitably involved in the subject matter before the court and a judgment cannot justly be made between the litigants without either adjudging or necessarily affecting the absentee's interest." Allen B. DuMont Labs., Inc. v. Marcalus Mfg. Co., 30 N.J. 290, 298 (1959); see also N.J. Ct. R. 4:28-1(a).

In its motion, respondent argues that the State of New Jersey and unidentified, prospective receiving districts are indispensable parties and that the Petition should be dismissed for failure to join them. Respondent contends that the State is an indispensible party to this matter because it is the entity charged with the legal obligation to provide for the thorough and efficient education that petitioners allege they are not receiving and that such failure necessarily implicates the conduct of the State. See Resp. Brief in Support of Motion to Dismiss for Failure to Join Indispensible Parties of 11/15/2012 at 10. At first glance, it might appear that joinder of the State and all potential receiving districts would ensure a complete and final hearing process. Nevertheless, before they can be determined to be indispensible parties, it must be determined that the matter cannot proceed or an adequate judgment cannot be entered without their inclusion. N.J.A.C. 6A:3-1.2. When viewed under this standard, no other party is necessary to resolve the present controversy between the petitioners and respondent in regards to whether the Camden Board of Education failed to provide petitioners a thorough and efficient public education. Petitioners have made no allegation that any action or omission of the State or any other school district has caused the deprivation of petitioners' civil rights in Camden. See Neil v. Klein, 141 N.J. Super. 394, 406 (App. Div. 1976) ("it is the nature and character of the claim in an action which governs the classification of the parties as indispensable") (citation omitted). Petitioners have also presented no claim to declare any state statute or regulation unconstitutional. Furthermore, to the extent that respondent would seek to use any action or omission of the State or any other school district as an affirmative defense, it will not be precluded by the absence of those entities as a named party. Respondent retains its rights to produce whatever evidence, including witness testimony, that it deems relevant to its case.

Simply stated, the present controversy is between petitioners and the Camden Board of Education, and as such, they are the only necessary parties to resolve that dispute. Although the allegations are made only against Camden, the requested relief does seek an order for the petitioners to be sent to other, unidentified school districts that could, arguably, provide a thorough and efficient public education. On this prong, because such relief would clearly affect the interest of those school districts, they would be an indispensible party to the crafting of any such relief. However, because such districts have not been identified, no other district beyond Camden has any interests in the outcome of this case at the moment. See Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am., 394 N.J. Super. 71, 82 (2007) (holding that a party, whose role is speculative until the fact-finding process is complete, cannot be considered an indispensable party). Furthermore, that other school districts may become indispensible once the issue of relief is addressed does not preclude an adjudication of the matter before this forum. See Ross v. Ross, 308 N.J. Super. 132, 144 (App. Div. 1998). In Ross, the Court held that:

> Even if the court is mistaken in its decision to proceed in the absence of an interested person, it does not by that token deprive itself of the power to adjudicate as between the parties already before it through proper service of process. But the court can make a legally binding adjudication only between the parties actually joined in the action. It is true that an adjudication between the parties before the court may on occasion adversely affect the absent person as a practical matter, or leave a party exposed to a later inconsistent recovery by the absent person. These are factors which should be considered in deciding whether the action should proceed, or should rather be dismissed; but they do not themselves negate the court's power to adjudicate as between the parties who have been joined.
>
> [Ibid. (quoting Pressler, Current N.J. Court Rules comment 1 on R. 4:28-1 (2007) (quoting Fed. R. Civ. P. 19 introductory comment of advisory committee's note)) (emphasis in original.]

Here, the necessary parties are present to decide the claims stated in the Petition, thus respondent's motion to dismiss for failure to join indispensible parties should be denied. This conclusion is exemplified by the fact that no other parties were

necessary to the Commissioner and State Board's finding that Camden has denied its students a thorough and efficient public education in ordering the previously discussed State intervention. It is noted though that, should this matter proceed to a hearing, any potential relief to be crafted would be limited to the parties actually joined in the action.

V. Granting all reasonable inferences to petitioners' factual allegations, they suggest a cause of action that respondent violated their right to a thorough and efficient public education.

Finally, as to respondent's motion to dismiss for failure to state a cause of action, under N.J.A.C. 6A:3-1.10, the Commissioner of Education may dismiss a petition for lack of jurisdiction, or, "on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true . . . " Since evaluating such a motion is a quasi-judicial responsibility, state agencies may look to judicial principles for guidance. See City of Hackensack v. Winner, 82 N.J. 1, 29 (1980) ("[S]ince there are pronounced similarities in the exercise of judicial and quasi-judicial powers . . . court-fashioned doctrines for the handling of litigation . . . have some genuine utility and relevance in administrative proceedings."); see also N.J.A.C. 1:1-1.3 (permitting the OAL and the ALJ to look to court rules for guidance).

Under the court rules, when a court reviews a motion to dismiss for failure to state a claim pursuant to N.J. Ct. R. 4:6-2(e), it must assume the truth of the non-moving party's allegations and give the non-moving party the benefit of all factual inferences that its allegations support. "The standard traditionally utilized by courts to determine whether to dismiss a pleading for failure to state a claim on which relief may be granted is a generous one." Green v. Morgan Props., 215 N.J. 431, 451 (2013). As the Court explained:

> "[i]n reviewing a complaint dismissed under Rule 4:6-2(e) our inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint. The essential test is simply whether a cause of action is suggested by the facts. In exercising this important function, a reviewing court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim,

> opportunity being given to amend if necessary. Moreover, the court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint, rather, plaintiffs are entitled to every reasonable inference of fact. As we have stressed, the examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach."
>
> [Id. at 451-52. (internal quotation marks and citations omitted).]

In the present matter, I **CONCLUDE** that respondent's motion to dismiss for failure to state a cause of action should be granted as to Count Two of the Petition because, regardless of the facts alleged, the Commissioner does not have jurisdiction to decide a claim under the New Jersey Civil Rights Act, as previously discussed. Respondent contends that Count One of the petition must be dismissed for failure to state a cause of action by arguing that there is no basis in law affording petitioners a right to attend alternative schools outside of district boundary lines. A basic understanding of New Jersey's education structure would support respondent's view. See N.J.S.A. 18A:38-1 (defining a school district's obligation to educate, at its own expense, only persons between the ages of five and twenty who are domiciled within the district). However, by focusing on portion of the requested relief, respondent ignores the Commissioner's authority to craft an appropriate remedy once a deprivation is established. Instead, granting all reasonable inferences to petitioners' factual allegations, they suggest a cause of action that respondent violated their right to a thorough and efficient public education. That the OAL does not have jurisdiction to order an unidentified, non-participating school district to accept the students does not relieve it of its obligation to hear and decide the allegations relative to Count One of the Petition and to develop a complete and informed record so that the Commissioner may develop an appropriate remedy. Accordingly, respondent's motion to dismiss for failure to state a cause of action should be denied relative to Count One.

CONCLUSION

Respondent's motion to dismiss for lack of jurisdiction should be **DENIED** in part relative to Count One, and **GRANTED** in part relative to Count Two. Respondent's motion to dismiss for failure to join indispensible parties should be **DENIED**. Respondent's motion to dismiss for failure to state a cause of action should be **DENIED** in part relative to Count One and **GRANTED** in part relative to Count Two. Count One of the Petition, however, should be dismissed as premature, moot, and precluded by the principle of res judicata.

IT IS therefore on this 6th day of December, 2013, **ORDERED** that Count Two of the Petition is **DISMISSED** for lack of jurisdiction and for failure to state a cause of action. Count One of the Petition is **DISMISSED** as premature, moot, and precluded by the principle of res judicata.

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

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

December 6, 2013
DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: December 10, 2013

Date Mailed to Parties: December 10, 2013

/cb

51-14

OAL DKT. NO. EDU 10231-10
AGENCY DKT. NO. 323-8/10

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/29/14

Date of Mailing: 1/30/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10231-10
AGENCY DKT. NO. 323-8/10

GAIL SMITH,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on September 20, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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2013 NOV 2 P 5:24
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

GAIL SMITH,	:	BEFORE THE COMMISSIONER OF EDUCATION/ OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
vs.	:	OAL DOCKET NO. EDU-10231-2010N AGENCY REFERENCE NO. 323-8/10
ELIZABETH BOARD OF EDUCATION,	:	
	:	**SETTLEMENT AND RELEASE**
Respondent.		

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Gail Smith ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Gail Smith vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No. EDU-10231-2010N, Agency Reference No. 323-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner is entitled to gross back salary in the amount of **$55,107.73**, for the period from **September 1, 2010 through March 15, 2011**. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through March 15, 2011. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an option from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010

at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through March 15, 2011 was **$16,200.00**.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is **$38,907.73**.

4. The Parties agree that Petitioner has no earnings from other employment during the period from September 1, 2010 through March 15, 2011. The parties further agree that this Final Gross Amount shall be reduced by 10%. **Thus, the Final Gross Amount of back salary due to Petitioner is $35,016.96.** Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Gail Smith".

5. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to

the 2010-2011 school year. The back pay amounts specified represent back salary due (after the educations and deductions specified above) for the period from September 1, 2010 to March 15, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now

and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present, or future employee of the Board regarding any school years subsequent to the 2010-2011 school year.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER GAIL SMITH

Date: 1/2/13 Gail Smith

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

13-63

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010

Petitioner	OAL Docket #
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

52-14

OAL DKT. NO. EDU 10343-10
AGENCY DKT. NO. 413-8/10

CHRISTINE LILLIS-FLAHERTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/14

Date of Mailing: 1/30/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10343-10
AGENCY DKT. NO. 413-8/10

CHRISTINE LILLIS-FLAHERTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on September 24, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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2013 DEC -2 P 5:31
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

CHRISTINE LILLIS-FLAHERTY, Petitioner,	:	BEFORE THE COMMISSIONER OF EDUCATION/ OFFICE OF ADMINISTRATIVE LAW
vs	:	OAL DOCKET NO. EDU-10343-2010N
ELIZABETH BOARD OF EDUCATION, Respondent.	:	**SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Christine Lillis-Flaherty ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Christine Lillis-Flaherty vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No. EDU-10343-2010N (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner is entitled to gross back salary in the amount of **$17,736.00**, for the period from **September 1, 2010 through June 30, 2012.**

2. The Parties further agree that this Gross back salary shall be reduced by 10%. **Thus, the Final Gross Amount of back salary due to Petitioner is $15,962.40.** Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Christine Lillis-Flaherty".

3. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 and 2011-2012 school years. The back pay amount specified represent back salary due (after the educations and deductions specified above) for the period from September 1, 2010 to June 30, 2012.

4. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any

action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim for employment in an educational services capacity for the 2010-2011 and 2011-2012 school years.

5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 and 2011-2012 school years.

6. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

7. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

8. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

9. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

10. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

11. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER CHRISTINE LILLIS-FLAHERTY

Date: 1/23/13

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

53-14

OAL DKT. NO. EDU 10186-10
AGENCY DKT. NO. 355-8/10

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/14

Date of Mailing: 1/30/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10186-10
AGENCY DKT. NO. 355-8/10

DIANA LOPEZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on September 16, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

RECEIVED
2013 DEC -2 P 5:31
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

DIANA LOPEZ	:	BEFORE THE COMMISSIONER OF EDUCATION/ OFFICE OF ADMINISTRATIVE LAW
vs.	:	AGENCY REFERENCE NO. 355-8/10
ELIZABETH BOARD OF EDUCATION,	:	
Respondent.	:	**SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Diana Lopez ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Diana Lopez vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as Agency Reference No. 355-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner is entitled to gross back salary as a classroom teacher (including extended hours) in the amount of **$65,959.00**, for the period from **September 1, 2010 through June 30, 2011**. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through June 30, 2011. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010

at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through June 30, 2011 was **$15,000.00**.

3. The parties further agree that the Petitioner received **$14,735.11** as a Teacher Assistant/Aide employed by the Board for the time period between February 28, 2011 until June 30, 2011.

4. The Parties agree that the total gross amount of Unemployment Benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for the repayment of Unemployment Benefits and the receipt of the salary as a Teacher Assistant/Aide as referred to in paragraph 3 of this Agreement is **$36,223.89**.

5. The parties further agree that this Final Gross Amount shall be reduced by 10%. **Thus, the Final Gross Amount of back salary due to Petitioner is $32,601.30.** Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Diana Lopez".

6. In addition to back salary, the Board shall pay Petitioner the sum of **$2,637.50** as money damages paid by

Petitioner to maintain her insurance coverage and to satisfy co-payments for doctors' visits and prescription costs during the period from September 1, 2010 to February 28, 2011. This amount will be paid in a **separate check** payable to "Diana Lopez" and will not be subject to income tax withholding or payroll deductions since this sum does not constitute back salary.

7. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the deductions specified above) for the period from September 1, 2010 to June 30, 2011. In addition, Petitioner's seniority as a teacher will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise.

8. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present, or future employee of the Board regarding any school years subsequent to the 2010-2011 school year.

9. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year.

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

14. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

15. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

54-14

OAL DKT. NO. EDU 10335-10
AGENCY DKT. NO. 291-8/10

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/14

Date of Mailing: 1/30/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10335-10
AGENCY DKT. NO. 291-8/10

VIRGINIA TROPEANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on September 22, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

VIRGINIA TROPEANO	:	BEFORE THE COMMISSIONER OF EDUCATION/ OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
vs.	:	OAL DOCKET NO. EDU-10335-2010N AGENCY REFERENCE NO. 291-8/10
ELIZABETH BOARD OF EDUCATION,	:	
	:	**SETTLEMENT AND RELEASE**
Respondent.		

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Virginia Tropeano ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Virginia Tropeano vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No. EDU-10335-2010N, Agency Reference No. 291-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner is entitled to gross back salary in the amount of **$14,657.26**, for the period from **September 1, 2010 through November 22, 2010**. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 22, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an option from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010

at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 22, 2010 was **$6,650.00**.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is **$8,007.26**.

4. The Parties agree that Petitioner has no earnings from other employment during the period from September 1, 2010 through November 22, 2010. The parties further agree that this Final Gross Amount shall be reduced by 10%. **Thus, the Final Gross Amount of back salary due to Petitioner is $7,206.55.** Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Virginia Tropeano".

5. In addition to back salary, the Board shall pay Petitioner the sum of $2,014.49 as money damages paid by Petitioner to maintain her health insurance coverage through COBRA during the period from September 1, 2010 to November 22, 2010. This amount will be paid in a separate check payable to

"Virginia Tropeano" and will not be subject to income tax withholding or payroll deductions since this sum does not constitute back salary.

6. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the educations and deductions specified above) for the period from September 1, 2010 to November 22, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any

days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present, or future employee of the Board regarding any school years subsequent to the 2010-2011 school year.

8. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to

the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any

required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER VIRGINIA TROPEANO

Date: 1/26/13 Virginia R. Tropeano

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

55-14

OAL DKT. NO. EDU 10354-10
AGENCY DKT. NO. 414-8/10

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/14

Date of Mailing: 1/30/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10354-10
AGENCY DKT. NO. 414-8/10

NANCY MARTINEZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on September 24, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 DEC -2 P 5:37
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

NANCY MARTINEZ,

Petitioner

vs.

ELIZABETH BOARD OF EDUCATION,

Respondent.

: BEFORE THE COMMISSIONER OF EDUCATION/ OFFICE OF ADMINISTRATIVE LAW

: AGENCY REFERENCE NO. 414-8/10

: **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Nancy Martinez ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Nancy Martinez vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as Agency Reference No. 414-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner was entitled to gross back salary in the amount of **$86,938.09**, for the period from **September 1, 2010 through December 1, 2011** when she was reappointed as a Spanish Teacher within the Elizabeth School District. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through December 1, 2011. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and

August, 2010 and 2011 do not have to be repaid because Petitioner had no reasonable expectation of employment for the 2010-2011 and 2011-2012 school years.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through December 31, 2010 and from September 1, 2011 through November 30, 2011 was **$16,364.49**.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is **$70,573.60**.

4. The parties further agree that the Petitioner received **$25,381.89** from the Franklin Township Board of Education as a classroom teacher from January 1, 2011 through June 30,2011 reducing the gross amount of back pay due to Petitioner to **$45,191.70**.

5. The parties further agree that this Final Gross Amount shall be reduced by 10%. **Thus, the Final Gross Amount of back salary due to Petitioner is $40,672.54**. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Nancy Martinez".

6. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 and 2011-2012 school years. The back pay amounts specified represent back salary due (after the deductions specified above) for the period from September 1, 2010 to December 1, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and with an additional three months for the period between September 1, 2011 through November 30, 2011 and that this additional time shall be treated as one full year plus three months of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to claims to employment for the 2010-2011 and 2011-2012 school years. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present, or future employee of the Board regarding any school years subsequent to the 2010-2011 school year.

8. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 and 2011-2012 school years.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER NANCY MARTINEZ

Date: 1-29-13

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

56-14

OAL DKT. NO. EDU 10185-10
AGENCY DKT. NO. 306-8/10

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/29/14

Date of Mailing: 1/30/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10185-10
AGENCY DKT. NO. 306-8/10

JESSICA SERAFIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on September 17, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 NOV 12 P 5:24
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RECEIVED
2013 DEC -2 P 5:31
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

JESSICA SERAFIN,	:	BEFORE THE COMMISSIONER OF EDUCATION/ OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
vs.	:	OAL DOCKET NO. EDU-10185-2010N AGENCY REFERENCE NO. 306-8/10
ELIZABETH BOARD OF EDUCATION,	:	
	:	**SETTLEMENT AND RELEASE**
Respondent.		

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Jessica Serafin ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Jessica Serafin vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No. EDU-10185-2010N, Agency Reference No. 306-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner is entitled to gross back salary in the amount of **$35,928.00**, for the period from **September 1, 2010 through March 20, 2011**. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through March 20, 2011. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an option from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010

at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through March 20, 2011 was **$10,200.00.**

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is **$25,728.00.**

4. The Parties agree that Petitioner has no earnings from other employment during the period from September 1, 2010 through March 20, 2011. The parties further agree that this Final Gross Amount shall be reduced by 10%. **Thus, the Final Gross Amount of back salary due to Petitioner is $23,155.00.** Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Jessica Serafin".

5. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified

represent back salary due (after the educations and deductions specified above) for the period from September 1, 2010 to March 20, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the

issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present, or future employee of the Board regarding any school years subsequent to the 2010-2011 school year.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER JESSICA SERAFIN

Date: 1/12/13

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
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Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
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Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

57-14

OAL DKT. NO EDU 10230-10
AGENCY DKT. NO. 294-8/10

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/14

Date of Mailing: 1/30/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10230-10

AGENCY DKT. NO. 294-8/10

BAYLISS JOHNSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on September 20, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 DEC -2 P 5:31

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BAYLISS JOHNSON,
Petitioner,

vs.

ELIZABETH BOARD OF EDUCATION,
Respondent.

BEFORE THE COMMISSIONER OF EDUCATION/
OFFICE OF ADMINISTRATIVE LAW

: AGENCY REFERENCE NO. 294-8/10

: **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Bayliss Johnson ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Bayliss Johnson vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as Agency Reference No. 294-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner is entitled to gross back salary in the amount of **$23,704.48**, for the period from **September 1, 2010 through January 3, 2011**. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through January 3, 2011. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an option from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010

at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through January 3, 2011 was **$10,460.00**.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is **$13,244.48**.

4. The Parties agree that Petitioner has no earnings from other employment during the period from September 1, 2010 through January 3, 2011. The parties further agree that this Final Gross Amount shall be reduced by 10%. **Thus, the Final Gross Amount of back salary due to Petitioner is $11,920.00**. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Bayliss Johnson".

5. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to

the 2010-2011 school year. The back pay amounts specified represent back salary due (after the educations and deductions specified above) for the period from September 1, 2010 to January 3, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now

and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present, or future employee of the Board regarding any school years subsequent to the 2010-2011 school year.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of his Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER BAYLISS JOHNSON

Date: Dec. 22, 2012 Bayliss Johnson

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
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Shantel Dabady	EDU 10565-2010
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Elizabeth Dressler	EDU 12107-2010
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Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
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James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

Petitioner	OAL Docket#	Petitioner	OAL Docket #
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Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

WILLIAM PATERSON UNIVERSITY

OFFICE OF HUMAN RESOURCES • COLLEGE HALL
P.O. BOX 913 • WAYNE, NEW JERSEY 07474-0913
EMPLOYMENT 973 720 2605 • PROFESSIONAL DEVELOPMENT 973 720 2887
EMPLOYEE RELATIONS 973 720 3594 • FAX 973 720 2090 • WWW.WPUNJ.EDU

January 30, 2014

To Whom It May Concern:

This will confirm that Helen (Bligen) Tinsley, Social Security Number XXX-XX-4677, was employed as adjunct faculty by the William Paterson University. Ms. Tinsley assignment was in the Office of Field Experience during the following semesters:

Fall 1997	09/01/97-12/19/97
Fall 1998	09/01/98-12/18/98

Should you have questions, I can be reached at 973-720-2287.

Julia O'Neill
Technical Program Assistant
Human Resources

58-14

OAL DKT. NO. EDU 10337-10
AGENCY DKT. NO. 298-8/10

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/14

Date of Mailing: 1/30/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10337-10
AGENCY DKT. NO. 298-8/10

JESUS FERNANDEZ,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on September 23, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

RECEIVED

2013 DEC -2 P 5:31

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JESUS FERNANDEZ		BEFORE THE COMMISSIONER OF EDUCATION/ OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
vs.	:	OAL DOCKET NO. EDU-10337-2010N
ELIZABETH BOARD OF EDUCATION,	:	
	:	**SETTLEMENT AND RELEASE**
Respondent.		

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Jesus Fernandez ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner was a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Jesus Fernandez vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as Docket No. EDU-10337-2010N (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner is entitled to the sum of **$3,435.70** as money damages paid by Petitioner to maintain his insurance coverage (through COBRA) for the period between August, 2010 through November, 2010. This amount will be paid in a **separate check** payable to "Jesus Fernandez" and will not be subject to income tax withholding or payroll deductions since this sum does not constitute back salary.

2. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or health insurance premium reimbursement or on any other basis which were or could have been asserted against the Board in this Litigation.

3. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement.

4. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of his Petition of Appeal in this matter.

5. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

6. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

7. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

8. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

9. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

10. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER JESUS FERNANDEZ

Date: 1/24/13

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
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Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
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Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

59-14

OAL DKT. NO. EDU 10344-10
AGENCY DKT. NO. 396-8/10

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/14

Date of Mailing: 1/30/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10344-10
AGENCY DKT. NO. 396-8/10

QIANA DAVIS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on September 24, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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2013 DEC -2 P 5:31

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

QIANA DAVIS,		BEFORE THE COMMISSIONER OF EDUCATION/ OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
vs.	:	OAL DOCKET NO. EDU-10344-2010N AGENCY REFERENCE NO. 396-8/10
ELIZABETH BOARD OF EDUCATION,	:	
	:	**SETTLEMENT AND RELEASE**
Respondent.		

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Qiana Davis ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Qiana Davis vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No. EDU-10344-2010N, Agency Reference No. 396-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner is entitled to gross back salary in the amount of **$38,264.00**, for the period from **September 1, 2010 through March 14, 2011**. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through March 14, 2011. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an option from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010

at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through March 14, 2011 was **$16,800.00**.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is **$21,464.20**.

4. The Parties agree that Petitioner has no earnings from other employment during the period from September 1, 2010 through March 14, 2011. The parties further agree that this Final Gross Amount shall be reduced by 10%. **Thus, the Final Gross Amount of back salary due to Petitioner is $19,317.78.** Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Qiana Davis".

5. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to

the 2010-2011 school year. The back pay amounts specified represent back salary due (after the educations and deductions specified above) for the period from September 1, 2010 to March 14, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now

and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present, or future employee of the Board regarding any school years subsequent to the 2010-2011 school year.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER QIANA DAVIS

Date: 12/27/2012 Qiana Davis

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
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Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
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Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
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Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

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OAL DKT. NO. EDU 12213-10
AGENCY DKT. NO. 588-10/10

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/14

Date of Mailing: 1/30/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12213-10

AGENCY DKT. NO. 588-10/10

GLORIA SEMPERVIVE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on October 28, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 NOV 3 P 5:24
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

RECEIVED
2013 DEC -2 P 5:31
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

GLORIA SEMPERVIVE	:	BEFORE THE COMMISSIONER OF EDUCATION
Petitioner,	:	OFFICE OF ADMINISTRATIVE LAW
vs.	:	AGENCY REFERENCE NO. 588-10/10
ELIZABETH BOARD OF EDUCATION,	:	
Respondent.	:	**SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Gloria Sempervive ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Gloria Sempervive vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as Agency Reference No. 588-10/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner is entitled to gross back salary in the amount of **$57,239.00**, for the period from **September 1, 2010 through June 30, 2011**. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through June 30, 2011. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an option from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010

at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through June 30, 2011 was **$18,360.00.**

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is **$38,879.00.**

4. The Parties agree that Petitioner has no earnings from other employment during the period from September 1, 2010 through June 30, 2011. The parties further agree that this Final Gross Amount shall be reduced by 10%. **Thus, the Final Gross Amount of back salary due to Petitioner is $34,991.78.** Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Gloria Sempervive".

5. In addition to back salary, the Board shall pay Petitioner the sum of **$3,070.08** as money damages paid by Petitioner to maintain her insurance coverage (Chapter 75 premium costs) during the period from September 1, 2010 to June 30, 2011. This amount will be paid in a **separate check** payable to "Gloria

Sempervive" and will not be subject to income tax withholding or payroll deductions since this sum does not constitute back salary.

6. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the educations and deductions specified above) for the period from September 1, 2010 to June 30, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative

proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present, or future employee of the Board regarding any school years subsequent to the 2010-2011 school year.

8. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER GLORIA SEMPERVIVE

Date: 1/1/13

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 1/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010

Petitioner	OAL Docket #
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

61-14

OAL DKT. NO. EDU 10232-10
AGENCY DKT. NO. 356-8/10

ROBERT LANGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/14

Date of Mailing: 1/30/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10232-10
AGENCY DKT. NO. 356-8/10

ROBERT LANGAN, JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on September 20, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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2013 DEC -2 P 5:31

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

ROBERT LANGAN,
Petitioner,

vs.

ELIZABETH BOARD OF EDUCATION,
Respondent.

BEFORE THE COMMISSIONER OF EDUCATION/
OFFICE OF ADMINISTRATIVE LAW

: OAL DOCKET NO. EDU-10232-2010N
AGENCY REFERENCE NO. 356-8/10

: **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Robert Langan ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Robert Langan vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No. EDU-10232-2010N, Agency Reference No. 356-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner is entitled to gross back salary in the amount of **$17,901.85**, for the period from **September 1, 2010 through November 29, 2010**. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 29, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an option from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010

at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 29, 2010 was **$7,800.00**.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is **$10,101.00**.

4. The Parties agree that Petitioner has no earnings from other employment during the period from September 1, 2010 through November 29, 2010. The parties further agree that this Final Gross Amount shall be reduced by 10%. **Thus, the Final Gross Amount of back salary due to Petitioner is $9,091.67.** Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Robert Langan".

5. In addition to back salary, the Board shall pay Petitioner the sum of $908.98 as money damages paid by Petitioner to maintain health insurance benefits through COBRA during the period from September 1, 2010 to November 29, 2010. This amount will be paid in a separate check payable to "Robert Langan" and

will not be subject to income tax withholding or payroll deductions since this sum does not constitute back salary.

6. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the educations and deductions specified above) for the period from September 1, 2010 to November 29, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any

days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present, or future employee of the Board regarding any school years subsequent to the 2010-2011 school year.

8. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of his Petition of Appeal in this matter as to all claims related to

the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any

required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER ROBERT LANGAN

Date: 12/22/12 Robert Langan

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

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Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
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Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
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Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010

Petitioner	OAL Docket #
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

#62-14

OAL DKT. NO. EDU 10180-10
AGENCY DKT. NO. 309-8/10

BRENDA GREEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/30/14

Date of Mailing: 1/30/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10180-10
AGENCY DKT. NO. 309-8/10

BRENDA GREEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Stephen B. Hunter, Esq. for petitioner (Detzky and Hunter, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 11, 2013 Decided: December 11, 2013

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

This matter was transmitted to the Office of Administrative Law on September 17, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 11, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-16-13

Mailed to Parties: DEC 16 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 DEC -2 P 5:31

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BRENDA GREEN	:	BEFORE THE COMMISSIONER OF EDUCATION/ OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
vs.	:	OAL DOCKET NO. EDU-10180-2010N AGENCY REFERENCE NO. 309-8/10
ELIZABETH BOARD OF EDUCATION,	:	
	:	**SETTLEMENT AND RELEASE**
Respondent.		

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Brenda Green ("Petitioner"), and the Respondent, Elizabeth Board of Education (the "Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned **Brenda Green vs. Elizabeth Board of Education**, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Docket No. EDU-10180-2010N, Agency Reference No. 309-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties mutually agree that Petitioner is entitled to gross back salary in the amount of **$15,468.75**, for the period from **September 1, 2010 through November 22, 2010**. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 22, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an option from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010

at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 22, 2010 was **$7,300.00**.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment Benefits is **$8,168.75**.

4. The Parties agree that Petitioner has no earnings from other employment during the period from September 1, 2010 through November 22, 2010. The parties further agree that this Final Gross Amount shall be reduced by 10%. **Thus, the Final Gross Amount of back salary due to Petitioner is $7,351.88**. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Brenda Green".

5. The parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to

the 2010-2011 school year. The back pay amounts specified represent back salary due (after the educations and deductions specified above) for the period from September 1, 2010 to November 22, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now

and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present, or future employee of the Board regarding any school years subsequent to the 2010-2011 school year.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this Agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER BRENDA GREEN

Date: Dec. 21, 2012 Brenda G. Green

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU.09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
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Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

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Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
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Adriana DelaRosa	EDU 10237-2010
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Marissa Falcon	EDU 11158-2010
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Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
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Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

65-14

OAL DKT. NO. EDU 9673-10
AGENCY DKT. NO. 246-8/10

BRIDGET TURANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 1/31/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9673-10
AGENCY DKT. NO. 247-8/10

BRIDGET E. TURANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 7, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 DEC 2 P 5:30
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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2013 NOV [illegible] P 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BRIDGET TURANO,

Petitioner,

ELIZABETH BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW

OAL Dkt. No. EDU 09673-2010N
Agency Ref. No. 247-8/10

SETTLEMENT AND RELEASE

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Bridget Turano ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding caption Bridget Turano v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. EDU 09673-2010N, Agency Dkt. No. 247-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $8,157.24, for the period from September 1, 2010 through November 21, 2010. This

amount has already been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010 was $6,480.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $8,157.24.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 21, 2010. Thus, the Final Gross Amount of back salary due to petitioner is $8,157.24. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Bridget Turano."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to November 21, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 1/13/13 Bridget Turano

Bridget Turano

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

13-63

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010

Petitioner	OAL Docket #
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
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Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
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Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

66-14

OAL DKT. NO. EDU 9625-10
AGENCY DKT. NO. 404-8/10

MARIESTELLE MAGLIANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 1/31/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9625-10
AGENCY DKT. NO. 404-8/10

MARIESTELLE MAGLIANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 2, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 NOV P 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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2013 DEC -2 P 5:3
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MARIESTELLE MAGLIANO, Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 09625-2010N Agency Ref. No. 404-8/10

SETTLEMENT AND RELEASE

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Mariestelle Magliano ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Mariestelle Magliano v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 09625-2010N, Agency Dkt. No. 404-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $7,509.24, for the period from September 1, 2010 through November 21, 2010. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010 was $7,200.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $7,509.24.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 21, 2010. Thus, the Final Gross Amount of back salary due to petitioner is $7,509.24. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Mariestelle Magliano" .

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to November 21, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 2/15/13

Mariestelle Magliano

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
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Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
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Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
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Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
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Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

67-14

OAL DKT. NO. EDU 9660-10
AGENCY DKT. NO. 263-8/10

ANABELA SILVA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 1/31/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9660-10
AGENCY DKT. NO. 263-8/10

ANABELA L. SILVA,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 1, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 DEC -2 P 5:30
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

RECEIVED
2013 NOV 22 P 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

ANABELA SILVA,

Petitioner,

v.

ELIZABETH BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW

OAL Dkt. No. EDU 09660-2010N
Agency Ref. No. 263-8/10

SETTLEMENT AND RELEASE

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Anabela Silva ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding caption Anabela Silva v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. EDU 09660-2010N, Agency Dkt. No. 263-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $7,577.05, for the period from September 1, 2010 through November 21, 2010. This

amount has already been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010 was $6,480.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $7,577.05.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 21, 2010. Thus, the Final Gross Amount of back salary due to petitioner is $7,577.05. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Anabela Silva."

5. The Parties agree that the payments specified herein shall constitute full and fi[illegible] settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to November 21, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued si[illegible] leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 1/4/13

Anabela Silva

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

13-63

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

Petitioner	OAL Docket#
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Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
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Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
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Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
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Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

68-14

OAL DKT. NO. EDU 10336-10
AGENCY DKT. NO. 320-8/10

MICHELE LOURENCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 1/31/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10336-10
AGENCY DKT. NO. 320-8/10

MICHELLE LORENCO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 13, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
~~CHIEF ADMINISTRATIVE LAW JUDGE~~

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2013 NOV 22 P 5:
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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2013 DEC -2 P 5:29
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MICHELE LOURENCO, Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU Agency Ref. No. 320-8/10

SETTLEMENT AND RELEASE

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Michele Lourenco ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Michele Lourenco v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU _____, Agency Dkt. No. 320-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $7,509.24, for the period from September 1, 2010 through November 21, 2010. This

amount has been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010 was $7,200.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $7,509.24.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 21, 2010. Thus, the Final Gross Amount of back salary due to petitioner is $7,509.24. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Michele Lourenco."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to November 21, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: January 4, 2013 Michele Lourenco

Michele Lourenco

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
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Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
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Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

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Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

69-14

OAL DKT. NO. EDU 10163-10
AGENCY DKT. NO. 385-8/10

VERA MATOS-PEREIRA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 1/31/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10163-10
AGENCY DKT. NO. 385-8/10

VERA L. MATOS-PEREIRA,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 15, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

RECEIVED
2013 NOV 12 P 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

VERA MATOS-PERIERA,

Petitioner,

v.

ELIZABETH BOARD OF EDUCATION,

Respondent.

RECEIVED
2013 DEC -2 P 5:30
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW

OAL Dkt. No. EDU 10163-2010N
Agency Ref. No. 385-8/10

SETTLEMENT AND RELEASE

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Vera Matos-Periera ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Vera Matos-Periera v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10163-2010N, Agency Dkt. No. 385-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $3,009.26, for the period from September 1, 2010 through September 27, 2010. This

amount has been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through September 27, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through September 27, 2010 was $2,400.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $3,009.26.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through September 27, 2010. Thus, the Final Gross Amount of back salary due to petitioner is $3,009.26. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Vera Matos-Periera" .

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to September 27, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education

and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this agreement.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 3/1/2013 Vera Matos-Periera

Vera Matos-Periera

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 4/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010

Petitioner	OAL Docket #
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

Petitioner	OAL Docket#	Petitioner	OAL Docket #
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Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
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Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

70-14

OAL DKT. NO. EDU 10166-10
AGENCY DKT. NO. 330-8/10

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

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 1/31/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10166-10
AGENCY DKT. NO. 330-8/10

JASMINE SANTIAGO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

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

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 14, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

JASMINE SANTIAGO Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU-10166-2010 Agency Ref. No. 330-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, __JASMINE SANTIAGO__ ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned __JASMINE SANTIAGO__ v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU __10166-2010____, Agency Dkt. No. _330-8/10__ (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ _58,730_, for the period from __September 1, 2010__ through __February 1, 2011__. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from __September 1, 2010__ through _February 1, 2011___. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, __2010__, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, _201-_ at that time

and the back pay due to Petitioner runs from _September 1, 2010_.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from _____ through _____ was $ ___0_____.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $ ___0_____.

4. The Parties agree that Petitioner had earnings from other employment during the period from _September 2010__ through __February 1, 2011_. Thus, the Final Gross Amount of back salary due to petitioner is $ __7,065____. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "__Jasmine Santiago___".

5. In addition to back salary, the Board shall pay Petitioner the sum of $_____0_____ as money damages based on amounts paid by Petitioner for medical bills during the period from _____ to _____ that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "_____NA_____" and will not be subject to income

tax withholding or payroll deductions since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the __2010-2011__ school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from __September 1, 2010__ to __February 1, 2011___. In addition, Petitioner's seniority will be credited for one full year for the entire school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the _2010-2011_ school year, less any days used during any portion of that year when

Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the ___2010-2011_ school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the _2011-2012____ school year or thereafter.

8. The Parties agree that Petitioner's seniority as of __January 31, 2013__ as a result of this settlement is:

a) __6.42_____ years as an __elementary school teacher__.

b) _____ years as a _____.

9. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the __2010-2011_ school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

14. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding

action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this agreement.

15. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 2/19/13

Jasmine Santiago

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#
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Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010

Petitioner	OAL Docket #
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

71-14

OAL DKT. NO. EDU 10229-10
AGENCY DKT. NO. 332-8/10

ANGELINA PECORARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 1/31/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10229-10
AGENCY DKT. NO. 332-8/10

ANGELA PECORARO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

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

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 20, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

ANGELINA PECORARO Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU-10229 Agency Ref. No. 332-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, ___ANGELINA PECORARO_ ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned _ANGELINA PECORARO__ v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU __10229-2010_____, Agency Dkt. No. __332-8/10___ (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ _10,285.04_, for the period from _September 1, 2010__ through _October 20. 2010___. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from __September 1, 2010__ through __October 20, 2010__. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, _2010_, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, _2010_ at that time

and the back pay due to Petitioner runs from _September 1, 2010__.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from __September 1, 2010___ through __October 1, 2010___ was $ __0___.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $ _10, 285.04_.

4. The Parties agree that Petitioner had earnings from other employment during the period from ___September 1, 2010_ through __October 20, 2010__ in the amount of $8190. Thus, the Final Gross Amount of back salary due to petitioner is $ _1,639.84__. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "__Angelina Pecoraro_".

5. In addition to back salary, the Board shall pay Petitioner the sum of $__0_____ as money damages based on amounts paid by Petitioner for medical bills during the period from _____ to _____ that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "_____NA_____" and will not be subject to income

tax withholding or payroll deductions since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the __2010-2011__ school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from __September 2010___ to __October 20, 2010__.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the __2010-2011__ school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal

rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the __2011-2012___ school year or thereafter.

8. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the __2010-2011_ school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of

counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this agreement.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 03/22/13

11/25/2013

FOR RESPONDENT,

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

10j

COPY

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

72-14

OAL DKT. NO. EDU 9669-10
AGENCY DKT. NO. 419-8/10

BARBARA L. MANDELA-CANTA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner notes that the figure set forth in paragraph one of the settlement agreement as representing petitioner's gross back pay before the deduction of $7,200 of paid unemployment benefits is identical to the figure in paragraph 3 which represents the net amount of back pay due after the deduction of $7,200 in unemployment benefits. Consequently, the Commissioner is constrained to remand this matter for reformation of the settlement agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 2/03/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9669-10
AGENCY DKT. NO. 419-8/10

BABARA L. MANDELA-CANTA,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 1, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
~~CHIEF ADMINISTRATIVE LAW JUDGE~~

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BARBARA L. MANDELA-CANTA, Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 09669-2010N Agency Ref. No. 419-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Barbara L. Mandela-Canta ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Barbara L. Mandela-Canta v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 09669-2010N, Agency Dkt. No. 419-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $8,551.66, for the period from September 1, 2010 through November 21, 2010. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010 was $7,200.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $8,551.66.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 21, 2010. Thus, the Final Gross Amount of back salary due to petitioner is $8,551.66. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Barbara L. Mandela-Canta."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to November 21, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 11/8/12 Barbara Mandela-Canta

Barbara L. Mandela-Canta

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

C
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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010

Petitioner	OAL Docket #
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

73-14

OAL DKT. NO. EDU 9628-10
AGENCY DKT. NO. 234-8/10

JOAN M. MANNIX-MOEDT,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 2/03/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9628-10
AGENCY DKT. NO. 234-8/10

JOAN M. MANNIX-MOEDT,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 1, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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OFFICE OF ADMIN. LAW

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

JOAN MANNIX-MOEDT ,

Petitioner,

v.

ELIZABETH BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW

OAL Dkt. No. EDU 09628-2010N
Agency Ref. No. 234-8/10

SETTLEMENT AND RELEASE

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Joan Mannix-Moedt ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Joan Mannix-Moedt v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 09628-2010N, Agency Dkt. No. 234-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The parties agree that the petitioner was employed effective September 1, 2010 and suffered no salary losses for the 2010-2011 school year.

2. The Board shall pay Petitioner the sum of $1,200.78 as money damages based on amounts paid by Petitioner for alternate medical insurance coverage during the period from September 1, 2010 to December 31, 2010. These amounts will be paid in a separate check payable to "Joan Mannix-Moedt" and will not be subject to income tax withholding or payroll deductions since they do not constitute back salary.

3. The Parties agree that the payment specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

4. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which

were raised or could have been raised in this or any action arising out of the subject matter of th within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

6. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

7. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

8. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

9. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

10. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

11. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 1/4/13

Joan Mannix-Moedt

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
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Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

74-14

OAL DKT. NO. EDU 9653-10
AGENCY DKT. NO. 224-8/10

KEITH DEPRE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 2/03/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9653-10
AGENCY DKT. NO. 224-8/10

KEITH D. DEPRE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 2, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

KEITH D. DEPRE, Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 09653-2010N Agency Ref. No. 224-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Keith D. Depre ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Keith D. Depre v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 09653-2010N, Agency Dkt. No. 224-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $7,509.24, for the period from September 1, 2010 through November 21, 2010. This

amount has been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010 was $7,200.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $7,509.24.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 21, 2010. Thus, the Final Gross Amount of back salary due to petitioner is $7,509.24. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Keith Depre."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to November 21, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 1/8/13

Keith D. Depre

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

10j

COPY

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
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Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
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Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

Petitioner	OAL Docket#	Petitioner	OAL Docket #
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Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

75-14

OAL DKT. NO. EDU 10149-10
AGENCY DKT. NO. 350-8/10

JEANNINE ALFANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 2/03/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10149-10
AGENCY DKT. NO. 350-8/10

JEANNINE ALFANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

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

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 14, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-17

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

JEANNINE ALFANO Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. **EDU 10149-2010N** Agency Ref. No.350-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, JEANNINE ALFANO ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned JEANNINE ALFANO v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10149-2010N, Agency Dkt. No. 350-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ _31,385_, for the period from _September 1, 2010___ through __February 1, 2011_. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from _September 1, 2010___ through ___February 1, 2011__. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, _2010__, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, _2010_ at that time

and the back pay due to Petitioner runs from _September 1, 2010__.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from _September 1, 2010__ through _February 1, 2011___ was $ 0_.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $ _31,385_____.

4. The Parties agree that Petitioner had earnings from other employment during the period from _September 1, 2010__ through _February 1, 2011__. Thus, the Final Gross Amount of back salary due to petitioner is $ _3,427.20__. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "__Jeannine Alfano__".

5. In addition to back salary, the Board shall pay Petitioner the sum of $___0_____ as money damages based on amounts paid by Petitioner for medical bills during the period from _____ to _____ that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "_____NA_____" and will not be subject to income

tax withholding or payroll deductions since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the __2010-2011___ school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from __September 2010___ to ____February 1, 2011___. In addition, Petitioner's seniority will be credited for one full year for the entire school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the __2010-2011_ school year, less any days used during any portion of that year when

Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the __2010-2011__ school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the __2011-2012__ school year or thereafter.

8. The Parties agree that Petitioner's seniority as of _January 31, 2013__ as a result of this settlement is:

a) ___8.42____ years as an _elementary school teacher__.

b) _____ years as a _____.

9. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the _2010-2011_ school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

14. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding

action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this agreement.

15. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 7/24/13

Jeannine Alfano

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/15/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
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Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
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Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
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Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

Petitioner	OAL Docket#
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Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

76-14

OAL DKT. NO. EDU 10188-10
AGENCY DKT. NO. 358-8/10

NATALIA GALCZYNSKI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 2/03/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10188-10

AGENCY DKT. NO. 358-8/10

NATALIA GALCZYNSKI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 17, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

NATALIA GALCZYNSKI , Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 10188-2010N Agency Ref. No. 358-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Natalia Galczynski ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captione Natalia Galczynski v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 10188-2010N, Agency Dkt. No. 358-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $16,861.82, for the period from September 1, 2010 through February 2, 2011. This

amount has been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through February 2, 2011. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through February 2, 2011 was $12,100.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $16,861.82.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through February 2, 2011. Thus, the Final Gross Amount of back salary due to petitioner is $16,861.82. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Natalia Galczynski."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to February 2, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 1/9/13 _____ _____
Natalia Galczynski

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013 _____ _____

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

Petitioner	OAL Docket#	Petitioner	OAL Docket #
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Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
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Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
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Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
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Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

77-14

OAL DKT. NO. EDU 9847-10
AGENCY DKT. NO. 418-8/10

MILDRED LORENZO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 2/03/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9847-10
AGENCY DKT. NO. 418-8/10

MILDRED E. LORENZO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 8, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

MILDRED LORENZO , Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 09847-2010N Agency Ref. No. 418-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Mildred Lorenzo ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Mildred Lorenzo v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. EDU 09847-2010N, Agency Dkt. No. 418-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $17,009.33, for the period from September 1, 2010 through March 21, 2011. This

amount has already been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through March 21, 2011. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through March 1, 2011 was $17,400.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $17,009.33.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through March 21, 2011. Thus, the Final Gross Amount of back salary due to petitioner is $17,009.33. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Mildred Lorenzo."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to March 21, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 8/12/13 Mildred E Lp

Mildred Lorenzo

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
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Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
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Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
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Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

Petitioner	OAL Docket#
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Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
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Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
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Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010

Petitioner	OAL Docket #
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Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

78-14

OAL DKT. NO. EDU 11478-10
AGENCY DKT. NO. 568-9/10

GERALDINE CALHOUN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 2/03/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11478-10
AGENCY DKT. NO. 568-9/10

GERALDINE T. CALHOUN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on October 14, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

GERALDINE CALHOUN , Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 11478-2010N Agency Ref. No. 568-9/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Geraldine Calhoun ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Geraldine Calhoun v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. EDU 11478-2010N, Agency Dkt. No. 568-9/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $7,509.24, for the period from September 1, 2010 through November 21, 2010. This

amount has already been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 1, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 1, 2010 was $7,200.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $7,509.24.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 21, 2010. Thus, the Final Gross Amount of back salary due to petitioner is $7,509.24. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Geraldine Calhoun."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to November 21, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 4/4/13

Geraldine Calhoun

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

C
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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 8626-2011
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

Petitioner	OAL Docket#	Petitioner	OAL Docket #
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Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

#79-14

OAL DKT. NO. EDU 9658-10
AGENCY DKT. NO. 226-8/10

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

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

Upon review, the Commissioner notes that the figure set forth in paragraph one of the settlement agreement as representing petitioner's gross back pay before the deduction of $12,000 of paid unemployment benefits is identical to the figure in paragraph 3 which represents the net amount of back pay due after the deduction of $12,000 in unemployment benefits. Consequently, the Commissioner is constrained to remand this matter for reformation of the settlement agreement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 2/03/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9658-10

AGENCY DKT. NO. 226-8/10

MELISSA ORTIZ,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 2, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 DEC -2 P 5:30
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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2013 NOV 22 P 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MELISSA ORTIZ,

Petitioner,

v.

ELIZABETH BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW

OAL Dkt. No. EDU 09658-2010N
Agency Ref. No. 226-8/10

SETTLEMENT AND RELEASE

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Melissa Ortiz ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding caption Melissa Ortiz v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 09658-2010N, Agency Dkt. No. 226-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $14,044.48, for the period from September 1, 2010 through January 23, 2011. This

amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through January 23, 2011. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through January 23, 2011 was $12,000.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $14,044.48.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through January 23, 2011. Thus, the Final Gross Amount of back salary due to petitioner is $14,044.48. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Melissa Ortiz."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to January 23, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 1/12/13

Melissa Ortiz

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 1/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

13-63

Petitioner	OAL Docket#
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Maria Bartolomeo	EDU 10571-2010
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Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

#80-14

OAL DKT. NO. EDU 10153-10
AGENCY DKT. NO. 353-8/10

CARA CARUANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 2/03/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10153-10
AGENCY DKT. NO. 353-8/10

CARA CARUANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

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

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 14, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

CARA CARUANO Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. Agency Ref. No. **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, _CARA CARUANO_ ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned _CARA CARUANO v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU __10153___, Agency Dkt. No. __353-8/10___ (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ $5,940, for the period from September 1, 2010 through November 22, 2010. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 22, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 22, 2010 was $0.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $ $5,940.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 22, 2010. Thus, the Final Gross Amount of back salary due to petitioner is $ 5,940. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Cara Caruano".

5. In addition to back salary, the Board shall pay Petitioner the sum of $0 as money damages based on amounts paid by Petitioner for medical bills during the period from September 1, 2010 to November 22, 2010 that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "Cara Caruano" and will not be subject to income tax withholding or payroll deductions since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to November 22, 2010. In addition, Petitioner's seniority will be credited for September 1, 2010 through November 22, 2010 for the entire school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2011-2012 school year or thereafter.

8. The Parties agree that Petitioner's seniority as of January 31, 2013 as a result of this settlement is:

a) _8.42__ years as an __elementary school teacher__.

b) _____ years as a _____.

9. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with

prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

14. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the

issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this agreement.

15. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 7-17-13 Cara Caruano

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
Thomas Coyle	EDU 09656-2010	Margherita Martino-Avella	EDU 13961-2011
Mary Kate Cullinan	EDU 855-2011	Vera Matos-Pereira	EDU 10163-2010
Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
Adriana DelaRosa	EDU 10237-2010	Melissa Ortiz	EDU 09658-2010
Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

13-63

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
Thomas Coyle	EDU 09656-2010
Mary Kate Cullinan	EDU 855-2011
Shantel Dabady	EDU 10565-2010
Q'iana Davis	EDU 10344-2010
Adriana DelaRosa	EDU 10237-2010
Keith Depre	EDU 09653-2010
Elizabeth Dressler	EDU 12107-2010
Marissa Falcon	EDU 11158-2010
Giuliano Farina	EDU 10475-2010
Jesus Fernandez	EDU 10337-2010
Natalia Galczynski	EDU 10188-2010
Brenda Green	EDU 10180-2010
Susan Hernandez	EDU 10573-2010
Lauren Herrmann	EDU 10189-2010
Bayliss Johnson	EDU 10230-2010
Nicole Kovacs	EDU 10237-2010
Robert Langan, Jr.	EDU 10232-2010
Christine Lillis-Flaherty	EDU 10343-2010
Janil Llano	EDU 10237-2010

Petitioner	OAL Docket #
Diana Lopez	EDU 10186-2010
Mildred Lorenzo	EDU 09847-2010
Michele Lourenco	EDU 8626-2011
Mariestelle Magliano	EDU 9625-2010
Barbara Mandela-Canta	EDU 09669-2010
Joan Mannix-Moedt	EDU 09628-2010
Nancy Martinez	EDU 10354-2010
Margherita Martino-Avella	EDU 13961-2011
Vera Matos-Pereira	EDU 10163-2010
Larry Morgan	EDU 13881-2010
Allison Mutchler-Post	EDU 10237-2010
Melissa Ortiz	EDU 09658-2010
Diana Oviedo-Cruz	EDU 10237-2010
Angelina Pecoraro	EDU 10229-2010
Robin Pier	EDU 09662-2010
Mindy Pistol	EDU 11409-2010
Jasmine Santiago	EDU 10166-2010
Gloria Sempervive	EDU 12213-2010
Jessica Serafin	EDU 10185-2010
Anabela Silva	EDU 09660-2010
Catherine Simon	EDU 10237-2010
Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

81-14

OAL DKT. NO. EDU 9656-10
AGENCY DKT. NO. 216-8/10

THOMAS COYLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 2/03/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 9656-10
AGENCY DKT. NO. 216-8/10

THOMAS S. COYLE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 2, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

THOMAS COYLE , Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 09656-2010N Agency Ref. No. 216-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Thomas Coyle ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Thomas Coyle v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 09656-2010N, Agency Dkt. No. 216-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $4,667.17, for the period from September 1, 2010 through November 21, 2010. This

amount has been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010 was $6,480.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $4,667.17.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 21, 2010. Thus, the Final Gross Amount of back salary due to petitioner is $4,667.17. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Thomas Coyle."

5. In addition to back salary, the Board shall pay Petitioner the sum of $5,460.16 as money damages based on amounts paid by Petitioner for medical bills during the period from September 1, 2010 to November 1, 2010 that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "Thomas Coyle" and will not be subject to income tax withholding or payroll deductions since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to November 21, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

8. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

9. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

10. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

12. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

13. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

14. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 11/7/13

Thomas Coyle

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-63

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
Gail Bates	EDU 10563-2010	Michele Lourenco	EDU 10336-2010
Geraldine Calhoun	EDU 11478-2010	Mariestelle Magliano	EDU 9625-2010
Cara Caruano	EDU 10153-2010	Barbara Mandela-Canta	EDU 09669-2010
Rachel Ceus	EDU 12475-2010	Joan Mannix-Moedt	EDU 09628-2010
Jane Colford	EDU 10237-2010	Nancy Martinez	EDU 10354-2010
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Shantel Dabady	EDU 10565-2010	Larry Morgan	EDU 13881-2010
Q'iana Davis	EDU 10344-2010	Allison Mutchler-Post	EDU 10237-2010
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Keith Depre	EDU 09653-2010	Diana Oviedo-Cruz	EDU 10237-2010
Elizabeth Dressler	EDU 12107-2010	Angelina Pecoraro	EDU 10229-2010
Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
Natalia Galczynski	EDU 10188-2010	Gloria Sempervive	EDU 12213-2010
Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
Nicole Kovacs	EDU 10237-2010	Virginia Tropeano	EDU 10335-2010
Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
Gail Bates	EDU 10563-2010
Geraldine Calhoun	EDU 11478-2010
Cara Caruano	EDU 10153-2010
Rachel Ceus	EDU 12475-2010
Jane Colford	EDU 10237-2010
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Mildred Lorenzo	EDU 09847-2010
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Nancy Martinez	EDU 10354-2010
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Vera Matos-Pereira	EDU 10163-2010
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Gail Smith	EDU 10231-2010
Virginia Tropeano	EDU 10335-2010
Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

#82-14

OAL DKT. NO. EDU 9662-10
AGENCY DKT. NO. 238-8/10

ROBIN PIER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 2/03/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9662-10

AGENCY DKT. NO. 238-8/10

ROBIN PIER,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: December 13, 2013 Decided: December 13, 2013

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

This matter was transmitted to the Office of Administrative Law on September 1, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated November 21, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

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

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

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

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

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

December 13, 2013
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 12-17-13

Mailed to Parties: DEC 17 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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2013 DEC -2 P 5:30
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

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2013 NOV [illegible] P 5:23
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

ROBIN PIER,

Petitioner,

v.

ELIZABETH BOARD OF EDUCATION,

Respondent.

BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW

OAL Dkt. No. EDU 09662-2010N
Agency Ref. No. 238-8/10

SETTLEMENT AND RELEASE

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Robin Pier ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Robin Pier v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. EDU 09662-2010N, Agency Dkt. No. 238-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

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

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $8,056.66, for the period from September 1, 2010 through November 21, 2010. This

amount has already been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010 was $7,200.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $8,056.66.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 21, 2010. Thus, the Final Gross Amount of back salary due to petitioner is $8,056.66. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Robin Pier."

5. The Parties agree that the payments specified herein shall constitute full and fi settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to November 21, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sic leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall iss the payments required herein within 30 calendar days.

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

FOR PETITIONER

Date: 1/11/13 Robin Pier

Robin Pier

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 11/25/2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

Elizabeth, New Jersey
November 21, 2013

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and the parties as filed in the Office of the School Business Administrator/Board Secretary have discussed a resolution to this matter; and

WHEREAS, in the interest of cost efficiency and in lieu of litigation, the parties have agreed to settle their cases.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the confidential settlement agreements on file in the Legal Department.

TRUE COPY APPROVED AND ADOPTED AT
THE BOARD OF EDUCATION MEETING
HELD ON NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

Petitioner	OAL Docket#	Petitioner	OAL Docket #
Jeanine Alfano	EDU 10149-2010	Diana Lopez	EDU 10186-2010
Maria Bartolomeo	EDU 10571-2010	Mildred Lorenzo	EDU 09847-2010
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Marissa Falcon	EDU 11158-2010	Robin Pier	EDU 09662-2010
Giuliano Farina	EDU 10475-2010	Mindy Pistol	EDU 11409-2010
Jesus Fernandez	EDU 10337-2010	Jasmine Santiago	EDU 10166-2010
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Brenda Green	EDU 10180-2010	Jessica Serafin	EDU 10185-2010
Susan Hernandez	EDU 10573-2010	Anabela Silva	EDU 09660-2010
Lauren Herrmann	EDU 10189-2010	Catherine Simon	EDU 10237-2010
Bayliss Johnson	EDU 10230-2010	Gail Smith	EDU 10231-2010
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Robert Langan, Jr.	EDU 10232-2010	Bridget Turano	EDU 9673-2010
Christine Lillis-Flaherty	EDU 10343-2010	James Villarino	EDU 10237-2010
Janil Llano	EDU 10237-2010	Kimberly Waugh	EDU 10237-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD NOVEMBER 21, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

Petitioner	OAL Docket#
Jeanine Alfano	EDU 10149-2010
Maria Bartolomeo	EDU 10571-2010
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Gail Smith	EDU 10231-2010
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Bridget Turano	EDU 9673-2010
James Villarino	EDU 10237-2010
Kimberly Waugh	EDU 10237-2010

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OAL DKT. NO. EDU 13597-13
(EDU 2378-13 ON REMAND)
AGENCY DKT. NO. 26-2/13

MELANIE ALSTON-BALAPUTRA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. The Commissioner approves the settlement terms and the Initial Decision with the proviso that the language on page 2 of the Initial Decision – indicating that the parties' settlement agreement became effective on June 11, 2013 – was premature.

Similarly premature were sections 8 and 9 of the Agreement, which identified actions targeted to take place prior to consideration of the settlement by the Commissioner. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

The foregoing notwithstanding, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for effectuation of same. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/04/14
Date of Mailing: 2/05/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13597-13
AGENCY DKT. NO. 26-2/13

ON REMAND
OAL DKT. NO. EDU 02378-13
AGENCY DKT. NO. 26-2/13

MELANIE ALSTON-BALAPUTRA,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF HACKENSACK, BERGEN COUNTY,
Respondent.

Alfred F. Maurice, Esq. for petitioner (Springstead & Maurice, attorneys)

Richard E. Salkin, Esq. for respondent

Record Closed: December 9, 2013 Decided: December 18, 2013

BEFORE **CARIDAD F. RIGO** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 19, 2013, for resolution of a contested case regarding petitioner's alleged improper termination from employment in Respondent's district.

Petitioner filed a motion seeking certain emergent and other relief against the Respondent. The parties submitted briefs and exhibits in support of their respective positions along with oral argument. As a result of those submissions, oral representations and by agreement between the parties a Pre-Hearing Order dated on or about March 8, 2013 was entered. Hearing dates were scheduled for May 21 and 24, 2013. During the pendency of the case and subsequent to the pre-hearing conference the parties reached a settlement. The settlement agreement and release was entered into and became effective on June 11, 2013. It was approved by the Board of Education of the city of Hackensack on June 11, 2013. The complete agreement is attached and is hereby made a part of this Initial Decision Settlement-Remand.

Having reviewed the contents of the attached Settlement Agreement and Release, I **FIND**:

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

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

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

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

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

December 18, 2013
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: December 24, 2013

Date Mailed to Parties:
lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Attachment December 24, 2013

SETTLEMENT AGREEMENT & RELEASE

This Agreement and Release ("the Agreement") is entered into and effective this 11th day of June, 2013 ("the Effective Date"), by and between Melanie Alston-Balaputra (ALSTON) and the Hackensack Board of Education ("Board").

WHEREAS, the Board is a body public and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1; and

WHEREAS, ALSTON is employed by the Board as a tenured teaching staff member; and

WHEREAS, ALSTON has commenced an action before the Commissioner of Education of New Jersey under OAL Docket No. EDU 02378-2013N, Agency Ref. No. 26-2/13; and

WHEREAS, the parties desire to resolve and settle all employment disputes between them pursuant to the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth in this Agreement, the Parties agree as follows:

TERMS OF AGREEMENT

1) The Board agrees to reinstate ALSTON's academic leave of absence originally granted for the period July 30, 2012 through June 21, 2013 (intended to be effective through the end of the 2012-2013 school year.

2) The Board agrees to rescind its resolution of January 7, 2013, revoking ALSTONS academic leave of absence referenced above by formal action of the Board.

3) The Board agrees to remove all references in ALSTON's personnel file referring to the revocation of ALSTON's academic leave of absence and permit ALSTON to personally verify the same.

4) The Board agrees to redact from ALSTON's personnel file all references to inappropriate conduct, job abandonment or performance deficiencies, if any, contained therein and permit ALSTON to personally verify the same.

5) The Board agrees to provide ALSTON with a letter of reference appropriate to her performance reviews in the district.

6) In the event, ALSTON is unable to find gainful employment on or after July 1, 2013, the Board agrees not to contest any application made by ALSTON for unemployment compensation.

M.J.A. Initials _____
BOE Pres. Initials VMM

7) The Board agrees to permit ALSTON access to the Board's premises for the purpose of removing her personal belongings.

8) The Board agrees to tender to Alston the sum of $6,592.32 within 30 days of the execution of this agreement. Said payment represents a settlement of litigation and all claims between the parties. No Form 1099 or similar document will be issued to ALSTON as a result of this payment. Said payment will be made to the attorney trust account of Alston's attorney.

9) ALSTON agrees to tender her resignation of employment from the Hackensack School District, effective June 30, 2013, subject to the terms of this agreement.

10) ALSTON agrees to withdraw the Petition of Appeal, above referenced, with prejudice upon the satisfaction of the terms of this agreement.

11) No Admissions

This Agreement is entered into solely for the purpose of resolving disputed claims, and neither the execution, delivery, nor performance of this Agreement, nor ALSTON's resignation, shall constitute or be construed at any time or for any purpose to be an admission of fact or liability by any of the parties; and the parties further agree that neither this Agreement and Release nor ALSTON's resignation shall be used as evidence in any judicial, administrative, or quasi-judicial proceeding, except to enforce the terms of the Agreement.

12) Mutual Release by the Parties

In exchange for the above consideration, ALSTON and the Board and their respective successors in interest, heirs and assignees hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, whether known or unknown, which they have or may have against each other, personally and officially, individually and collectively. This release shall not only apply to ALSTON and the sitting Board but to present and past Board members, officers, administrators, agents, employees, attorneys, from claims, arising in any way out of ALSTON's employment with the Board, her separation from employment with the Board including, but not limited to, any claims for attorneys fees, back pay or front pay, any claims existing on the date of this agreement for emotional distress or pain and suffering, any claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions, Title VII of the Civil Rights Acts of 1871 and 1991, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Employee Retirement Income Security Act, the Federal Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Workers' Adjustment and Retraining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, New Jersey Title 18A, 6 & 6A, any collective negotiations agreement, any common law claim and any other claims for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically, exempted from the release are any claims for health insurance

M.J.A. Initials _____

BOE Pres. Initials _____

continuation coverage under and pursuant to Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA") and workers compensation claims.

13) **Authority**

This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

14) **Successors and Assigns**

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

15) **Amendment; Severability; No Waiver**

This Agreement shall not be amended, changed or modified except in a writing signed by all parties. The provisions of this Agreement are severable. If any term or portion thereof of this Agreement shall be held to be invalid or unenforceable to any extent, the remainder of this Agreement shall not be affected thereby, and each remaining term or portion thereof shall be valid and enforced to the fullest extent permitted by law. Any failure to enforce any provision of this Agreement shall not operate as a waiver of such provision or of any other provision.

16) **Confidentiality**

ALSTON and the Board understand and agree that this Agreement, its terms, and the matters discussed in negotiating its terms are confidential, to the extent permitted by law. Neither party may directly or indirectly, divulge, discuss, publicize, disclose or in any way communicate the fact of this Agreement or the terms of this Agreement, the discussion or circumstances surrounding the negotiation or execution of this Agreement or the facts and circumstances leading to ALSTON's resignation in the District to anyone, without the express written authorization by an authorized representatives of the other party unless compelled to do so pursuant to applicable law. The foregoing confidentiality obligations shall not apply to disclosure by ALSTON to her immediate family, union, legal representatives and/or tax advisors, provided ALSTON first instructs them, and secures their agreement, to keep all such information in strict confidence.

17) **Non-Disparagement**

Each party to this agreement agrees not disparage or make or solicit any comments, statements, or the like to the media, the public or to others that may be considered derogatory or detrimental to the good name or business reputation of the other.

18) **Personal Belongings**

ALSTON will be permitted to obtain her personal belongings from the District on or after school hours. The parties shall arrange the details of said pick-up.

M.J.A. Initials _____

BOE Pres. Initials _____

19) **Entire Agreement**

This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings and agreements, whether oral or written. Each party acknowledges that neither the other party, nor any agent or attorney of the other party, has made any promise, representation or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

20) **Construction**

The terms of this Agreement are not to be construed against any one party but are to be construed as if all parties prepared it equally.

21) **Law Governing**

This Agreement is governed by the laws of New Jersey.

IN WITNESS WHEREOF, the parties have executed this agreement consisting of four (4) pages as of the effective date.

Witness:

MELANIE ALSTON BALAPUTRA

Dated: 6/11/13

Witness:

Dated: 6/11/2013

HACKENSACK BOARD OF EDUCATION

Witness:

By: _____

Dated:

Dated:

M.J.A. Initials _____

BOE Pres. Initials _____

875 Main Street
Apt. 3F
Hackensack, NJ 07601

June 11, 2013

Dear Members of the Board:

I hereby tender my irrevocable letter of resignation from any employment with the Hackensack Board of Education for personal reasons effective at the close of business on June 30, 2013. This resignation is contingent upon the Board approving the corresponding settlement agreement.

Very truly yours,

MELANIE ALSTON BALAPUTRA

89-14

#89-14R

OAL DKT. NO. EDU 17198-13
(On Remand EDU 10689-12)
AGENCY DKT. NO. 193-7/12

H.L.R., on behalf of minor child, H.L.R.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the Settlement Agreement (Agreement), and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On December 2, 2013, the Commissioner remanded this matter to OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge did not include the transcript from the August 1, 2013 proceeding at the OAL that is referenced in the Agreement.

Upon review of the revised record on remand, the Commissioner finds that the Agreement now contains the August 1, 2013 transcript. According to paragraph 8 of the Agreement, the petitioner was to begin making payments toward the outstanding tuition on September 1, 2013, which date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

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

IT IS SO ORDERED

COMMISSIONER OF EDUCATION

Date of Decision: 2/03/14

Date of Mailing: 2/05/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 17198-13
AGENCY DKT. NO. 193-7/12

(REMAND OF OAL DKT. NO. EDU 10689-12)

H.L.R. ON BEHALF OF H.L.R.,
Petitioner,
v.
MOORESTOWN TOWNSHIP BOARD OF EDUCATION,
Respondent.

William R. Burns, Esq., for petitioner (Lawyers' Committee for Civil Rights Under Law, attorneys)

R. Taylor Ruilova, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: December 5, 2013 Decided: December 13, 2013

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

This matter was previously heard under OAL Docket No. EDU 10689-12. The record closed on October 15, 2013, and the undersigned issued an Initial Decision Settlement on October 16, 2013. However, the Commissioner **REMANDED** the matter because the transcript of the original stipulations to which the parties agreed on the record on August 1, 2013, was not provided, and as such, the Commissioner could not

ascertain whether the August 21, 2013, Settlement Agreement articulated all of the settlement terms or rather, set forth terms in addition to the original stipulations. This Amended Initial Decision Settlement addresses that deficiency. In addition, it should also be noted that the August 21, 2013, Settlement Agreement does articulate all of the settlement terms and stipulations.

This matter was transmitted to the Office of Administrative Law on remand on December 2, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The transcript of the proceedings which took place on the record before this tribunal on August 1, 2013, is now attached. As a result, all of the terms of the settlement between the parties have now been provided.

The parties have agreed to a consent order entered at the return date of trial on August 1, 2013 (J-1), and a resulting settlement, and have prepared a Settlement Agreement dated August 21, 2013, indicating the terms thereof, which is attached and fully incorporated herein, (J-2).

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

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

2. The August 21, 2013, Settlement Agreement articulates all of the settlement terms, and no additional terms have been added.

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

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

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

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

December 13, 2013
DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: 12/16/13

Date Mailed to Parties: 12/16/13

/cb

APPENDIX

LIST OF EXHIBITS

Jointly submitted

J-1 Consent Order, dated August 1, 2013

J-2 Settlement agreement, received October 15, 2013

J-3 Board Resolution confirming settlement, received October 15, 2013

5 10/2

H.L.R. o/b/o H.R.
Petitioner,

v.

Moorestown Township Board of Education
Respondent

State of NJ
Office of Admin Law
Dock#: EDU-10689-12
Agency Ref: 193-7/12

Consent Order

This matter being brought before the Court by Hector Ramos o/b/o H.R. by and through his attorney William R. Burns, Esq of the Firm of Destribats Campbell, LLC and the Moorestown Township Board of Education, by & through their attorney R. Taylor Ruiloua, Esq of the Firm the Comegno Law Group, P.C.

It the Parties have after negotiation entered into this agreement voluntarily and have resolved all matters currently pending before the Court.

It is hereby ordered this the First (1) day of August 2013 as follows:

1) the agreement as placed on the record, and attached hereto as the transcript is entered.

2 of 2

2) The parties Agree to be bound by the terms Detailed on the Record and transcribed & recorded in the transcript of which this order (J1) is Attached

3) The Agreement / order are binding on all parties as follows immediately on Hector Ramos Petitioner and contingent on the Board giving Approval at the next Regularly Scheduled ~~meeting~~ currently scheduled for August 13, 2013.

4) All matters currently Before the court are marked as settled.

5) The parties entered into this agreement freely / voluntarily

6) The terms of the agreement will be further Detailed in a supplemental agreement Prepared by Respondents counsel

8/1/13 R. Taylor Ruiloua Esq
Respondents counsel

William R Burns
Petitioner counsel

Lynn E. Shugars

8/1/13 Lynn E. Shugars
Moorestown Board of Ed

Hector Ramos
Petitioner

Edward T. Ordway, Jr. A.L.J.

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
(t) (856) 234-4114
(f) (856) 234-4262

Attorneys for Respondent, Moorestown Township Board of Education

BY: ARTHUR F. RISDEN, ESQUIRE
R. TAYLOR RUILOVA, ESQUIRE

RECEIVED
2013 OCT 15 P 2:30
STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

H.R. o/b/o H.L.R., Petitioners, v. MOORESTOWN TOWNSHIP BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION DOCKET NO: EDU-10689-12 AGENCY REF: 193-7/12 **SETTLEMENT AGREEMENT AND RELEASE**

The Settlement Agreement and Release ("Agreement") is entered into by and between Petitioner H.R., individually and on behalf of his son H.L.R. ("Petitioner"), and the Moorestown Township Board of Education (the "Board") to resolve and settle all outstanding issues involved in this matter between Petitioner and the Board (Petitioner and the Board, collectively the "Parties") as follows:

WHEREAS, following a student residency hearing conducted on June 18, 2013, the Board determined that Petitioner did not reside within the Moorestown Public Schools District (the "District"); and

WHEREAS, Petitioner appealed the Board's determination by filing a Petition of Appeal (the "Petition") and commencing the instant matter; and

WHEREAS, after engaging in discovery and motion practice in this matter, the Parties appeared for hearing on August 1, 2013 at the Office of Administrative Law ("OAL"); and

WHEREAS, following good faith negotiations, the Parties amicably agreed to resolve the disputes raised in the Petition while present at the OAL on August 1, 2013; and

WHEREAS, the terms of the Parties' settlement were placed on the record before the Honorable Edward J. Delanoy, A.L.J., which included extensive questioning of Petitioner as to his understanding and acceptance of the terms of the Agreement and that same were binding upon him as of August 1, 2013; and

WHEREAS, a Consent Order was entered on August 1, 2013 between the Parties, which was entered by the Court that same day, incorporating and attaching the terms of the settlement as placed on the record, and which is attached hereto as Exhibit "1" and incorporated by reference herein; and

WHEREAS, in order to further memorialize in writing the Parties' agreement reached on August 1, 2013, and in consideration of the mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties enter into this Agreement to more fully outline their agreement, release claims, and express the full and complete terms of same.

NOW, THEREFORE, THE PARTIES HEREBY AGREE THAT:

1. In order to enroll H.L.R. in the District for the 2013-2014 school year, Petitioner must present the Board with all of the following proofs of residency to the Board Administration Building, 803 North Stanwick Road, Moorestown, NJ 08057, Attention:

Business Administrator, on or before September 1, 2013:

a. a copy of a valid lease/deed in Petitioner's name for a property where he currently resides within the District (the "Moorestown Property");

b. copies of cancelled checks/proof of payment of the lease/mortgage for the Moorestown Property;

c. Petitioner's driver's license changed to reflect the address of the Moorestown Property;

d. copies of utility bills in Petitioner's name for service to the Moorestown Property;

e. copies of cancelled checks/proof of payment of the utilities reflected in the bills noted above; and

f. a copy of a bank or credit card statement in Petitioner's name and reflecting the Moorestown Property address.

2. In order to verify his continued residency in the District going forward, Petitioner shall provide to the Board Administration Building, 803 North Stanwick Road, Moorestown, NJ 08057, Attention: Business Administrator, a copy of a utility bill(s) in his name for service to the Moorestown Property and proof of payment of same on a monthly basis, commencing on October 1, 2013, and continuing until H.L.R. graduates from the District.

3. In the event Petitioner fails to provide any of the above required proofs of residency, he consents, individually and on behalf of H.L.R., to the immediate entry of an

Order of Removal for H.L.R. to be removed from the District.

4. In addition, if Petitioner fails to provide the ongoing proofs of residency specified in paragraph 2 above, he shall pay tuition, via certified funds and/or money order, to the Board for the entire school year in which he failed to provide such documentation in the amount of the daily tuition rate for H.L.R. for each school day from the date of the failure to provide the proofs, back to the first day of school for that given year.

5. In light of the outstanding tuition amounts (the "Outstanding Tuition") which Petitioner and H.L.R.'s mother owe to the Board in connection with the Board's residency proceeding against Petitioner and H.L.R.'s mother in 2010, and for the additional tuition amounts for which the Board was seeking payment in this matter, Petitioner and H.L.R.'s mother consent to the entry of a money judgment (the "Judgment") against them in the amount of Forty Thousand Dollars ($40,000.00). The Board shall hold the Judgment and not take action to collect upon same unless Petitioner defaults on the payment requirements set forth below.

6. In addition, the mortgage lien (the "Mortgage"), in the amount of Thirty-Two Thousand Thirty-Nine Dollars ($32,039.00) that was recorded on the home owned by Petitioner and H.L.R.'s mother in Hainesport, New Jersey pursuant to the 2010 Agreement in Lieu of Further Residency Proceedings (the "2010 Agreement"), shall remain in full force and effect.

7. Of the Thirty-Two Thousand Thirty-Nine Dollars ($32,039.00) in tuition owed from the 2010 residency proceedings involving Petitioner, it is the Board's position that

Eighteen Thousand Eight Hundred Thirty Dollars ($18,830.00) remains unpaid and owing at the time of this Agreement. It is Petitioner's position that he made additional cash payments resulting in a lower Outstanding Tuition amount. As such, the Parties agree that if Petitioner is able to produce documentary proof satisfactory to the Board that additional cash payments which Petitioner purports to have made towards the Outstanding Tuition were actually received and accepted by the Board, then the amount of the Outstanding Tuition shall be adjusted accordingly.

8. In order to satisfy the Outstanding Tuition, commencing on September 1, 2013, Petitioner shall make payments, via certified funds or money order, payable to the "Moorestown Township Board of Education" and deliver same to the Board Administration Building, 803 North Stanwick Road, Moorestown, NJ 08057, Attention: Business Administrator, in the amount of Three Hundred Dollars ($300.00) every month on the first of the month until such time as the Outstanding Tuition amount has been paid in full. If the first of the month falls on a day on which the District is closed, Petitioner shall make the payment no later than the immediately following day the District is open.

9. Notwithstanding the above, if Petitioner is able to produce a lump sum payment of Twelve Thousand Dollars ($12,000.00), via certified funds or money order, to the Board Administration Building, 803 North Stanwick Road, Moorestown, NJ 08057, Attention: Business Administrator, on or before September 1, 2013, the Board will accept same as full satisfaction of the Outstanding Tuition.

10. Once the Outstanding Tuition amount is satisfied, either pursuant to the payment

mechanisms specified in paragraphs 8 or 9 above, the Board will discharge the Mortgage and the Judgment.

11. In the event that Petitioner at any time fails to make the payments toward the Outstanding Tuition as specified above, the Board may immediately move to collect upon the Judgment, and the Mortgage shall remain in place and be paid according to its terms.

12. At Petitioner's request, the Board will not involve H.L.R. directly (i.e., interviewing him) in any future residency investigations which may take place.

13. Notwithstanding the above, Petitioner acknowledges and understands that the Board is not waiving any other right which it may have to commence further residency investigations or proceedings against Petitioner where warranted or deemed necessary.

14. In exchange for the above, Petitioner, individually and on behalf of H.L.R., hereby forever and fully waives and releases the Board from all claims that have accrued as of the date of this Agreement which he and/or H.L.R. have or may have against the Board, including all legal, contractual, common law, statutory and/or equitable claims under state and/or federal law through the date of this Agreement. Nothing in the release set forth above shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement.

15. Neither the Board nor Petitioner will be considered to be a "prevailing party" for any purpose.

16. Petitioner, individually and on behalf of H.L.R., waives any claims for advocate, attorney or other professional fees which he may have incurred in connection with this

matter, with the understanding that each Party shall be responsible for their own fees and costs, including reasonable attorneys' fees and costs, incurred in connection with this matter, to the extent applicable.

17. Petitioner, individually and on behalf of H.L.R., hereby consents to the dismissal and withdrawal of the Petition filed in this matter with prejudice. In this regard, counsel shall notify the Court and the Department of Education in writing within five (5) days of Petitioner's execution of this Agreement of his request to withdraw the Petitioner with prejudice.

18. The Parties agree and acknowledge that this Agreement is subject to approval by the Board during its next regularly scheduled meeting following the execution of this Agreement.

19. The Parties acknowledge that they have read and understand the terms of this Agreement, that they have had the opportunity to have the Agreement reviewed by counsel, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

20. Petitioner represents that he has sole authority to enter into this Agreement, and that it shall be binding as if entered into by any other parent and/or guardian of H.L.R. not a party hereto.

21. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of

the Parties.

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

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

IN WITNESS WHEREOF, the Board and Petitioner hereto set their hands and seals this _____ day of _____, 2013.

FOR THE MOORESTOWN TOWNSHIP BOARD OF EDUCATION:

BY: _____ DATED: 8-21-13

FOR PETITIONER:

BY: _____ DATED: 6-6-13

Hector Ramos, individually and o/b/o H.L.R.

MOORESTOWN TOWNSHIP PUBLIC SCHOOLS
Administration Building, 803 North Stanwick Road
Moorestown, New Jersey 08057
(856) 778-6600 Ext. 18150
Fax: (856) 235-0961
E-mail lshugars@mtps.com

Lynn E. Shugars
Business Administrator / Board Secretary

2013 OCT 15 P 2:30

September 26, 2013

On August 13, 2013, the Moorestown Township Board of Education approved the following resolution:

11. Student Settlement Agreement

MOTION:

I recommend the Board approve the following resolution:

Resolved by the Moorestown Township Board of Education to adopt and approve the Settlement Agreement between Student #4000971 and the Moorestown Township Board of Education. Approval of this resolution indicates that Mrs. Lynn E. Shugars, Business Administrator/Board Secretary for the Board, is authorized to execute the Settlement Agreement and Release on behalf of the Board, and by executing the Settlement Agreement and Release, the Board acknowledges that its Counterclaim will be dismissed.

Moved by: Mrs. Goldenberg Second: Mr. Weinstein Vote: All Ayes

This is a certified copy of the minutes of the Moorestown Township Board of Education meeting held on August 13, 2013.

Lynn E Shugars

Lynn E. Shugars
Board Secretary

#90-14

NORTHERN BURLINGTON REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND BRET SCHUNDLER,	:	
RESPONDENTS.	:	

SYNOPSIS

The Appellate Division charged the Commissioner with determining the amount of reimbursement, if any, to which the petitioning Board is entitled as a result of the respondent Department's withholding of equalization aid following Governor Christie's Executive Order 14 on February 11, 2010 – which declared a fiscal emergency and, *inter alia*, ordered the Commissioner to withhold State aid payments to districts based upon any surplus and reserve account monies available to them at the end of the 2009 fiscal year. Citing 20 *U.S.C.A.* Sec. 7709, the Board asserted that the Department's withholding of "excess surplus" violated federal law and was *ultra vires* because, in the Board's case, its excess surplus wholly consisted of federal impact aid. The petitioner demanded reimbursement in the amount of $1,672,507; respondent contended that the Board failed to prove entitlement to reimbursement of the withheld funds.

The ALJ found, *inter alia*, that: the petitioning Board receives federal impact aid based upon the presence of the joint military base McGuire-Dix-Lakehurst within its boundaries; this impact aid essentially serves as payment in lieu of local property taxes for the children of military families; the Board has proven by a preponderance of the credible evidence that its excess surplus – upon which the Department's withholding of state aid in 2010 was based – consisted entirely of unanticipated federal impact aid; and the Federal Impact Aid Law prohibits a state from providing less State aid to a local school district than it would have received if the district did not receive federal impact aid. Accordingly, the ALJ concluded that the respondent must restore to the petitioner $1,672,507 in State aid that was withheld in the 2010 fiscal year in violation of the Federal Impact Aid Law.

Upon review of the record of the remand proceedings in the Office of Administrative Law (OAL) and the Initial Decision of the ALJ, the Commissioner concluded that petitioner has provided expert evidence in support of its position that the withheld funds were comprised of unanticipated federal impact aid received prior to FY 2009, and that respondent has been unable to persuasively rebut the Board's evidence. Accordingly, the Commissioner found that, under 20 *U.S.C.A.* Sec. 7709, respondent must reimburse the petitioning Board in the amount of $1,672,507. In so finding, The Commissioner noted that, under 20 *U.S.C.A.* Sec. 7709(b), the respondent may apply for certification from the United States Secretary of Education that the State has in effect a program of State aid to equalize expenditures for free public education among local educational agencies in the State; such certification is a prerequisite that can enable the respondent to reduce State aid to an agency which receives federal impact aid, and may thereby eliminate the potential for future litigation over the issues in the present case.

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

February 4, 2014

OAL DKT. NO. EDU 2799-12
AGENCY DKT. NO. 131-6/10

NORTHERN BURLINGTON REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND BRET SCHUNDLER,	:	
RESPONDENTS.	:	

The Commissioner has been charged by the Appellate Division with determining the amount of reimbursement, if any, to which the petitioning Board of Education of the Northern Burlington Regional School District in Burlington County (the Board) is entitled as a result of the respondent Department of Education's (the Department) withholding of equalization aid in 2010. Petitioner demands reimbursement in the amount of $1,672,507 and respondent contends that petitioner has failed to prove entitlement to same. Upon review of the record and Initial Decision of the Office of Administrative Law[1] the Commissioner concurs with the Administrative Law Judge's determination that, within the framework of the law of the case as articulated by the Appellate Division, the weight of the evidence is in petitioner's favor.

The above-referenced withholding of equalization aid payments was a consequence of Governor Christie's Executive Order 14 (EO14), dated February 11, 2010, which declared a state fiscal emergency and, *inter alia*, ordered the Commissioner of Education to reserve district state aid payments based upon the respective surpluses and reserve account monies available to districts at the

[1] Respondent's exceptions and petitioner's replies thereto were both untimely.

end of Fiscal Year 2009 (FY 2009). The Department posited that petitioner's 'excess surplus' for the 2009 fiscal year had amounted to $1,672,507, and withheld State aid in that amount.[2]

Petitioner asserts that the Department's withholding of the 'excess surplus' was *ultra vires* because it violated a federal statute. More specifically, the Board cites 20 *U.S.C.A.* Sec. 7709, which provides as follows:

> State consideration of payments in providing State aid
>
> (a) General prohibition. Except as provided in subsection (b), a State may not –
> (1) consider payments under this title [20 USCS §§ 7701 et seq.] in determining, for any fiscal year:
>
> (A) the eligibility of a local educational agency for State aid for free public education; or
> (B) the amount of such aid; or
>
> (2) make such [federal] aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not so eligible.

Contending that any surplus which might have existed for the 2009 fiscal year consisted primarily of federal impact aid, petitioner urges that the Department violated 20 *U.S.C.A.* Sec. 7709 when it included such 'surplus' in its determination concerning the withholding of $1,672,507 of State aid.

The controversy was brought before then Commissioner Bret Schundler, who ruled in favor of the Department's withholding of the $1,672,507 of State aid. However, the Appellate Division of New Jersey Superior Court reversed the Commissioner's decision. In a ruling which constitutes the law of this case only, the Appellate Division of New Jersey Superior Court advised:

> ...*U.S. Const.* art. I, § 8, cl. 1 includes the congressional power to "provide for the . . . general Welfare of the United States. . . [.]" "Incident to this power, Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 2795, 97 L. Ed. 2d 171 (1987).
>
> *Northern Burlington County Regional School District Board of Education v. Bret Schundler, Commissioner, New Jersey Department of Education*, Unpublished Decision, Docket No. A-0607-10T3 (App. Div. February 3, 2012), at 8.

---

[2] The Department withheld an additional $468,762, which was the equivalent of 25% of petitioner's reserve account balances, but petitioner does not seek reimbursement of same.

The Appellate Division concluded that:

> the Commissioner lacked authority under the Act to reduce state aid by offsetting it against the district's "excess surplus" to the extent that "excess surplus" included Impact Aid, even if not set aside in a "legal reserve." The District asserted that its excess surplus is comprised entirely of unanticipated Federal Impact Aid dating back to the [sic] 1999. In its submissions to the ECS and Commissioner, it included its auditor's report in which the auditor reviewed budget reports and fund balances for a ten-year period and concluded "impact aid is a major contributor to any fund balance being on hand." In view of the Commissioner's determination that Federal Impact Aid becomes part of the general fund, the Commissioner made no findings as to whether the $2,141,169 withheld was all attributable to the Federal Impact Aid, as the District contends.
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> *Northern Burlington County Regional School District Board of Education v. Bret Schundler, Commissioner, New Jersey Department of Education*, Unpublished Decision, Docket No. A-0607-10T3 (App. Div. February 3, 2012), at 10.

Thus, the Appellate Division remanded the case for further proceedings addressing the source of the District's 'excess surplus' funds.

Upon review of the record of the remand proceedings in the Office of Administrative Law (OAL), and the Initial Decision of the officiating Administrative Law Judge (ALJ),[3] the Commissioner concludes that the Department has not been able to rebut expert evidence provided by petitioner that the withheld funds were likely comprised of unanticipated federal aid received by petitioner prior to FY 2009. Thus, the Department's withholding of the disputed $1,672,507 would appear to have negated the intended salutary effect of 20 *U.S.C.A.* Sec. 7709(a)(1)(B) and 20 *U.S.C.A.* Sec. 7709(a)(2).

Petitioner's auditor, Rodney Haines, was qualified in the OAL as an expert witness in public school accounting without objection from the Department. 2T 34-35.[4] He performed an audit of petitioner's finances for FY 2000 through FY 2009, and testified about his conclusions. It appears undisputed that for fiscal years 2000 through 2009, monies received by the district during a particular

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[3] The section of the Initial Decision entitled "stipulated facts" was actually the ALJ's summary of what she believed to be undisputed facts.

[4] 1T signifies the transcript of the February 13, 2013 portion of the hearing in the OAL. 2T signifies the transcript of the balance of the hearing, which took place on March 25, 2013.

fiscal year – whatever the source – were counted as additions to the district's general fund. Consequently, for those years, receipts could not be tracked from their source to their ultimate use, making it difficult to prove whether a particular federal dollar was used on a computer or went into surplus – which was ultimately used to provide tax relief.

However, Haines was able to draw certain pertinent conclusions from his audit of petitioner's finances for fiscal years 2000 through 2009, and his review of petitioner's budget for subsequent years. For example, he noted that following the district's segregation of its unanticipated federal aid into a separate legal reserve account in FY 2010, its accounting statements no longer revealed any excess surpluses. 2T49. Petitioner's Exhibit P-21 shows that this was the case for FY 2010, FY 2011 and FY 2012. Haines viewed this as an indication that petitioner's excess surpluses had been primarily comprised of unanticipated federal aid payments. 2T54-57.

Haines also pointed out that petitioner's fund balance for FY 2009 ($9,031,737) minus the sum of all the allowable reserves ($3,183,192) was $5,848,545, an amount comparable to the total of unanticipated federal impact aid which the district had received over the prior ten fiscal years (*i.e.*, $6,403,266). 2T49-53. Thus he concluded that – assuming petitioner had maintained all of its programs – it would not have had any appreciable surplus funds at the end of FY 2009, were it not for the infusions of unanticipated federal aid. 2T50-53.

Haines also drew conclusions from his knowledge of the nature of school districts' categories of income, how those income categories are received, how budgets are created and how surpluses are calculated. Thus, he noted that when a district formulates its budget, it already knows the amount of local revenues it can count on and the amount of state aid it will receive. By way of contrast, it has no idea how much federal aid it will receive, and typically budgets far less than it ultimately receives for the budgeted year. Consequently, excess funds are more likely attributable to federal aid than to the other major contributing budget categories, *i.e.*, local taxes and state aid. 2T64-65.

Finally, there appeared to be no significant disagreement among the witnesses for both petitioner and respondent[5] about the budgetary fact that unanticipated federal impact aid received by a district in a given fiscal year is allowed as an adjustment (subtraction) to the calculation of the district's allowable surplus for that fiscal year and is not usually spent in that year; rather, it is rolled over into surplus for a subsequent year, after which it can be used, *inter alia,* to lower the amount of taxes required to support the district's next school budget. *See, e.g.,* the testimony of Richard Kaz, Jr., petitioner's business administrator, at 2T21-22, and the testimony of Patricia Scott, at 2T110.

In light of the foregoing, the petitioner has made a showing that it is more likely than not that its 'excess surplus' calculated for FY 2009 was attributable to the receipt of unanticipated federal impact aid. Respondent did not present a persuasive rebuttal to petitioner's showing. Therefore, in accordance with the mandate of the Appellate Division, all of the $1,672,507 which respondent withheld from petitioner in FY 2010 should be returned, since it made federal "aid available to [a] local educational agenc[y] in a manner that result[ed] in less State aid to [the] local educational agency that [was] eligible for such payment than such agency would [have] receive[d] if such agency were not so eligible." 20 *U.S.C.A.* Sec. 7709(a)(2).

The Commissioner further notes that under 20 *U.S.C.A.* Sec. 7709(b),[6] respondent – being a State educational agency which has in effect a program of state aid that equalizes

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[5] The Department's only witness, Patricia C. Scott, was not qualified as an expert and presented no expert reports. She had knowledge of school district budgeting issues but had never prepared a school district budget or conducted an audit on behalf of a school district. 2T104-05.

[6] State equalization plans.

> (1) In general. A State may reduce State aid to a local educational agency that receives a payment under section 8002 or 8003(b) [20 USCS § 7702 or 7703(b)] (except the amount calculated in excess of 1.0 under section 8003(a)(2)(B) [20 USCS § 7703(a)(2)(B)] and, with respect to a local educational agency that receives a payment under section 8003(b)(2) [20 USCS § 7703(b)(2)], the amount in excess of the amount that the agency would receive if the agency were deemed to be an agency eligible to receive a payment under section 8003(b)(1) [20 USCS § 7703(b)(1)] and not section 8003(b)(2) [20 USCS § 7703(b)(2)]) for any fiscal year if the

expenditures for free public education among local educational agencies in the State – may reduce state aid to an agency which receives federal impact aid. However, certification by the United States Secretary of Education is a prerequisite to such an action on the part of a state. Application by respondent for such certification might eliminate the need for future litigation over the issues in the present case.

In summary, the Commissioner finds that, under the federal law discussed *supra,* respondent must reimburse to petitioner the $1,672,507 withheld as a result of EO 14 in 2010.

IT IS SO ORDERED.[7]

COMMISSIONER OF EDUCATION

Date of Decision: 2/04/14

Date of Mailing: 2/05/14

Secretary determines, and certifies under subsection (c)(3)(A), that the State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in the State.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2799-12
AGENCY DKT. NO. 131-6/10

NORTHERN BURLINGTON REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, BURLINGTON COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION AND BRET SCHUNDLER, COMMISSIONER,

Respondents.

Cameron R. Morgan, Esq., for petitioner (Parker McCay, PC, attorneys)

Geoffrey N. Stark, Deputy Attorney General, for respondents (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: May 13, 2013 Decided: September 25, 2013

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This case is before the Office of Administrative Law on remand from the Appellate Division. On February 3, 2012, the Appellate Division issued a decision, Northern Burlington County Regional School District Board of Education v. Bret Schundler, Commissioner, New Jersey Department of Education, No. A-0607-10T3 (App. Div. February 3, 2012). The Appellate Division reversed the decision of the Commissioner of Education to withhold $1,672,507 in State aid from the petitioner, Northern Burlington County Regional School District, and remanded the case to the Commissioner of the Department of Education for factual findings on how much of the State aid withheld as excess surplus was based on federal Impact Aid. A hearing was held on February 13 and March 25, 2013. The record was held open for written summations and replies. The record closed on May 13, 2013.

STIPULATION OF FACTS

1. The Northern Burlington County Regional School District (District) is a regional school district serving children in grades seven through twelve who reside in Chesterfield Township, Mansfield Township, North Hanover Township, and Springfield Township, along with the children of United States Armed Forces service members residing on the joint military base McGuire-Dix-Lakehurst.

2. The Board is the local educational agency responsible for the operations of the District.

3. The District, along with several adjoining school districts, receives federal Impact Aid based upon the presence of the joint base McGuire-Dix-Lakehurst within its boundaries.

4. The intended purpose of federal Impact Aid is to subsidize local school districts that educate children from families who reside on federal property within the districts, since those families do not pay local property taxes. In essence,

federal Impact Aid payments serve as payments in lieu of taxes for the children of military families.

5. Under the current regulations of the New Jersey Department of Education (NJDOE), the amount of federal Impact Aid received can be set aside and reserved for one year. Pursuant to N.J.A.C. 6A:23A-8.5(b), in calculating the amount of excess surplus that must be designated in the budget for tax relief in the subsequent year, a district must include an estimate of its unreserved general fund balance as of June 30 of the pre-budget year in excess of the two percent statutory limitation contained in N.J.S.A. 18A:7F-7, but less, among other allowable adjustments, the amount of any federal Impact Aid anticipated to be received in the pre-budget year. In other words, federal Impact Aid is permitted to be held in reserve for one year, as it is set aside as an allowable adjustment to the excess-surplus calculation only in the year in which it is received. However, after being set aside for the initial year, the federal Impact Aid funds flow into the fund balance.

6. On February 11, 2010, Governor Chris Christie signed Executive Order 14, which effectively froze State aid to local school districts in amounts not exceeding excess surpluses and certain portions of reserve accounts available to local school districts. As a result, the NJDOE withheld monthly State aid payments to the District for the period February 2010 through June 2010, based on the District's excess surplus and certain portions of its reserve accounts as they were reported in the Comprehensive Annual Financial Report (CAFR) for fiscal year 2008–2009 as of June 30, 2009.

7. Following the issuance of Executive Order 14, each district was notified of the amount of its withholding and the amount of unanticipated surplus and reserve-account balances on which the allocation was based.

8. The District was notified that its State aid would be withheld in the total amount of $2,141,269, which was based on the NJDOE's calculation that the

District had excess surplus in the amount of $1,672,507 and that twenty-five percent of its reserve-account balances and under-projected-fund balance was $468,762. The sum of those two numbers comprised the State's total State aid withholding of $2,141,269.

9. In calculating the District's excess-surplus figure, 100 percent of which was withheld by the State, the Commissioner of Education (Commissioner) relied upon the District's June 30, 2009, CAFR and Auditor's Management Report (AMR). The CAFR indicated that the District's excess surplus was $1,672,507 as of June 30, 2009.

10. The District was notified that its State aid would be withheld in the total amount of $2,141,269, which was based on the numbers submitted by the District indicating an excess surplus in the amount of $1,672,507, and that twenty-five percent of its reserve-account balances and under-projected-fund balance was $468,762. The sum of those two numbers comprised the State's total State aid withholding of $2,141,269.

11. The calculation of excess surplus began with the adjusted 2008–2009 general fund expenditures ($29,729,860).

12. The adjusted 2008–2009 general fund expenditures ($29,729,860) were then multiplied by two percent ($594,597), and then increased by the allowable adjustment ($2,512,905). The allowable adjustment included, among other things, the total amount of federal Impact Aid received during the 2008–2009 school year ($2,238.903).

13. The sum of the allowable adjustment ($2,512,905) and two percent of the adjusted 2008–2009 general fund expenditures ($594,597) is the maximum unreserved/undesignated-fund balance ($3,107,502), i.e., maximum amount of surplus that could be maintained as such for the upcoming year.

14. The maximum unreserved/undesignated-fund balance ($3,107,502) is then compared to the total unreserved/undesignated-fund balance ($4,780,009) to arrive at the amount of excess surplus. For the District, as of June 30, 2009, the amount of excess surplus was $1,672,507.

15. Thus, the $1,672,507 in excess surplus for fiscal year 2008–2009 did not include the $2,238,903 of federal Impact Aid received during fiscal year 2008-2009, since that amount was an allowable adjustment. It did include federal Impact Aid received during prior years, since those amounts were included in the undesignated-fund balance upon receipt and were thus included in the $4,780,009 that comprised the total unreserved/undesignated-fund balance as of June 30, 2009. Also included in the unreserved/undesignated-fund balance were local levy, State aid, and other miscellaneous revenue.

16. In calculating twenty-five percent of the District's reserve-account balances and under-projected-fund balance, the Commissioner calculated the sum of the reserve-account balances and under-projected-fund balance.

17. The total amount of the District's reserve-account balances was $749,365, which figure was comprised of $699,365 in capital reserve and $50,000 in emergency reserve.

18. The District's under-projected-fund balance was $1,125,682. This amount was calculated by taking the amount of unreserved/undesignated surplus as of June 30, 2009 ($2,656,038) and subtracting the amount of excess surplus budgeted in the 2008–2009 budget ($1,530,356).

19. Next, the sum of the reserve-account balances and under-projected-fund balance ($1,875,047) was multiplied by twenty-five percent, thereby equaling $468,762.

20. Accordingly, the Commissioner advised the District that State aid would be withheld in the amount of $2,141,269 ($1,672,507 + $468,762).

21. Once received by the District, federal Impact Aid revenue is included in the District's general fund.

22. Following the issuance of Executive Order 14, the NJDOE issued "Guidelines for County Review of Requests for Adjustments of Surplus and Reserve Accounts," which allowed local school districts to request an adjustment of the amount of State aid to be withheld pursuant to Executive Order 14. Following this recommended procedure, on February 16, 2010, the Board passed a resolution authorizing and directing the District administration to contest the withholding of its State aid on the grounds that the excess-surplus amounts being withheld were generated by the District's receipt of federal Impact Aid and were protected by federal law on that basis.

23. On February 17, 2010, the District's superintendent of schools, Dr. James Sarruda, sent a letter to the Burlington County executive superintendent, Dr. Lester Richens, requesting an adjustment of the District's State aid reductions on the grounds that such monies were derived from federal Impact Aid.

24. By letter dated February 25, 2010, Dr. Richens approved the District's request in the amount of $1,953,928, thereby recommending restoration of all $1,672,507 withheld as excess surplus and that portion of the other withholding that was based upon a percentage of the $1,125,682 in under-projected-fund balance for surplus activity after June 30, 2009. Dr. Richens found that both withholdings were due to surplus that consisted of unanticipated federal Impact Aid.

25. Dr. Richens's recommendations were forwarded to the Commissioner.

26. By email dated March 26, 2010, Dr. Richens notified Dr. Sarruda that, despite his earlier recommendation, the excess surplus would not be restored.

27. On April 19, 2010, Dr. Sarruda and District business administrator Richard Kaz met informally with Commissioner Bret Schundler and Yutse Thomas to discuss the situation further. The parties discussed the withholding at that meeting, but did not come to a resolution.

28. On June 23, 2010, having received no decision from the NJDOE, the District filed a formal petition of appeal with the Commissioner.

29. On August 17, 2010, the Commissioner sent a letter to Dr. Sarruda notifying the District that its appeal was denied in part and approved in part.

30. In his August 17, 2010, decision, the Commissioner denied the Board's request to restore the $1,672,507 in State aid withheld as excess surplus.

31. The Commissioner approved the District's appeal of the $1,125,682 in under-projected-fund balance based on surplus activity after June 30, 2009, finding that amount to be based on Impact Aid.

32. As a result, the reservation of State aid was recalculated to reflect a restoration of $281,421 ($1,125,682 x 25 percent). In other words, the sum of the District's -balances and under-projected-fund balance as set forth in Paragraph 24 above was recalculated as $749,365 (comprised entirely of $699,365 in capital reserve and $50,000 in emergency reserve) and the twenty-five percent withholding was reduced by $281,421 (from $468,762 to $187,341).

33. The Commissioner's partial restoration of withholdings is reflected in the 2009–2010 General Fund and Special Revenue Fund State Aid Payments—Payment Schedule Final, which was attached as Exhibit A to the Board's petition of appeal. In that final payment schedule from the Division of Finance, the

State's $2,141,269 in State aid withholdings is shown in seven withholdings of $305,896 each from February 2010 to May 2010, while the Commissioner's approved adjustment of $281,421 is reflected in three restorations of $93,807 each from April 2010 to May 2010. The District did not appeal the Commissioner's restoration based upon the $1,125,682 in surplus activity after June 30, 2009.

34. With respect to the contested $1,672,507 of State aid based on excess surplus that the Commissioner refused to restore, Commissioner Schundler reasoned:

> Impact Aid is recorded in the general fund with other sources of revenue such as state aid, tax levy, and miscellaneous revenue. Once received, it becomes part of the overall resources for use by the district. There is no authority, either in New Jersey statute or generally accepted accounting principles (GAAP) to set these funds in a legal reserve. The department does allow impact aid as an adjustment to the excess surplus calculation for the year in which it is awarded and your district utilized an allowance of $2,238,903 Impact Aid for the June 30, 2009 calculation.

35. The District's petition of appeal was never transmitted to the Office of Administrative Law for a hearing. Instead, the NJDOE determined that the Commissioner's letter of August 17, 2010, constituted a "final agency decision" appealable to the Appellate Division.

36. The District thereafter withdrew its formal petition of appeal and filed a timely notice of appeal with the Appellate Division on September 27, 2010.

37. On February 3, 2012, the Appellate Division issued a decision. The Appellate Division reversed the Commissioner's decision to uphold the withholding of $1,672,507 in State aid to the extent that such withholding was based on excess surplus that included federal Impact Aid, regardless of when

the Impact Aid was received or whether it was set aside or comingled in the general fund in prior years.

38. Noting that the Commissioner failed to make any findings as to whether the entire amount of the State aid withholding was attributable to federal Impact Aid, as the Board contended, the Appellate Division remanded for further proceedings to determine how much of the State aid withholding of excess surplus was based on the presence of federal Impact Aid received by the District.

FACTUAL DISCUSSION

James Sarruda, Ed.D., testified that he has been the superintendent in Northern Burlington Regional since August 1993. He has a bachelor's degree, a master's degree and a doctorate from the University of Pennsylvania. He has certifications as an administrator, principal/supervisor, teacher of English, and secondary-school principal. As superintendent, he oversees a $35,000,000 budget. He also has served as an adjunct professor at Georgian Court College and Rowan University. He is the former national director of Region 1 and former New Jersey State chairperson of the National Association of Federally Impacted Schools (NAFIS), which is an organization that addresses issues of schools that receive federal-government appropriations for serving military children. His school district serves grades seven to twelve, and has an enrollment of 1,950. The percentage of military students is twenty-four percent. The school is in the DE factor group, which is an indication of the wealth of a community. DE is fifth out of eight in socioeconomic wealth. Since the military live on federal land that is not taxable, the federal government provides federal Impact Aid to local school districts that serve the military children as a payment in lieu of taxes. Congress determines the amount of Impact Aid. The money is unrestricted, without guidelines as to how to spend it. The Board's job is to anticipate the revenue and build it into the budget. Since Impact Aid is never guaranteed, he has learned not to overestimate the anticipated revenue amount. Doing so could cause layoffs mid-year, which would be disastrous. If the District received no federal Impact Aid, it would be short hundreds of thousands of dollars and it would have to revise programs and reduce costs drastically.

He noted that every computer purchased by the District has been bought with unanticipated federal aid. The aid has also gone to buses, facility work, and supplemental educational materials.

Dr. Sarruda explained the auditor's analysis of federal Impact Aid agreements dating back to 2000. (P-12.) There was a time when the impact aid used to pay 100 percent of the appropriate costs. However, since the 1970s, they have created a distribution formula, so now the District receives a local opportunity threshold (LOT), which is a formula for how the Department distributes Impact Aid. It is a needs-based formula, so the District's portion was at 100 percent. In Northern Burlington, the tax revenue per pupil is approximately $8,800. The District gets a percentage of the LOT. This year, it may be fifty percent, depending on the effects of the sequester. The District will get a payment for the fiscal year and the federal Department of Education will go back and look at available revenue from a prior year and decide if it can distribute more money. The excess is equal to the unanticipated payments from prior years. For instance, they received an extra 2006 payment in the year 2009. The District is not able to anticipate when such payments will arrive. The unanticipated revenue is a windfall that helps the District to be closer to being fully funded for the military students. The funds are moved forward to offset taxes in the next year rather than being accounted for separately. The District did not separate federal funds because the State Department of Education would not allow for it.

Dr. Sarruda continued that, after the executive order came into play, they went back and looked at their process and decided that they could no longer be vulnerable like this to the State claiming the excess. Therefore, they put unanticipated funds into a reserve account as of the 2010–2011 fiscal year. After Executive Order 14, the State withheld $2.1 million from the District. (P-2.) The guidelines of the State say that they can only have a two percent excess of unreserved, undesignated funds. Dr. Sarruda explained how the maximum two percent of excess surplus was calculated. (P-4.) The District had a surplus of $3,107,502. This is the figure that the Commissioner based its withholding on. Although Dr. Sarruda explained in a letter to the executive county superintendent that the surplus consists of federal Impact Aid and prohibits the State

from withholding it, the State still withheld State aid from the District. (P-8.) The executive county superintendent reviewed the matter and then reinstated the State aid withholding by letter dated February 25, 2010. He stated that Impact Aid is not an entitlement, but a program funded by the federal government. Richens approved the request to restore the State aid. (P-9.) It never happened, however, because the Commissioner reconsidered it and sent a letter to that effect. The District then contacted its auditor, who put together an analysis for the ten years prior to the 2009 fiscal year. The auditor concluded that the entire District's surplus can be attributed to the Impact Aid. Dr. Sarruda further testified that Dr. Richens noted that the appeal was not granted, nor was the surplus going to be restored. However, he did not give an explanation, he just denied the request. (P-13.) The Board next met with members of the Department of Education, including Yutse Thomas. They next met with Commissioner Schundler and Thomas, along with the business administrator and Congressman Smith. Dr. Sarruda prepared a PowerPoint presentation that laid out the law, the economic impact, and the federal Impact Aid and explained the consequences of their actions and the impact on State aid and violation of federal law. Dr. Sarruda felt that he had not been heard in the meeting. The Commissioner upheld the decision denying the appeal and advised them to appeal. There was never any full hearing, but the Department treated the Commissioner's letter denying the relief sought as a final decision, which they appealed to the Appellate Division. (P-20.) The Board directed the auditor to issue a full report that sets forth "New Jersey state aid withholding calculations" to understand the years assigned and years received.

On cross-examination, Dr. Sarruda said that Impact Aid comes to the District unrestricted and can be used for any purpose the District deems necessary. A surplus occurs when a district does not spend all of its total revenues for the fiscal year. The surplus is identified in an annual audit which is due out in early December. No portion of the excess was spent in 1998 going through the years in question. The District has an excess surplus every year. Even if the District spends the Impact Aid, it is allowed an adjustment for it. Dr. Sarruda noted how the $2,238,903 in Impact Aid included both anticipated Impact Aid, which they budgeted for, as well as unanticipated aid. The District never disputed the amount of the allowable adjustment.

Richard Kaz, Jr., testified that he has been the business administrator and Board secretary for Northern Burlington Regional School District for over ten years. He is certified as a school business administrator and is responsible for managing the budget, running the transportation department, running the technology department, payroll and personnel divisions, benefits and anything regarding the budget. His involvement with Impact Aid is that he anticipates revenue, when it is received deposits it in the bank, reports it to the Board, and budgets and plans for its use. The Impact Aid goes into a general fund and is intermingled with other revenue. He files an application for aid every year as a state that is federally impacted by having military families. (P-27.) He completed the application in question on October 15, 2012. Each year the federal Impact Aid has not been appropriated. When there is no budget crisis, the District can get a current payment in January. Sometimes, however, it comes in March or April. He is not able to predict the size of the payment. He budgets what he receives for the current year based on years prior. The District does not depend on unanticipated aid. The District's auditor developed an analysis of the Impact Aid received as of June 30, 2009. (P-12.) The $5.88 million that is designated as excess funds is actually unanticipated revenue. Mr. Kaz further explained how there was a $3.1 million permitted surplus in savings in the District. (P-4.)

Mr. Kaz noted that the auditors' report indicated that over ten years the District accumulated $5.88 million in excess Impact Aid. The 2009 fiscal year alone resulted in $1.398 million in excess aid because the District had anticipated only $744,588. When one makes an adjustment to the excess-surplus calculation by subtracting $2.238 million received in just 2009, it comes to $3.6 million in unallocated excess Impact Aid. From that figure the auditor subtracted $1.67 million in withholding, and also subtracted $1.52 million as the fund balance designated for the fiscal year. It was easy for him to track the federal Impact Aid funds by just going through the revenue accounts. Each year the Impact Aid was received as current-year revenue. The Impact Aid can be held in an undesignated unreserved fund, but it does not change its character as Impact Aid. The revenue rolls forward into the general-fund balance from year to year. After the executive order issued and the District's aid was reduced, the District started to reserve federal funds separately. Once they stopped commingling funds they had no excess

surplus for three years. In order to separate their money, they had to get a qualified audit opinion letter because the District was not adhering to accepted accounting principles. They have received qualified audit opinions since 2010. All of the financial statements from the auditors have been filed with the Department and other federal agencies.

Mr. Kaz explained that under general accounting principles, State aid, tax levy funds, and federal Impact Aid go into a fund, and excess surplus is deemed to roll over to lower taxes such that Impact Aid that was not budgeted for 2009 will be used to offset the 2011 budget, for example. The District's accountant was able to track the federal Impact Aid payments setting forth the year received and the year for which they were designated. (P-7, at P-2, at 2.) Impact Aid payments are listed under "totals" and the budgeted amount is set forth for each of the fiscal years in the third row from the top. The grand totals of Impact Aid are set forth at the bottom line of the worksheet. (P-7, at P-2, at 2.) If the District had not received Impact Aid, the fund balance contribution would have been less and would have resulted in cuts in programs or increase of the tax levy to offset the lack of revenue. In his opinion, the District would not have had excess to surplus if it were it not for receipt of unanticipated Impact Aid. This is shown by the fact that since they changed their accounting for it, there has been no excess surplus. The District prepared another general-fund revenue analysis that indicates the percentage of the fund balance that the federal aid represents and the amount of excess surplus generated. (P-21). In 2009 alone, there was $1,672,507 in excess surplus because the District had under-budgeted for federal Impact Aid in the amount of $1,494,315. He explained that the excess surplus is now $0 for 2010–2012 because the District is now reserving federal Impact Aid as part of his accounting practice. This means that the 2009 surplus was a result of not reserving federal Impact Aid. He admitted that the reservation of unanticipated federal Impact Aid is not provided for in Title 18A or Department of Education regulations. It is not part of generally accepted accounting principles (GAAP). The District began to receive a qualified opinion on audits made after 2009, which was the year the State went after the District's federal Impact Aid. The effect of a qualified opinion was that their bond rating with the State of New Jersey could be hurt. Federal Impact Aid was always less than

ten percent each year. (P-21). Before 2009, the District's general fund was a comingled fund with federal aid, State aid, and local aid. Expenditures were paid out of the general fund. He further explained that the excess-surplus calculation for 2009 had a maximum of $3,107,502 that the District could have maintained going into the next year. The total unreserved undesignated-fund balance was greater than the maximum at $4.7 million. The difference is the excess surplus.

Mr. Kaz agreed that the allowable adjustment for $2.2 million adjusted the fund balance for the year 2009. Without the allowable adjustment for Impact Aid, the maximum unreserved amount would be less and the surplus would be lower. The State's withholding was due to the calculation of excess surplus. If the adjustment for Impact Aid received in 2009 lowers the excess surplus, the money is excluded from excess surplus and there has never been a deficit in Impact Aid. The District did not immediately appropriate the extra money; rather, it was budgeted in the next year, which is two years from receipt of it. The amount the District budgeted for in federal Impact Aid was spent in 2009. In 2009, the adjustment was for the entire amount of Impact Aid received. The excess surplus was designated for subsequent years of expenditures.

Rodney Haines, CPA, the District's auditor, testified as an expert in public-school accounting. He does the review of the District's financial statements in line with the guidelines and prepares the CAFR. He prepared the District's excess-surplus calculation that was required by the State in the 2008–2009 school year. (P-7 at P-1.) He explained the document stating that the District had received $5,882,785 in unanticipated federal Impact Aid and $520,481 in unanticipated Department of Defense (DOD) funds over the past ten fiscal years. Those funds were held in the Board's unreserved, undesignated-fund balance after being reserved during the year in which they were received. The amount of State aid withheld pursuant to Executive Order 14, $1,672,507, was based on the District's excess surplus as of June 30, 2009. After 2009, the District began to set aside the federal Impact Aid, which made him give a qualified audit, in that there was an exception to the finance statements in GAAP. There is no legal guidance that allows the District to set up an Impact Aid reserve. The

letter that he issued to the executive county superintendent set forth his position that the excess surplus was unanticipated Impact Aid and DOD funds received over a period of time. His ten-year analysis illustrates the amount of unanticipated revenue from 2001 to 2009. (P-12.) There were two categories of funds, but they were both associated with federal impact students. His conclusion was that Impact Aid and DOD funds put $2,000,000 of funds into the District. He tried to explain this at a meeting with the Department of Education, but the NJDOE attendees were not interested in hearing his concerns. The District then requested that he prepare a thorough report, which he did. (P-7.)

Haines concluded that the District's excess surplus was fully attributable to the Impact Aid. He added that this becomes clear because when the District changed its method of accounting to reserve the Impact Aid, its excess went to zero. Without Impact Aid, it would be hard for any excess surplus to be calculated. In 2009, the District received $1,494,315 in unanticipated federal Impact Aid, which was 7.36 percent of the total revenue. Thus, the amount of Impact Aid associated with the excess surplus is "all of it." At most, Impact Aid made up 9.8 percent of all revenue. In any given year, Impact Aid made up less than 10 percent of revenue for the District.

Haines admitted that his opinion relies on Impact Aid not being spent that year and the assumption that it was not spent in subsequent years. The balance of the fund was comingled. The excess surplus had to be budgeted in subsequent years. Originally, the District budgeted for the excess in order to give tax relief. The District used the fund balance to balance its budget. Haines explained that, although one cannot determine how much of the funds being spent were State aid, State aid is a set figure prior to building the budget so there is not going to be excess. Excess revenue is limited to Impact Aid since it is unknown and miscellaneous. It is the only significant source contributing to revenue. When last asked in his expert opinion, how much of the excess surplus balance as of June 30, 2009, was due to unanticipated federal Impact Aid, he said, "probably all of it." This is despite that the total-fund balance of $9,000,000 decreased by encumbrances, excess surplus from prior years, and other reserve-fund balances brings the excess to $6,400,000. Yet he cannot say that the

$2,600,000 difference is something other than unanticipated federal Impact Aid. If the fund balance is greater than the total dollar amount that is attributable to Impact Aid, the aid had to come from somewhere, so it could not be from Impact Aid. Money had to be in the original budget.

Patricia Scott testified that she has been the director in the Department of Education's Office of School Finance since September 2011. She has been with the Department since 1999. Prior to working at the Department, she worked with a local accounting firm for twelve years doing audits of nonprofit corporations, including private schools. Her responsibilities have included drafting recommendations for school audit procedures and assisting with designing the financial statements used by school districts. School districts must follow GAAP.

Regarding the excess surplus, Scott testified that revenue is categorized as: State aid; local tax levy; federal sources; other local sources; and budget surplus from the prior year. These funds are comingled, that is, placed in the same bucket. They are unrestricted. However, there are limited circumstances in which a particular expenditure or transfer can be traced to Impact Aid revenue. A district can transfer Impact Aid without Commissioner approval. One can tell if it is attributable to Impact Aid by looking at prior statements.

Ms. Scott continued, testifying that districts can carry a surplus in the budget subject to the limitation of twenty percent of expenditures. The budget excess must go to the subsequent year. It was built into the software. The purpose of the statute is that if a district raised too much money, it has to go back into the budget. The allowable adjustments are those allowed by code to the expenditures. They allowed an adjustment for extraordinary aid. Impact Aid was included in the calculation. It does not matter if the aid was unanticipated; the district still gets the full adjustment. She further explained that the legal reserves are those that are statutory, debt service and GAAP, where there are external constraints that are legally binding. If there was a surplus, the State would withhold State aid in such a way that the District had funds to offset it. Ms. Scott testified that N.J.A.C. 6A:23A-13.3(d)(6) permits a district to transfer

funds from its fund balance or under-budgeted revenue and use the funds without Commissioner approval, if the funds were excluded as an allowable adjustment to the District's excess-surplus calculation in the pre-budget year. She explained that at one point $6,000,000 had already been adjusted out and was sitting in the fund balance.

On cross-examination, Ms. Scott testified that she had no involvement in preparation for auditing of a school district budget. She agreed there was no law providing for a reserve for federal Impact Aid. Although she knew that 110 districts appealed from Executive Order 14, withholding of excess surplus, she did not recall how many had their aid restored. She testified that Impact Aid set aside in initial receipt falls to surplus.

FINDINGS OF FACT AND CONCLUSION OF LAW

The Federal Impact Aid Law was designed to strengthen and improve elementary and secondary schools educating "children who reside on Federal property and whose parents are employed on Federal property." 20 U.S.C.A. § 7701. The law allows for payment in lieu of property taxes. The law prohibits states from considering the amount of federal Impact Aid provided to local school districts in determining eligibility for and the amount of State aid to local school districts. 20 U.S.C.A. § 7709. Specifically, the law prohibits a state from offsetting federal Impact Aid by reducing its own State aid to the local district. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 85, 127 S. Ct. 1534, 1538, 167 L. Ed. 2d 449, 456 (2007). Because the Appellate Division held that "the Commissioner lacked authority under the Act to reduce state aid by offsetting it against the district's 'excess surplus' to the extent that 'excess surplus' included Impact Aid, even if not set aside in a 'legal reserve,'" it directed the Commissioner to make fact findings through this court to determine how much of the $1,672,507 that the State withheld as excess surplus from the June 2009 CAFR was the result of federal Impact Aid received by the District.

Petitioner asserted that its excess surplus is comprised entirely of unanticipated Impact Aid for ten years between 2000 and 2010. In support of its assertion, petitioner

presented the report of its auditor, Haines, which concluded that "impact aid is a major contributor to any fund balance being on hand." After being qualified as an expert in public accounting, Haines gave his expert opinion to a reasonable degree of accounting certainty that "probably all" of the $1,672,507 excess surplus was due to unanticipated Federal Impact Aid." He was less equivocal in stating that when the District changed its method of accounting to reserve the Impact Aid, its excess went to zero, so without Impact Aid, it would be hard to calculate any excess surplus. Haines's opinion on that point was not refuted by the respondent's witness. However, the Department counters that, pursuant to Executive Order 14, the Department withheld $1,859,848 in State aid in the 2010 fiscal year and beyond, and that withholding is the reason for the depletion of the District's excess surplus, not the change in accounting method. No witness from the Department testified to that opinion. Further, despite that argument, the Department had no alternative figure for the amount of surplus attributable to federal Impact Aid. Rather, it asserts that it is entitled to retain the entire surplus that it took regardless of the Appellate Division opinion. The record does not support this. I **FIND** the expert opinion of Haines to be credible and proven by his auditor's report. The withholding of State aid was not shown by substantial credible evidence in the record to account fully for the excess surplus going to zero after the change in accounting. I **FIND** that the District would have had less money in excess surplus as of June 30, 2009, if it did not receive unanticipated federal Impact Aid, and the reason the excess surplus went to zero after 2010 was due to the change in accounting method.

The Department focused greatly on the funds that the Department returned as an allowable adjustment to the 2009 excess-surplus calculation. However, as it readily admits, the allowable adjustment was only for the unanticipated Impact Aid for the 2009 year, not the previous ten years totaling $5,882,785 of Impact Aid. The Department continues to assert the position the Commissioner originally took that was reversed by the Appellate Division. It continues to assert that because the impact aid was placed in the general fund and comingled with the other revenue streams, it became part of the overall resources for the District, and the District was not authorized to set aside those funds in a legal reserve. The Department asserts that the District received the only adjustment to the excess-surplus calculation to which it was entitled, which was for the

year 2009. This was rejected by the Appellate Division. The adjustment for Impact Aid in any given year does not change the fact that the entire excess-surplus balance being rolled over from year to year below the statutory adjusted two percent maximum amount is still derived from federal Impact Aid received in previous years. The fact that the unanticipated Impact Aid was not separated does mean that one cannot trace the total amounts in order to reach the conclusion that the excess surplus is attributable to unanticipated Impact Aid. This was testified to by business administrator Kaz and reiterated by Mr. Haines. The State's witness, Ms. Scott, also had no other explanation for where the unanticipated federal Impact Aid from prior years would go, other than the excess surplus in the June 30, 2009, CAFR and AMR. Thus, I **FIND** that the excess surplus consisted entirely of federal Impact Aid.

As set forth above, the Federal Impact Aid Law prohibits a state from providing less State aid to a local school district than it would have received if the district did not receive federal Impact Aid. 20 U.S.C.A. § 7709(a)(2). Although there is no way to determine which funds of the revenue stream are being used to pay for any District expenditure, the fact remains that the genera-fund balance on hand at the end of each fiscal year is higher as a result of the amounts of federal Impact Aid received in that fiscal year and in prior years. I therefore **CONCLUDE** that the petitioner proved by a preponderance of the credible evidence that the $1,672,507 in withheld excess-surplus was attributable to unanticipated federal Impact Aid.

ORDER

Based on the foregoing, I **ORDER** that the Department of Education restore $1,672,507 in State aid that was withheld in the 2010 fiscal year in violation of the Federal Impact Aid Law.

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

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

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

September 25, 2013
DATE

Lisa James-Beavers
LISA JAMES-BEAVERS, ALJ

Date Received at Agency: September 26, 2013

Date Mailed to Parties: September 26, 2013

cmo

APPENDIX
EXHIBITS

For Petitioner:

P-1 Executive Order No. 14, issued on February 11, 2010

P-2 NJ State Aid Withholding Calculation

P-3 Final Payment Schedule

P-4 Excess Surplus Calculation

P-5 State-generated spreadsheets listing the withholding of State aid and adjusted withholding of State aid to Burlington County school districts, dated October 7, 2010

P-6 Budgetary Comparison Schedule for Fiscal Years ending June 30, 2009, and 2008

P-7 Auditor's Report entitled "Northern Burlington County Regional School District – Impact Aid Information" (in separate binder)

P-8 Correspondence from Dr. James Sarruda, Superintendent of Schools, to Dr. Lester Richens, Executive County Superintendent, dated February 17, 2010

P-9 Correspondence from Dr. Lester Richens, Executive County Superintendent, to Dr. James Sarruda, Superintendent of Schools, dated February 25, 2010

P-10 E-mail Correspondence from Eloi Richardson, former Executive County Business Administrator, to Patricia Scott, Director, Office of Fiscal Policy and Planning, New Jersey Department of Education, dated March 8, 2010

P-11 Correspondence from Rodney R. Haines, CPA, District Auditor, to Dr. Lester Richens, Executive County Superintendent, dated March 22, 2010

P-12 Ten-Year Analysis of Federal Impact Aid, prepared by Rodney R. Haines, CPA, District Auditor

P-13 E-mail correspondence from Dr. Lester Richens to Dr. James Sarruda, dated March 26, 2010

P-14 Superintendent's PowerPoint presentation for the April 19, 2010, meeting

P-15 Verified Petition of Appeal, filed by the Board on or about June 23, 2010

P-16 Commissioner's decision, dated August 17, 2010, in the form of a letter correspondence from Commissioner Schundler to Dr. James Sarruda

P-17 Correspondence from Shannon M. Ryan, DAG, to M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, dated September 20, 2010

P-18 Correspondence from Shannon L. Hudak, Esq., to M. Kathleen Duncan, dated September 22, 2010

P-19 Notice of Appeal and Civil Case Information Statement filed on or about September 28, 2010

P-20 Appellate Division Decision, N. Burlington County Reg'l Sch. Dist., Bd. of Educ. v. Schundler, A-0607-10T3 (February 3, 2012)

P-21 "General Fund Reserve Analysis" prepared by Richard Kaz, Business Administrator

P-22 Petitioner's Proposed Joint Stipulation of Facts on Remand (from Board)

P-23 Respondent's Proposed Joint Stipulation of Facts on Remand (from NJDOE)

P-24 Curriculum Vitae of Dr. James Sarruda, Ed.D.

P-25 Curriculum Vitae of Richard J. Kaz, Jr., Business Administrator

P-26 Curriculum Vitae of Rodney R. Haines, CPA, RMA, PSA, School Auditor

P-27 Impact Aid Payment Vouchers from U.S. Department of Education

For Respondents:

R-1 Correspondence from Dr. James Sarruda to Lucille E. Davy, Commissioner of Education, dated March 4, 2010

91-14

M.K., on behalf of minor children, V.K. and N.K.,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner filed an appeal of the determination of the Union County Executive Superintendent of Schools (County Superintendent) that she and her children, M.K. and V.K., were not homeless and therefore not entitled to a free education in the Cranford school district during the 2012-2013 school year; further, the County Superintendent identified Trenton as the family's district of residence. The children were enrolled in Cranford schools in August 2012 and attended until January 22, 2013. The respondent Board filed a counterclaim for tuition reimbursement. The matter was transmitted to the OAL for hearing.

The ALJ found that: telephone conferences in this matter were held in April 2013, during which petitioner contended that the family continued to be homeless, but that the children had begun to be home schooled after January 22, 2013; petitioner agreed verbally to settle the appeal and counterclaim, and counsel for respondent agreed to present a draft settlement for petitioner's signature; thereafter, counsel for respondent advised that petitioner would not agree to the settlement; petitioner failed to make herself available for a mandatory telephone conference scheduled for December 2013 despite appropriate notice of the date and the fact that petitioner's failure to make herself available for the conference would subject her appeal to dismissal for failure to prosecute. The ALJ concluded that there is just cause to dismiss the appeal with prejudice because of petitioner's lack of communication and cooperation; further, the ALJ concluded that the counterclaim for tuition should also be dismissed because petitioner's children only attended Cranford schools from their Trenton residence for a short period of time, which can be deemed transitional.

The Commissioner concurred with the ALJ that the matter is appropriately dismissed for failure to prosecute, and adopted the Initial Decision as the final decision in this matter.

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

February 4, 2014

OAL DKT. NO. EDU 03968-13
AGENCY DKT. NO. 34-2/13

M.K., on behalf of minor children, V.K. and N.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CRANFORD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner adopts the Initial Decision as the final decision for the reasons set forth therein. Accordingly, the petition is dismissed for failure to prosecute, and the Cranford Board of Education's counter-claim for tuition is also dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/04/14

Date of Mailing: 2/05/14

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION DISMISSAL

OAL DKT. NO. EDU 03968-13

AGENCY DKT. NO. 34-2/13

M.K. ON BEHALF OF MINOR CHILDREN

V.K. AND N.K.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF CRANFORD, UNION COUNTY,

Respondent.

M.K., petitioner pro se

Anthony P. Sciarrillo, Esq., for respondent Board of Education Cranford Township (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Record Closed: December 18, 2013 Decided: December 20, 2013

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner is the parent to two minor children who were previously enrolled in the school district of the Township of Cranford Board of Education (BOE). After the family claimed to have become homeless but entitled to a free education in Cranford, the County Superintendent entered a determination after investigation that the family was not homeless but residing in Trenton. Therefore, the children were no longer entitled to

remain in Cranford schools. Petitioner appealed that decision and the BOE filed a cross-claim for tuition reimbursement. The BOE filed an Answer and Counterclaim to the petition asserting a demand for tuition reimbursement from petitioner. The matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -13 and N.J.S.A. 52:14F-1 to 15.

I initiated a case management conference with the parties telephonically on April 5, 2013. On that date, the petitioner explained, albeit not under oath or subject to cross-examination, that she had registered the children in Cranford in August 2012 because she, her three children[i] and the children's father (J.K.) had moved into the home of her guardians. Both she and her partner had lost their jobs a few years ago. Apparently, on or about New Year's Eve, a family fight broke out and they all left. J.K. took the youngest child to stay with his parents and petitioner and the other two children moved in with some friends. The couple does own a home in Trenton but it might have been in foreclosure. From the end of the holiday school break until on or about January 22, 2013, petitioner drove the children from Trenton to Cranford every day for school. Petitioner then stated that she is now home schooling the children.

We established another telephonic conference for April 19, 2013. At that time, petitioner still maintained that they were homeless for the month of January but agreed to settle the appeal and counterclaim. Counsel for respondent agreed to present a draft settlement agreement to petitioner. Thereafter, in response to inquiries by my office, counsel for respondent advised the office that he had sent petitioner a proposal but could not get her agreement to it. Since that time, I have tried to communicate with petitioner.

Although not on the record or under oath, petitioner has on more than one occasion told myself or my secretary that her children are not attending Cranford schools, that the case can be closed but she refused to sign the draft settlement or even to confirm in writing her withdrawal of the matter, and I so **FIND**. Accordingly, on November 21, 2013, I scheduled a mandatory telephonic conference call for December

[i] The youngest child was just five years old so was not yet registered for school.

18, 2013. Petitioner was advised of the date and also advised that her failure to make herself available for that conference would subject her appeal to dismissal for failure to prosecute. On that date and time, petitioner again failed to make herself available, and has to date failed to explain her absence or in any manner to communicate with either counsel or the OAL.

I **CONCLUDE** that there is just cause, under all the circumstances, to dismiss this appeal with prejudice because of appellant's lack of communications and cooperation; however, I also **CONCLUDE** that there is good cause to also dismiss the counterclaim for tuition because it would appear that petitioner's children only attended Cranford schools from their Trenton residence for a short period of time, which could be deemed transitional.

ORDER

It is **ORDERED** that the appeal of petitioner M.K. be deemed dismissed with prejudice for failure to prosecute. Based upon the above findings, however, it is further **ORDERED** that the cross-claims of the Board of Education of the Township of Cranford also be dismissed.

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

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

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

Gail M. Cookson

December 20, 2013
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: December 20, 2013

Laura Sanders

Date Mailed to Parties: December 23, 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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93-14

#93-14

GABRIEL NAZZIOLA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the non-renewal of his employment contract as a principal in respondent's school district for the 2011-2012 school year, and sought reinstatement to that position. Petitioner had been appointed as principal in 2010 after many years of employment as a teacher in the district; the Board contended that petitioner's non-renewal was performance-based and linked to his alleged mishandling of an April 2011 incident in which a student brought a pellet gun to school. Petitioner asserted that the Board's actions in non-renewing his contract were driven by political motivations, and were specifically in response to petitioner's failure to follow an alleged patronage directive from a community leader.

The ALJ found, *inter alia*, that: in the course of his employment as principal, petitioner complied with requests made of him by community leaders regarding personnel recommendations, and modified his own personnel recommendations to his superintendent based on the choices of others; petitioner also supported community and political events he was encouraged to attend, and on one occasion in March 2011, failed to comply when requested not to attend a fundraiser for political reasons; although petitioner alleges that he felt his job security was threatened in retribution for not complying with a politically motivated directive, neither party presented testimony from the Board and community members who allegedly made the threats; unrelated to the foregoing, petitioner failed to follow district policy and procedures when a student brought a pellet gun to school in April 2011; such failure to follow the district's weapons policy was potentially harmful to students and staff, and was sufficient in and of itself to justify petitioner's non-renewal as principal; petitioner's three evaluations for the 2010-2011 school year documented declining confidence in his leadership as principal; and a school board has virtually unlimited discretion in hiring or renewing non-tenured staff. The ALJ concluded that the Board's action in non-renewing petitioner's contract for the 2011-2012 school year was not arbitrary, capricious or unreasonable, and petitioner was given a written statement of reasons why he was not offered another contract. Accordingly, the petition was dismissed.

Upon independent review, the Commissioner found no reason to reject the credibility determinations of the ALJ, and concurred with the ALJ that the Board's decision to non-renew petitioner's contract was not arbitrary, capricious or unreasonable given the missteps documented in petitioner's evaluations and other work related documents. The Commissioner also determined that petitioner failed to show a nexus between the community leader who made political requests of him and the district superintendent who recommended his non-renewal. Accordingly, the Commissioner adopted the Initial Decision as the final decision in this matter.

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

January 31, 2014

OAL DKT. NO. EDU 10984-11
AGENCY DKT. NO. 210-8/11

GABRIEL NAZZIOLA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,	:	
RESPONDENT.	:	

Petitioner in the instant controversy has challenged the respondent board of education's decision not to renew his employment as principal of one of the district's elementary schools. After a fact-finding hearing in the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) assigned to the case found that respondent's decision was not arbitrary, capricious, unreasonable or – as petitioner alleged – improperly driven by political motivations. Upon review of the record, Initial Decision of the OAL, petitioner's exceptions and respondent's replies thereto, the Commissioner is constrained to agree with the findings and conclusions of the ALJ.

At the outset, the Commissioner notes that in a case – such as the instant one – where resolution of the controversy relies heavily on the analysis of the facts presented by the parties, the head of an agency must give substantial weight to the ALJ's credibility determinations and to all findings based on these determinations, since it was the ALJ who had an opportunity to hear the testimony of the witnesses and to assess their demeanor. See *Clowes v. Terminix International, Inc.*, 109 *N.J.* 575, 587 (1988); *Renan Realty Corp. v. Department of Community Afairs*, 182 *N.J.* Super. 415, 419 (App. Div. 1981). The ALJ was further able to make determinations about the viability of each witness's testimony and about both the overall internal consistency of witness testimony, and its

consistency with all of the evidence presented at the hearing. *See, e.g., Congleton v. Pura-Tex Stone Corp.*, 53 *N.J. Super.* 282, 287 (App. Div. 1958). Thus, the Commissioner will not reject the ALJ's determinations concerning the credibility of witness testimony in this controversy unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record. *S.D. v. Division of Medical Assistance and Health Services and Monmouth County Board of Social Services*, 349 *N.J. Super.* 480, 484 n.1 (App. Div. 2002). The Commissioner can make no such determination here.

To the contrary, the Commissioner's independent consideration of the facts of this case leads to the same conclusions as those drawn by the ALJ in the Initial Decision. First, it is undisputed that petitioner had already been warned in the second of three evaluations in his first year as a principal that he needed to improve his management and relationship skills. Second, shortly after that second evaluation, petitioner failed to properly handle an incident in which a student brought a weapon to school. Third, by the end of the school year, multiple parents had registered complaints about aspects of petitioner's performance as principal.

The above three factors present a reasonable basis for a non-renewal, but the pellet gun incident, in particular, lends legitimacy to respondent's non-renewal decision. At 9:30 a.m. on April 15, 2011, petitioner learned from a student's mother that her son had brought a pellet gun to school. Petitioner retrieved the gun from the student, gave it to his mother to bring home, and sent the student back to class. At least five hours passed before petitioner took the actions required by district policy, *i.e.,* notification of the police and the superintendent of schools, relinquishment of the gun to the police, and segregation of the student from the rest of the student body, pending a psychological evaluation.

In his exceptions, petitioner attacks the Initial Decision on two fronts. First, he minimizes respondent's stated reasons for the non-renewal. Petitioner attempts to minimize the

significance of the pellet gun incident by 1) asserting that he had not been given the district policy on weapons, and had not received training on same, and 2) alleging that the district superintendent was equally ignorant of the policy. Petitioner also casts aspersions on his third and final evaluation for the year by noting that it was "the mirror opposite" of his first evaluation, in which he was praised for sound judgment and ability to be a leader.

The latter argument is meritless, as certain flaws in petitioner's performance only became apparent over the course of time, *e.g.*, the parent complaints and the pellet gun incident. Nor is the Commissioner persuaded by petitioner's attempts to minimize the significance of the pellet gun incident. When an incident as grave as the discovery of a weapon in school comes to the attention of a school administrator, the prudent response is immediate notification of the district superintendent and authorities, and immediate reference to district policy if the administrator is not already familiar with that policy. Ignorance is not an acceptable excuse in regard to a policy as important as response to the discovery of a weapon in school. The onus is on the administrator to apprise himself of the relevant policy. Whether or not the district superintendent was familiar with the policy is not germane to the instant controversy, since petitioner waited over five hours to contact him. *See,* Petitioner's Exhibit P-10.

Petitioner does not seem to appreciate the risk to student and staff safety posed by his actions. Giving the gun back to the student's mother could have led to the student's continued access to it. Failing to require the student to be evaluated left undetermined whether the student was experiencing difficulties that could pose a risk to other students – and staff. Failing to notify the authorities of a weapon opened the district to liability. In sum, petitioner's actions and his lack of appreciation of the gravity of the incident demonstrate a lack of good judgment.

As regards petitioner's alternate argument – *i.e.*, that political considerations had underlain his nonrenewal – initially, the Commissioner emphasizes that such political machinations have no place in the administration of public schools and notes that petitioner's own cooperative

behavior as a school administrator in that regard was contrary to the spirit and the letter of the School Ethics Act. See *N.J.S.A.* 18A:12-22 and 12-24b. Review of the evidence as a whole, however, leads the Commissioner to the conclusion that petitioner did not make a showing that political motivations were a basis for the non-renewal. Most importantly, petitioner did not prove a nexus between political leader Yanuzzi and Superintendent Picardo, the individual who was responsible for making – and who did make – the non-renewal recommendation adopted by the respondent Board of Education. Petitioner had the right to call both Picardo and Yanuzzi to question them about their statements, actions and possible interactions, but did not do so. The Commissioner also notes that petitioner maintains that he did Yanuzzi's bidding in all but one instance, *i.e.*, attendance at a fund raiser for the ailing mother of a student. Thus, the petitioner urges that he was non-renewed for one diversion from Yanuzzi's directions. The Commissioner finds this to be a less likely explanation for the non-renewal than the missteps documented in petitioner's evaluations and other work related documents.

Accordingly, the Commissioner adopts the Initial Decision of the OAL. The petition is herewith dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 1/31/14

Date of Mailing: 2/06/14

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10984-11
AGENCY DKT. NO. 210-8/11

GABRIEL NAZZIOLA,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner (Monroe Centre at Forsgate, attorneys)

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

Record Closed: July 31, 2013 Decided: December 16, 2013

BEFORE **EVELYN J. MAROSE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Gabriel Nazziola (Nazziola), was not recommended for a second renewal of his employment contract as the principal of School #5 for the 2011-2012 by Joseph Picardo (Superintendent Picardo), the superintendent of the Belleville Public

Schools. After receiving a statement of the reasons for his non-renewal, Nazziola requested a hearing before respondent, the Belleville Board of Education (Board). At the hearing, the Board chose to sustain Superintendent Picardo's decision, and Nazziola's contract was not renewed.

On July 26, 2011, Nazziola petitioned the Commissioner of Education challenging the Board's decision, and the Commissioner transmitted the matter to the Office of Administrative Law (OAL) as a contested case on September 15, 2011. The Board filed a Motion for Summary Decision on January 27, 2012. After considering the opposition filed by Nazziola, a reply submitted by the Board and oral argument, the Motion for Summary Decision was denied. Hearings were conducted on September 24, 2012, November 30, 2012, January 7, 2013, and May 1, 2013.

FACTUAL DISCUSSION AND FINDING OF FACTS

Numerous facts are not in dispute. Nazziola has been employed by the Board for more than twenty years. He was appointed to the position of principal to Belleville Elementary School No. 5 by the Board based on the recommendation of Superintendent Picardo. (P-1, P-2, P-3.) Nazziola's performance was evaluated by Superintendent Picardo on December 8, 2010, and April 7, 2011, through the use of "Administrators – Evaluation" forms. During the first evaluation, dated December 10, 2010, he obtained "Meets District Standards" (the highest mark) in thirty-three categories; "Suggested Improvements" (the second-highest mark) in four categories; and three "Non-applicable" marks. (P-4.) During the second evaluation, dated April 7, 2011, he received "Meets District Standards" in twenty-eight categories; "Suggested Improvements" in two categories; and three "Non-applicable" marks. (P-5.) He received no "Unsatisfactory" marks during either evaluation.

On April 15, 2012, at around 9:30 a.m., Nazziola was told by a mother of one of his students that her son had brought a pellet gun to school. Nazziola called the student down to his office. The student had a pellet gun in his bookbag. Nazziola gave the pellet gun to the mother and permitted the student to return to his classroom. At approximately 2:30 p.m. on that same date, Nazziola called the Belleville Police

Department (Police Department). Police officers came to the school and questioned the mother, who had been asked to return to school. An incident report and complaint were prepared by the Police Department. Nazziola memorialized his handling of the pellet gun incident in a letter to the superintendent, dated April 15, 2011.

On April 29, 2011, Superintendent Picardo sent Nazziola a letter detailing his concerns about Nazziola's handling of the pellet-gun incident. Among other things, the superintendent stated that Nazziola did not immediately inform the police or the superintendent about the incident, he allowed the parent to remove the weapon from the premises, he did not secure and document possession of the weapon, he did not report the incident to the superintendent in a timely manner, and he was not aware that the student should have been removed from the regular education program and provided with home instruction until the results of a psychiatric evaluation and a Board hearing could be conducted. (P-11.)

On May 11, 2011, Superintendent Picardo completed an End-of-Year Evaluation for Nazziola. He received eight "Does Not Meet District Standards" marks; eleven "Meets District Standards" marks; and zero "Exceeds District Standards" marks. (P-6.) On May 12, 2011, the superintendent notified Nazziola that his contract as principal at School No. 5 would not be renewed for the 2011-2012 school year. On May 13, 2011, Nazziola requested a statement of reasons for his non-renewal. In a letter dated June 13, 2011, the superintendent stated the decision to non-renew Nazziola's contract was based upon the following five reasons:

> a. need to demonstrate positive communication with parents, students and staff,
> b. does not effectively communicate and utilize resources to improve management skills,
> c. does not effectively utilize processes for gathering, analyzing and using data for decision making,
> d. does not demonstrate and or communicate problem solving [sic] strategies, and
> e. compromised the safety and well being of students and staff by failing to comply with state statute and district weapon policy.
>
> [P-11.]

On June 14, 2011, petitioner requested a public Donaldson Hearing before the Board. At the time of the hearing, Nazziola made a presentation to the Board. The Board did not make a motion to renew Nazziola's contract. On July 18, 2011, a letter was sent to Nazziola by Alfonse DeMeo, Esq., indicating that Superintendent Picardo's decision to not renew petitioner was upheld by the Board. Nazziola is presently a music teacher in the middle school.

In addition to addressing the foregoing facts, the witnesses stated the following during the hearing:

Nazziola

Nazziola had a pending application for principal in the Spring of 2010. He had previously applied for various principal positions in Belleville but was not selected. In June, though not a planned meeting, Nazziola had the opportunity to speak with a Board member, Joseph Longo (Longo), in the presence of another district teacher, Eugene Moriello (Moriello). They discussed various "openings" in the school system including superintendent and the principal position for which Nazziola applied. Nazziola stated that the essence of Longo's statements to him were that Nazziola had a good chance of becoming principal and that Richard Yanuzzi (Yanuzzi) would contact his father through the Optimist Club, in which his father and Yanuzzi were both members. Yanuzzi would tell his father if Nazziola was being appointed to the principal position.[1] The Optimist Club was a community service organization that, among things, provided scholarships to graduating Belleville seniors. Yanuzzi was also chairperson of the Belleville Athletic Council, which Nazziola asserted was a recognized committee by the Board.

In August 2010, Longo, Yanuzzi, and Board President Peter Zangari met with Nazziola and his father in a Belleville Deli. During that meeting, Yanuzzi pulled out a piece of paper containing two names and told Nazziola, "These are the people you are

[1] In fact, it was Superintendent Picardo that telephoned Nazziola and told him that he was selected to be principal of School #5.

going to recommend for the two open physical education teacher positions." That summer, after Nazziola had been appointed principal, he served on a committee to interview candidates for two open physical education positions and one open music position. The named individuals were two of the nine candidates reviewed. Neither candidate was recommended by the committee for hiring. In fact, one of the named candidates received the lowest of all committee ratings.

Nazziola asked Yanuzzi where he "got the names from," informed him that neither of the two candidates was among the best interviewees, and that another candidate, also a town resident, was found to be the best candidate. Yanuzzi informed him that the "best candidate" was not of the "right side of the fence." The candidates that Yanuzzi identified were "on their side" and Nazziola was to recommend those two candidates.

After being so advised by Yanuzzi, Nazziola spoke with the other members of the selection committee members individually and basically asked them, "Did you - I guess you got the call also." The committee members smiled and nodded their heads, indicating that they received the hiring/recommendation instruction that Nazziola had received from Yanuzzi. Nazziola said that, fearing retribution, he forwarded the two names of the candidates identified by Yanuzzi as his own recommendations. One of those candidates began working at School #5, where Nazziola was principal, that September.

Later in August 2010, Longo telephoned Nazziola's cell phone regarding an opening for a music teacher. He told Nazziola that he was to recommend a certain candidate for the job. Again, the candidate that Longo wanted him to recommend was not the first choice of the selection committee or Nazziola. Nazziola began to feel uneasy because this was the second interaction that he had where someone was dictating who he should hire and that recommendation was not based upon qualifications of the candidate. Nazziola told Longo that there was somebody else that he was going to recommend. In response, Longo told him that the previous person in his position was removed for not recommending "who they asked her to recommend for a teaching position." Nazziola assumed that if he did not comply, he would lose his job.

He recommended the candidate Longo identified in his cell call and that person was the successful job candidate.

Upon cross-examination, Nazziola acknowledged that the Board made appointments to education positions at the recommendation of the superintendent. Any parents, teachers, or administrators who interviewed candidates provided their recommendations to the superintendant for consideration, but the superintendent was not obligated to chose a candidate based upon the recommendations that he received.

On September 7, 2010, Yanuzzi telephoned Nazziola and asked him if he received an invitation to the "Hall of Fame" dinner, and if he planned to go. Nazziola attended the event, although he thought the $125 event fee was expensive, because he felt he "had to go" after Yanuzzi's called him. Most, if not all of the other principals, also attended the event, that was sponsored by the Belleville Athletic Council that Yanuzzi chaired.

Around October 2010, Longo approached Nazziola about a teacher who was filling a temporary position caused by a maternity leave. Nazziola told Longo that he had been in the teacher's classroom several times and thought the temporary teacher was doing an excellent job. Longo told Nazziola to distance himself from her and not to recommend her because one of her family members failed to make a political contribution when asked to do so.

Around February 11, 2011, Yanuzzi requested that Nazziola attend a fundraising dinner for the re-election of Longo and another member to the Board. He again attended because he felt that he had no other choice.

Around March 1, 2011, Yanuzzi called Nazziola and told him that he should not support a PTA fundraiser for a third-grade student at School No. 5 whose mother had terminal cancer, because the event was being organized by PTA President Carmen Vellon (Vellon), whose husband was an opposing candidate from Longo for the Board. Nazziola, who initially proposed having the event, for the first time failed to follow Yanuzzi's directions and supported the fundraiser.

Nazziola received an invitation to a fundraiser for the re-election of Longo. Though he did not receive a telephone call directing him to support the fundraising, Nazziola remembered the previous telephone call that he received from Yanuzzi regarding the Hall of Fame event and felt compelled to attend. Nazziola does not remember his exact contribution, but it was in the range of $75 to $100. Nazziola saw other principals and administrators at the fundraiser.

Fearing retribution, Nazziola did not report any of the requests that Longo or Yanuzzi made to him regarding school personnel, though he did discuss the requests with the athletic director.

All of Nazziola's evaluations as principal took about ten minutes. At his first evaluation, Superintendent Picardo told Nazziola to keep up the good work, that he was hearing good things about him, and that he was doing a great job. (P-4.) At his second evaluation, Superintendent Picardo again told Nazziola that he was doing a good job. The only suggestions that he received were in the categories of "fostering positive student/parent/teacher relationships" and "improving management skills." (P-5.) No teacher had ever filed a grievance against Nazziola. A few parents had complained to him in person or on the telephone during the school year, but not relating to Nazziola himself. Most of the complaints were related to disagreements with their child's teacher. One complaint concerned bullying. Nazziola believed that he handled all of the complaints to the satisfaction of the parents. He did not learn until June 2011 that the parent who complained that his child was being bullied was dissatisfied with the manner in which Nazziola handled his complaint. (P-7.) At his third evaluation in May 2011, Superintendent Picardo told Nazziola, "You just imploded." Nazziola was in shock and signed the evaluation "not in agreement." Nazziola acknowledged that an incident occurred in his school regarding a pellet gun on April 15, 2011, but he did not believe that his handling of the incident merited the evaluation that he received in May.

Nazziola testified in detail about how he handled the incident. After confirming that a student had a pellet gun in his backpack, Nazziola took the gun from the student, gave it to his mother, and sent the student back to class. Then he looked for the policy

that related to a student and weapons in the building, which he had to obtain online. (P-8.) When he found the policy, it was already later in the afternoon. The time it took him to locate the policy online was impacted by the regular principal duties that Nazziola performed that day.

Once he located and reviewed the policy, Nazziola contacted the Police Department and called Superintendent Picardo. Nazziola told Superintendent Picardo about the incident and informed him that the student had to be suspended until there was a board hearing. Superintendent Picardo told Nazziola, "I have to check that. I'll get back to you." Thereafter, Nazziola's secretary, at his direction, contacted the student's mother and asked her to bring the pellet gun back to the school. By the time the mother arrived at school, police officers were also at the school and the gun was given to the police. Later that day, Superintendent Picardo advised Nazziola to document the incident in writing. Nazziola documented the incident that day and forwarded it to Superintendent Picardo. (P-9.)

On April 29, 2011, Nazziola received a letter from Superintendent Picardo stating that he had great concerns with the manner in which Nazziola handled the pellet gun incident on April 15, 2011. In the letter, Superintendent Picardo stated that Nazziola did not act in accordance with Board's policy for the following reasons:

1. He did not immediately inform the police or the superintendent about the incident.
2. He allowed the parent to remove the weapon from the premises.
3. He did not secure and document the possession of the weapon.
4. His reporting of the incident to the superintendent was not in a timely manner.
5. He was not aware that the student was to be removed from the regular education program and provided with home instruction until the results of a psychiatric evaluation and a Board meeting could be conducted.

[P-10.]

Superintendant Picardo further stated that Nazziola's disregard of the policy had the potential to be detrimental and harmful to students and staff, and that he created a

situation that placed the District at financial liability and severely compromised the safety of students and staff. (P-10.)

In rebuttal, after Rivera, current Board president, testified Nazziola stated that the superintendent had never complained to him about how he interacted with parents. He did acknowledge that there were two occasions that the superintendent called Nazziola and asked how he handled a situation with a parent. However, after they conferred, the superintendent did not indicate that Nazziola's handling of the interaction was an issue or problem. Nazziola did not believe that the interactions reflected negative parental communication, but rather incidents that he appropriately handled as principal.

Also in rebuttal of Rivera's testimony, Nazziola described an incident wherein he went into his office and did not continue to communicate with a parent. The incident occurred after a snow fall, when the line to drop off students at school was particularly jammed. One father, whose son was marked tardy, came into the school office in an angry rage. He accused Nazziola of failing to shovel the street. When Nazziola told the parent that it was not his job to clean the streets of snow, but the job of the town, the parent charged at Nazziola. The staff had to block the parent's charge. The parent remained in the school office for some time after Nazziola went into his own office. The parent did not leave until he learned that a call to the police had been made. Weeks later Nazziola and the parent conferred regarding the incident, which Mr. Nazziola never felt merited reporting to the superintendant.

Eugene Morriello (Morriello)

Morriello has been employed by the Board for more than twenty-two years. He teaches and is the orchestra director for the middle school and the high school. He has been friends with Nazziola since 1979.

Just before lunch, in June 2010, Morriello and Nazziola were standing in the foyer of the school music room when they saw and greeted Longo. At the time, Longo was a Board member, but Nazziola had not yet become a principal. Nazziola had given Longo the name of someone he thought was a good candidate for the open position of

superintendent and they discussed who might become superintendent. Nazziola also told Longo that he wanted to be a principal. Longo replied, "If I can help you in any way, I will." Longo recommended that if Nazziola needed any information that he speak with his father who could speak with Yanuzzi. Yanuzzi had been a Board member, but his term had ended. However, Yanuzzi was still involved in numerous organizations in Belleville, including the Olympic Advisory Council and the Optimist Club.

Morrelli believed that the superintendent made personnel recommendations, including for teachers and administrators, to the Board and the Board would select and then ratify candidates.

Gabriel A. Nazziola, petitioner's father

Nazziola's father (Nazziola Senior) served three terms on the Board. The last two years of his last term, he served as Board President. The last year that he served was 1995. He is not a member of any organization that has an official affiliation with the Board. Nazziola Senior is a member of the Optimist Club, which is similar to the Elks, Lions, or Kiwanis. Nazziola Senior has known Yanuzzi, who is also a member of the Optimist Club, since the 1980's. Yanuzzi served one term on the Board during one of the Board terms of Nazziola Senior.

In August 2011, Nazziola Senior and Nazziola were eating at a town deli. At that time, Nazziola had already been appointed principal. During some of the time that they were eating, Yanuzzi, Board Member Longo, and then Board President Peter Zangari joined them. Longo told Nazziola that he had to recommend two identified persons to be teachers. Yanuzzi "chimed" in with, "these are our people." Nazziola Senior is uncertain if the candidates recommended by Yanuzzi for hiring were given the teaching positions.

Joseph Petrillo (Petrillo)

Petrillo was employed by the Board for thirty-eight years. His last position was principal of Belleville Senior High School for sixteen years until he retired in 2011.

Petrillo did not initially intend to retire in 2011. He was planning to work several more years. However, in May 2011, he received a telephone call from Yanuzzi, who requested, in a stern way, that Petrillo submit his retirement "ASAP." When Petrillo said he had no intention of retiring, Yanuzzi, who held no position that gave him the authority to request Petrillo's retirement, replied, "we'll deal with this." Petrillo knew Yanuzzi, who was a former student of Petrillo, to be involved in numerous town organizations. He was a director or "in some capacity" involved with the flea markets that raise funds for various organizations and clubs in the high school. Yanuzzi was involved with the Connie Francis Auditorium and represented the Belleville Education Foundation. Yanuzzi was also a former Board member.

A few days after Yanuzzi told Petrillo that he wanted him to retire, Petrillo was told by Superintendent Picardo to contact a representative from the Principal Supervisor Association and was directed to attend a meeting. Petrillo contacted Marilyn Hawthorn, his field representative and they met with Superintendent Picardo and the Board Attorney, Alfonse DeMeo, Esq. Petrillo was told that he was being suspended because he was "not meeting the requirements of principal since not all of his staff evaluations were complete." Petrillo acknowledged that some staff evaluations were not complete. However, his staff involved in evaluations—numerous supervisors, one administrator, and one vice-principal—had been drastically cut.

Petrillo had always received exemplary evaluations and was never spoken to before regarding any problems at the high school. He asked Superintendent Picardo and Board counsel directly, "You want me to leave? Let me finish out the 2011 school year." He was told, "No. We want your retirement immediately." Rather, than tarnish his clean record when "the writing was on the wall," Mr. Petrillo reluctantly retired.

Upon, cross-examination, Mr. Petrillo acknowledged that Picardo was a new Superintendent and that he had not completed the evaluations "to the satisfaction of the Board."

Yesenia Osorio (Osorio)

At the time of the hearing, Osorio was a member of the School #5 PTA. She had previously served as its president. In May or June 2011, she was in attendance at a meeting of the PTA, when the pellet-gun incident was discussed. Osorio asked John Rivera (Rivera), the Board liaison to the PTA, who was also present, "Is the reason he, [Nazziola] is being reassigned or not remaining our principal is because of the pellet gun situation?" Rivera replied that it was not the only reason. He did not identify any other reasons, but said that, because of privacy issues, "he couldn't put everything on the table." Osorio usually attended the monthly PTA meetings, was not aware of any complaints made by parents and had never even heard any negative comments about Nazziola's performance.

John Rivera

Rivera has been a member of the Board since April 2010. He currently serves as president. Each Board member serves as a liaison to one of the schools. When Nazziola served as principal of School #5, Rivera was that school's liaison. A liaison attends the PTA meetings, brings Board issues to the PTA president and the parents, and listens to concerns of the PTA and brings those back to the Board.

Riviera voted not to renew Nazziola's contract as principal after Superintendent Picardo did not recommend his renewal. Two of reasons given for the Superintendant's decision not to renew were that Nazziola "was ineffective relating to parents and due to the weapon's issue." The Superintendent provided examples to support his decision, including a complaint from an angry parent, who said that Mr. Nazziola refused to speak with him and remained in his office when the parent came to the school to see him.

Rivera did not personally observe or evaluate Mr. Nazziola or see any of his evaluations, but relied upon the recommendation of the Superintendent. Rivera had never received any complaint from parents about Nazziola. Rivera remembered being questioned by several parents as to why Nazziola was not being renewed as principal. He remembered Osorio asking if the only reason that he was not being renewed was

"the pellet gun issue." He remembered telling her that matters of personnel are confidential and that he couldn't answer. If she liked, she could ask Mr. Nazziola and he could elaborate.

In summation, Petrillo, former senior high principal, testified regarding numerous out-of-hearing statements that were made to him. Hearsay is admissible subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. There must be a residuum of legal competent evidence in the record to support it. Weston v. State, 60 N.J. 36, 51 (1972). In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." N.J.A.C. 1:1-15.5(a). While I saw nothing in Petrillo's demeanor to detract from his credibility, there was no legally competent evidence admitted to support admission of the statements that he stated were made to him by Yanuzzi and Superintendent Picardo, who further did not testify at the hearing. In addition, the statements were made were regarding his position as principal and not on point to the failure to renew Nazziola's contract.

While I make no findings as to the accuracy of the statements contained in a letter dated June 14, 2011, from a parent who also did not testify at the hearing, I admit the parent's letter for the limited purpose of indicating that a parent, who was dissatisfied with the manner in which Nazziola handled a complaint that his son was bullied, advised the Board of his dissatisfaction with Nazziola's handling of a bullying complaint. (P-7.) The letter is supported by Rivera's testimony that he was aware of a parental complaint that Nazziola did not handle a bullying complaint to the satisfaction of a parent and by Nazziola's own testimony that a parent complained to him that his son was bullied.

The testimony of Osorio regarding a conversation about Nazziola's failure to be offered another principal's contract was consistent with the testimony of Board president Rivera. Both stated that Rivera acknowledged that the "pellet gun incident" was a stated reason for the failure to renew and that Rivera felt that "he could not put everything on the table" because of privacy concerns.

A careful analysis of credibility is necessary in order to make critical findings of fact. For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. "'[T]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963).

Both Nazziola and Morriello describe a meeting that they had in the spring of 2011 with Board member Longo, in which they discussed Nazziola's application for principal. Both agree that Longo referred to Yanuzzi and the fact that Nazziola's father was a member of the Optimist Club with Yanuzzi. However, Moriello states that Longo offered to help Nazziola with his application in any way that he could, and referred him to Yanuzzi if he needed any additional information. In contrast, Nazziola states that Longo told him that he had a good chance of being appointed and that if his father contacted Yanuzzi, Yanuzzi could tell his father if Nazziola was being appointed to the principal position.

Moriello's description of the substance of the conversation is more credible. In this matter, Nazziola has presented Yanuzzi as someone who has influence over personnel decisions in Belleville, including Nazziola's principal assignment. He has a vested interest in characterizing statements of others to indicate that influence. In contrast, Moriello has no personal motivation to cast Yanuzzi with influence over personnel decisions. He also has no bias against Nazziola, with whom he has been friends and music colleagues for many years. Finally, it is uncontroverted that Nazziola did not first learn of the approval of his application from Yanuzzi, or by Yanuzzi informing his father. Superintendent Picardo advised Nazziola that his application for principal was approved.

After Nazziola was appointed principal, both Nazziola and his father testified that while they were eating at a town deli, Yanuzzi, Longo and then Board President Zangari stopped by or joined them. Both state that Nazziola was directed to recommend two candidates for three teaching openings. Nazziola testified that he was called on a second occasion by Board member Longo and directed to make certain teaching personnel recommendations. On that occasion, when Nazziola indicated that he wanted to recommend another, Nazziola's job security was essentially threatened.

Neither party called the Board member who allegedly threatened Nazziola to testify at the OAL hearing. Nazziola never reported that he had been threatened. However, Nazziola testified that, fearing retribution, he recommended the candidates that Longo and Yanuzzi directed him to recommend, rather than the candidate that he thought best. Nazziola also testified that he received telephone calls urging him to attend, and once not to attend, certain town fundraisers and board election campaigns.

Based upon a review of the documentary evidence presented and having had the opportunity to observe the demeanor and asses the credibility of the witness, I **FIND** the following pertinent **FACTS**:

Nazziola complied with requests that were made to him by community leaders, regarding personnel recommendations, and modified his own personnel recommendation to the Belleville superintendent. Instead of recommending the candidate he evaluated to be best qualified, he recommended the choices of others. Nazziola did not have final decision making power as to personnel.

Nazziola financially and by his attendance supported community and political events that he was encouraged to attend. On only one occasion, in March, 2011, did he not comply with a request that not attend a fundraiser that would benefit an ill parent because of one of the key persons working on the fundraiser was related to a Board candidate challenging the incumbents.

Nazziola received three performance evaluations in his first year as principal. While the first evaluation was very positive in December 2010, by his second

evaluation, in April 7, 2011, Nazziola was on notice that Superintendent Picardo wanted him to improve in student/parent/staff relationships, management skills, and use of technology. By his third evaluation on May 11, 2011, more than one parent had complained to Superintendent Picardo about Nazziola. Nazziola failed to keep the superintendent apprised of parental/student incidents that he had to handle. Nazziola failed to handle a pellet-gun incident in accordance with Board policy, which policy Nazziola stated he had difficulty locating online. Superintendent Picardo indicated on the evaluation that he would recommend non-renewal of contract as principal. Later, he provided Nazziola with a written statement of areas in which he evaluated him as deficient and upon which he based his recommendation to the Board that Nazziola's contract to be principal not be renewed.

LEGAL ARGUMENT

By statute, a board of education "shall renew the employment contract of a certified or non-certified officer or employee only upon the recommendation of the chief school administrator." N.J.S.A. 18A:27-4.1(b). A school board has virtually unlimited discretion in hiring or renewing non-tenured staff. "A non-tenured staff member may only litigate his non-renewal if the facts he alleges, if true, would constitute a violation of constitutional or legislatively conferred rights." Getz v. N. Hunterdon-Voorhees Reg'l Dist. Bd. of Educ., 96 N.J.A.R.2d (EDU) 606; see also Dore v. Bd. of Educ. of the Twp. of Bedminster, 185 N.J. Super. 447, 551 (App. Div. 1982).

To present a prima facie case in a "claim of discrimination based on political patronage in violation of the First Amendment[,]" one "must show that (1) he was employed at a public agency in a position that does not require political affiliation, (2) he was engaged in constitutionally protected conduct, and (3) this conduct was a substantial or motivating factor in the government's employment decision." Galli v. N.J. Meadowlands Comm'n, 490 F.3d 265, 270 (3d Cir. 2007); see also Travisano v. Bd. of Chosen Freeholders for Union County, A-2312-09 at *35-36 (App. Div. January 27, 2012), http://njlaw.rutgers.edu/collections/courts/. If a prima facie case is established, the respondent may "avoid a finding of liability by proving by a preponderance of the

evidence that the same employment action would have been taken even in the absence of the protected activity." Galli, supra, 490 F.3d at 271.

I **CONCLUDE** that the Board did not act in an arbitrary, capricious or unreasonable manner when it supported Superintendent Picardo's recommendation that Nazziola not be offered a contract as principal for the 2011-12 school year. Nazziola was given a written statement of reasons why he was not offered another contract. By his own admission, Nazziola failed to follow Board procedures when a student brought a pellet gun to school. By his own admission, Nazziola failed to advise Superintendent Picardo that he had to telephone the police and/or indicate to an angry parent that the police had been called in connection with a parent's anger over his child being marked tardy when snow delayed the parent's drop off. By his own admission, he handled a complaint by a parent that his child was being bullied. Although Nazziola thought he handled the complaint to the parent's satisfaction, the parent was very dissatisfied with Nazziola's handling of the matter and complained to Superintendent Picardo.

In contrast, Nazziola presented no credible evidence that Superintendent Picardo's failure to recommend him and the Board's acceptance of his recommendation was based politically motivated or a result of Nazziola's engaging in constitutionally protected conduct. Further, though no such evidence was presented, the substantial detailed reasons as why Nazziola was not recommended by Superintendent Picardo for renewal would have sufficient for me to **CONCLUDE** that the Board could, in its discretion, not renew his contract as principal.

ORDER

It is **ORDERED** that petitioner's request for to be re-instated as principal, with back pay and emoluments, is hereby **DENIED**.

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

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

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

12/16/13
DATE

EVELYN J. MAROSE, ALJ

Date Received at Agency: 12/16/13

Date Mailed to Parties: 12/17/13

sej

APPENDIX

WITNESSES

For Petitioner:

Gabriel Nazziola

Eugene Morriello

Gabriel A. Nazziola

Joseph Petrillo

Yesenia Osorio

For Respondent:

John Rivera

EXHIBITS

For Petitioner:

P-1 Certificate of Eligibility –Principal/Supervisor

P-2 DOE Board of Examiners Certificate of Teacher of Music

P-3 Nazziola Letter of Application to Picardo

P-4 Picardo Evaluation of Nazziola, December 8, 2010

P-5 Picardo Evaluation of Nazziola, April 7, 2011

P-6 Picardo Evaluation of Nazziola, May 11, 2011

P-7 Parent Letter to Board

P-8 Weapons Policy #8467

P-9 Nazziola Letter to Picardo, April 15, 2011

P-10 Picardo Letter to Nazziola, April 29, 2011

P-11 Ricardo Letter to Nazziola, June 13, 2011

For Respondent:

None

96-14

IN THE MATTER OF THE	:	
SUSPENSION OF THE TEACHING	:	COMMISSIONER OF EDUCATION
CERTIFICATION OF DIANE WASHER,	:	DECISION
RED BANK SCHOOL DISTRICT,	:	
MONMOUTH COUNTY.	:	

SYNOPSIS

In October 2013, the Commissioner of Education issued an Order to Show Cause upon respondent, requiring her to show cause why an order should not be entered suspending her teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9 – for resigning her position on inadequate notice. The respondent failed to answer the order. Respondent was duly advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation raised by the Board to be deemed admitted, and might result in summary decision by the Commissioner.

There being no response to the order to show cause, the Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and justify suspension of respondent's certification. Accordingly, summary decision was granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

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

February 12, 2014

96-14

AGENCY DKT. NO. 267-10/13

IN THE MATTER OF THE	:	
SUSPENSION OF THE TEACHING	:	COMMISSIONER OF EDUCATION
CERTIFICATION OF DIANE WASHER,	:	DECISION
RED BANK SCHOOL DISTRICT,	:	
MONMOUTH COUNTY.	:	

For Petitioner, McComber & McComber

Respondent: No appearance by or on behalf of Diane Washer

This matter was opened before the Commissioner of Education on October 30, 2013, by way of an Order to Show Cause served by petitioner, Red Bank School District, upon respondent, Diane Washer, requiring respondent to show cause why an order should not be entered suspending her teaching certificate, pursuant to *N.J.S.A.* 18A:26-10 and 18A:28-8, for resigning without providing the amount of notice required by her contract with respondent, and for failing to provide the 60 days notice required by law. By notice dated October 30, 2013, the Bureau of Controversies and Disputes (the Bureau) acknowledged receipt of proof of service upon respondent of the order to show cause.

On December 5, 2013, the Bureau sent respondent a final notice, via regular and certified mail, directing respondent to file an answer within ten days. The final notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the

Commissioner. Neither the notice sent by certified mail nor the notice sent by regular mail was returned., and no answer to the order to show cause has been filed as of this date.

As stated above, the final notice to respondent clearly advised that if an answer was not filed within ten days of receipt of same, each allegation in the papers supporting the order to show cause would be deemed to have been admitted and the Commissioner might decide the matter on a summary basis. The Commissioner now concludes that the allegations, which respondent has chosen not to deny, may be deemed admitted pursuant to *N.J.A.C.* 6A:3-1.5(e), and are sufficient to justify an order suspending respondent's teaching certification.

Accordingly, IT IS ORDERED that summary decision is granted to petitioner, and respondent's teaching certification is suspended for a period of one year pursuant to *N.J.S.A.* 18A:26-10 and 18A:28-8.[1] This order shall be forwarded to the State Board of Examiners for effectuation of same.

COMMISSIONER OF EDUCATION

Date of Decision: 2/12/14

Date of Mailing: 2/14/14

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

97-14

#97-14A

STATE BOARD OF EXAMINERS DKT. NO. 1011-189;
OAL DKT NO. EDE 5595-11
COMMISSIONER APPEAL NO. 2-3/13A

CHERYL SLOAN,	:	
APPELLANT,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	
RESPONDENT.	:	

Appellant Cheryl Sloan challenges the determination of the New Jersey State Board of Examiners (Board of Examiners) that her actions warranted the suspension of her teaching certificates for one year. The Commissioner has reviewed the evidence and legal discussion presented in the proceedings before the Board of Examiners, as well as the parties' appellate briefs and appendices, and concurs with the Board of Examiners' determinations.

The material facts underlying this controversy were established by way of a hearing in the Office of Administrative Law (OAL) and were adopted by the Board of Examiners. Namely, on two separate occasions appellant allowed a personal friend, P.B., into the school building where she taught, so that he could lunch with her in her classroom. A student, B.B., asked to join them, and appellant facilitated B.B.'s participation in the lunches by way of notes excusing B.B. from class. Appellant did not have permission or authority from either B.B.'s parents or the school administrators to pull B.B. out of class or facilitate such a social encounter with P.B. In fact, although appellant did not know it, B.B.'s mother did not wish her daughter – a fifteen year old girl – to be in contact with P.B., a twenty-eight year old man. She had repeatedly advised PB to stay away from her daughter.

Based upon these findings, the administrative law judge (ALJ) who conducted the hearing in the OAL determined, *inter alia,* that appellant had violated school policy in failing to secure the principal's permission before allowing a visitor access to a student. The ALJ concluded from this that appellant's conduct had been unbecoming, in that it adversely affected the public's trust in school employees and confidence in school operations. However, the ALJ balanced appellant's long and previously unblemished record against the unbecoming conduct, and recommended a three month suspension of appellant's teaching certificates.

The Board of Examiners concurred with the ALJ that appellant's conduct had been unbecoming, and that the appropriate remedy was a suspension of appellant's teaching certificates. However, it determined that the conduct warranted a more serious penalty.

More specifically, the Board of Examiners cited the established principle that teachers who are entrusted with the care of the public's children bear a heavy duty requiring "a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *IMO Tenure of Sammons,* 1972 *S.L.D.* 302, 321. By way of contrast, appellant – in the Board of Examiner's view – "overstepped the proper boundaries that a teacher must maintain with students" and "exercised extremely poor judgment," placing B.B. "at possible risk by not following school policy." *In the Matter of the Certificates of Cheryl Sloan,* State Board of Examiners Docket No. 1011-189 (September 21, 2012) at 4. The Board of Examiners, therefore, ordered that appellant's certificates be suspended for a year instead of three months.

The arguments in appellant's papers do not persuade the Commissioner that the penalty imposed by the Board of Examiners was unsupported by the record. First, appellant contends that the Board of Examiners ignored the ALJ's factual findings. By way of example, appellant cites the ALJ's finding that some of B.B.'s testimony was unreliable and inconsistent with other testimony and evidence. The Commissioner notes that the testimony which was deemed by the ALJ to be

unreliable was B.B.'s assertion that appellant had let P.B. into her classroom through a fire door.[1] But this "finding" of unreliable testimony was not central to the issue of the propriety of appellant's conduct. What is significant is the undisputed fact – which the ALJ did find – that appellant "arranged for B.B. to be present at th[e] lunch meeting [between appellant and P.B.]" (Initial Decision at 15)

Second, appellant maintains that the Board of Examiners ignored the ALJ's articulation of mitigation factors, such as appellant's long, unblemished record, the fact that appellant did not know about P.B.'s criminal record, the fact that appellant never left B.B. alone with P.B., and the fortunate circumstance that nothing 'inappropriate' happened. The Commissioner acknowledges that appellant's previously unblemished record should be weighed in deciding upon a penalty for appellant's conduct. However, the other three factors mentioned by appellant do not really mitigate in her favor.

It is undisputed in the record that appellant arranged a meeting between a fifteen-year old student and a twenty-eight year old male non-family member without the principal's knowledge or permission and, more importantly, without the knowledge or permission of B.B.'s parent. The purposes underlying the policies which appellant violated were fully in play. Common sense precludes any assumptions that there are good reasons for a fifteen year old girl to socialize with a twenty-eight year old man to whom she is not related. Any good reasons that might exist should properly be provided by the young girl's parent or guardian, and not be presumed by a teacher.

The result of appellant's conduct was that B.B. socialized with a man who has a criminal record, who paid improper attention to B.B. – including inappropriate postings on B.B.'s Facebook page and inappropriate requests to have her visit him overnight – and whose contact with B.B. had been forbidden by B.B.'s mother. This result is not an unforeseeable consequence of

[1] The ALJ also seemed doubtful about B.B.'s testimony that appellant had directly given B.B.'s teacher a note excusing her from class to lunch with appellant and P.B.

allowing contact between a teen-aged girl and a fully grown man without the imprimatur of the teenager's parent. Thus, it is not significant that appellant may not have known about P.B.'s criminal record or the nature of P.B.'s history with B.B.

Finally, appellant's denial that she put B.B. at risk is unpersuasive. It is fortunate that B.B. was not left alone with P.B. or physically harmed. However, appellant undisputedly put B.B. at risk by facilitating 1) her absence from a class which she should have been taking and 2) her socialization with a grown man whose behavior toward her had not been wholesome. Again, even without the knowledge that P.B. had a criminal record and had interacted inappropriately with B.B., appellant should have understood that it was reckless to facilitate a meeting between a fifteen year old girl and a twenty-eight year old man who was not a family member. Nor is the fact that B.B. may have advocated for said social encounter relevant to this controversy. She is a minor.

In sum, the Commissioner finds that the evidence in the record supports the Board of Examiner's determination that appellant's unbecoming conduct warrants a one-year suspension of her certificate. Accordingly, the Board's determination is affirmed and the appeal is dismissed.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 2/12/14
Date of Mailing: 2/14/14

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.

#98-14E

OAL DKT. NO. EDU 595-14
AGENCY DKT. NO. 9-1/14

JAMES MBOYA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

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

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

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/12/14

Date of Mailing: 2/14/14

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 00595-14
AGENCY DKT. NO. 9-1/14

JAMES O. MBOYA,
Petitioner,
v.
DEPARTMENT OF EDUCATION,
STATE BOARD OF EXAMINERS,
Respondent.

James O. Mboya, petitioner, pro se

Caroline Jones, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

STATEMENT OF THE CASE

Petitioner applied for a substitute credential and respondent denied the application because petitioner had been charged with murdering his roommate and committed to confinement in a psychiatric hospital for ten years. Did respondent act arbitrarily, capriciously, or contrary to law? No. Under N.J.A.C. 6A:9-17.2, respondent

may refuse to issue a certificate or credential if it determines that the applicant is not suitable for employment in the public schools, including for conduct unbecoming.

PROCEDURAL HISTORY

On December 6, 2013, petitioner applied to the State Board of Examiners for a substitute credential, which was denied.

Significantly, Petitioner did not, and still does not, possess a teaching certificate.

On January 15, 2014, petitioner filed a petition of appeal, as well as a motion for emergent relief, and the motion was transmitted to the Office of Administrative Law the following day under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

The return date was scheduled for January 22, 2014, but was rescheduled for January 24, 2014, because the office was closed on January 22, 2014, due to a snow storm.

FINDINGS OF FACT

Based on the papers the parties submitted, and their representations on the return date, I **FIND** the following as **FACT**:

By way of background, petitioner is currently receiving disability benefits, medication, and on-going therapy for mental illness. Petitioner states that he has been receiving this medical treatment for the past ten years without incident, that his mental illness is in remission, and that he is no longer a danger to himself or others. Nevertheless, petitioner acknowledges that he had been hospitalized for his mental illness, that this hospitalization was ordered by the Superior Court, and that his release is currently being monitored by two court-appointed agencies.

What petitioner does not make clear in his application, the Board makes clear in its opposition: Petitioner was arrested in 2004, charged with murdering his roommate, adjudicated "not guilty by reason of insanity," and committed to confinement in a psychiatric hospital for ten years. In 2010, petitioner was released from his confinement, but remains under supervision for life, including the monitoring of his medication and his therapy. Incidentally, this monitory includes medication by injection every two weeks and medication by mouth every night.

CONCLUSIONS OF LAW

I.

Under N.J.A.C. 6A:3-1.6, a motion for emergent relief shall address the following standards to be met for granting such relief under Crowe v. DeGioia, 90 N.J. 126 (1982), namely: (1) The petitioner will suffer irreparable harm if the requested relief is not granted; (2) The legal right underlying petitioner's claim is settled; (3) The petitioner has a likelihood of prevailing on the merits of the underlying claim; and (4) When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

A.

In his motion for emergent relief, petitioner seeks an order that the Board issue him a substitute credential so he can seek employment as a substitute teacher.

Petitioner also alleges that the Board has denied him this credential in violation of the Americans with Disability Act.

In support of his motion, petitioner argues that his doctor, his therapist, and representatives of the two-court appointed agencies will testify that he is in compliance with court orders and that his is no longer a danger to himself or others. Toward this end, petitioner submits a letter from Comprehensive Behavioral Healthcare, Inc., that his mental illness is in remission, as long as he is taking his medication, which petitioner

has done "impeccably," and that petitioner is now fit for employment. In fact, the psychotherapist/social worker writes that petitioner is a "dedicated worker and family man," and possesses advances skills in math and science, which would be an "asset" to any school district.

Petitioner also argues that he will suffer mental anguish if his motion for emergent relief is not granted.

B.

More comprehensively, the Board argues that petitioner is not entitled to the relief he seeks because he has not met any of the standards he must meet under Crowe for the grant of such relief.

First, the Board argues that petitioner will not suffer irreparable harm. More specifically, the Board argues that petitioner does not possess a teaching certificate. Therefore, he will not suffer the harm of no longer being able to teach if his motion is not granted.

The Board also argues that petitioner will not suffer irreparable harm because it is not denying him the opportunity to appeal its decision, which is currently before the Board.

Second, the Board argues that the legal rights underlying petitioner's claim is not well-settled because petitioner has made a non-specific or unarticulated allegation that respondent has violated the Americans with Disabilities Act in denying him his substitute credential and that it based its decision on petitioner's past conduct, not on his disability.

Third, the Board argues that petitioner does not have a likelihood of prevailing on the merits of his underlying claim because he will have difficulty proving that its determination was arbitrary, capricious, or contrary to law. Indeed, the Board argues that it properly exercised its authority under N.J.A.C. 6A:9-17.2, which states, "Notwithstanding that a candidate may meet all requirements for certification, the Board

of Examiners may refuse to issue a certificate to that candidate if, based on the record before it, the Board of Examiners determines that, for reasons set forth in N.J.A.C. 6A:9-17.5, the candidate is not suitable for employment as a teaching staff member in the public schools." Meanwhile, N.J.A.C. 6A:9-17.5 states, "The Board of Examiners may revoke or suspend the certificate(s) of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause.

In short, the Board argues that it properly exercised its authority under N.J.A.C. 6A:9-17.2, because of the severity and recency of petitioner's conduct.

In addition, the Board argues that its determination is made independent of a determination made by a treating physician, especially since it is well-settled that the term "conduct unbecoming" is an elastic term, citing the Appellate Division's decision in In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960), and borrowing its language, by writing that such conduct includes conduct, "which adversely affects the morale or efficiency" of the public entity or "has a tendency to destroy public respect for [its] employees and confidence in [its operations]."

Fourth, respondent argues that when the equities and interests of the parties are balanced, it will suffer greater harm than petitioner will suffer if the requested relief is granted because of the public interests at issue.

II.

Given my preliminary findings of fact, and this discussion of the law, I readily agree with the Board that petitioner is not entitled to the relief he seeks because he has not met any of the standards he must meet under Crowe. Indeed, I agree for the reasons the Board so plainly states. In addition, the fact that petitioner states he will suffer mental anguish if his motion is not granted raises the specter whether petitioner truly has the capacity to be entrusted with children at school. At the very least, it does not support his argument that he has a likelihood of prevailing on the merits of his claim and that the equities and interests of the parties favor him. Therefore, I **CONCLUDE**

that petitioner has not met the standard for emergent relief and that his motion for emergent relief should be denied.

ORDER

Given my preliminary findings of fact and conclusions of law, I **ORDER** that petitioner's motion for emergent relief is **DENIED**.

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

January 24, 2014
DATE

BARRY E. MOSCOWITZ, ALJ

db/dr

99-14

OAL DKT. NO. EDU 14193-12
AGENCY DKT. NO. 287-9/12

BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE,	:	DECISION
RESPONDENT.	:	

The record and Stipulation of Dismissal transmitted to the Commissioner by the Office of Administrative Law have been reviewed. Although this matter was categorized in the Administrative Law Judge's decision as a "Settlement" under *N.J.A.C.* 1:19.1(c)1, no settlement terms were presented for the Commissioner's review; the matter is appropriately categorized as a withdrawal, pursuant to *N.J.A.C.* 1:1-19.2. Such withdrawal is approved by the Commissioner and this matter is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/18/14

Date of Mailing: 2/19/14

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



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 14193-12

AGENCY DKT. NO. 287-9/12

BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,

Petitioners,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE,

Respondent.

Howard C. Long, Jr., Esq., for petitioner (Wade, Long, Wood & Kennedy, attorneys)

Christopher Huber, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorneys)

Record Closed: December 19, 2013 Decided: December 26, 2013

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

Petitioner Board appeals the decision of the New Jersey Department of Education, Office of Fiscal Accountability and Compliance regarding the amended deficit and resolution with respect to the Regional Day School. This matter was transmitted to the Office of Administrative Law on October 18, 2012, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On November, 2013, the parties executed a stipulation of dismissal with prejudice, having amicably resolved the issues in dispute between them.

Accordingly, I **FIND**:

1. The parties have voluntarily agreed to the dismissal as evidenced by the parties' signatures on the stipulation annexed here to Agreement.

2. The dismissal recognizes that all issues in controversy have been resolved.

I **CONCLUDE** that this dismissal meets the requirements of N.J.A.C. 1:19.1(c)1 and that it should be approved. I approve the resolution and therefore **ORDER** that the compliant be dismissed with prejudice and that these proceedings be concluded.

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

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

December 27, 2013
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency 12/30/13

Date Mailed to Parties: 12/30/13

Attachment

WADE, LONG, WOOD & KENNEDY, LLC

Attorneys at Law

John D. Wade
Howard C. Long, Jr.
Leonard J. Wood, Jr.
John S. Kennedy

Audra A. Pondish
Daniel H. Long
Christopher F. Long

December 17, 2013

Honorable Susan M. Scarola
NJ Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

RE: Winslow Township Board of Education v. New Jersey Department of Education
Agency Reference No: EDU 14193-2012
Docket No: EDU 14193-2012

Dear Judge Scarola:

Enclosed please find the executed Stipulation of Dismissal in the above referenced matter. Should you have any questions please contact me.

Very truly yours,
WADE, LONG, WOOD & KENNEDY, LLC

Audra A. Pondish

cc: Christopher Huber, DAG (via e-mail)
Dr. H. Major Poteat, Superintendent

Howard C. Long, Jr., Esquire
WADE, LONG, WOOD, & KENNEDY, LLC
1250 Chews Landing Road, Suite 1
Laurel Springs, NJ 08021
(856) 346-2800
Attorneys for Plaintiff Winslow Township
Board of Education

Winslow Township Board of Education Petitioner, State of New Jersey, Department of Education Respondent.	: STATE OF NEW JERSEY : OFFICE OF ADMINISTRATIVE : LAW : : OAL Docket: EDU 14193 2012 : : : STIPULATION OF DISMISSAL :

IT IS HEREBY STIPULATED and agreed by and between Howard C. Long, Jr., Esquire, attorney for Petitioner, Winslow Township Board of Education, and Christopher Huber, Esquire, attorney for Respondent, State of New Jersey, Department of Education, that the matter in difference in the above-entitled action having been amicably adjusted by and between the parties, it is hereby stipulated that the same be and it is hereby dismissed with prejudice.

Dated: 11/26/13

Howard C. Long, Jr., Esquire
Attorney for Plaintiff

Dated: 11/27/13

Christopher Huber, Esq.
Attorney for Defendant

100-14

OAL DKT. NO. EDU 08453-13
AGENCY DKT. NO. 105-5/13

R.K. and N.K., on behalf of minor child, A.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF WESTFIELD, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the parties' settlement to the extent he has jurisdiction over its terms and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/18/14

Date of Mailing: 2/19/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 08453-13
AGENCY DKT. NO. 105-5/13

R.K. AND N.K. ON BEHALF OF A.K.,
Petitioners,
v.
WESTFIELD BOARD OF EDUCATION,
Respondent.

Paul N. Barger, Esq., for petitioners

Richard J. Kaplow, Esq., for respondent

Caitlin W. Lundquist, Esq., for respondent

Record Closed: December 18, 2013 Record Decided: December 20, 2013

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

On June 18, 2013, the above referenced matter was remanded to the Office of Administrative Law (OAL) for "perfection of settlement or adjudication of merits". The executed Stipulation of Settlement and Board Resolution were forwarded to the undersigned on December 18, 2013 and are attached hereto.

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

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

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

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

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

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

December 18, 2013
DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: January 2, 2014

Date Mailed to Parties: January 2, 2014

lr
Attachment

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Caitlin Lundquist - ID #020422009
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Attorneys for Westfield Board of Education
Our File No. 77833 CAL

R.K. AND N.K. O/B/O A.K. Petitioners, V. WESTFIELD BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: EDU 08453-2013N AGENCY REF. NO.: 105-5/13 **SETTLEMENT AGREEMENT**

R.K. AND N.K. O/B/O A.K. Petitioners, V. WESTFIELD BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW DOCKET NO.: EDS 8502-13 AGENCY REF. NO.: 2013-19718

WHEREAS, A.K. is an educationally disabled student as defined in N.J.A.C. 6A:14-1.1 *et seq.*; and

WHEREAS, the Westfield Board of Education ("Board") is the local educational authority with the responsibility of providing a free, appropriate, public education to A.K.; and

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WHEREAS, Petitioners R.K. and N.K. are the parents of A.K. (collectively referred to as "Petitioners"); and

WHEREAS, A.K. is a student residing within the Westfield School District ("District") who is eligible to receive special education and related services under the classification category of Autistic; and

WHEREAS, a dispute existed with regard to a reported incident of alleged harassment, intimidation and bullying ("HIB") involving A.K., which was investigated by the District in accordance with the procedures set forth in its HIB policy; and

WHEREAS, following the District's investigation, A.K. was determined to have engaged in an act of HIB against another student and that HIB determination was affirmed by the Board, culminating in the filing of a petition of appeal with the Commissioner of Education ("Commissioner"), which was assigned Agency Reference Number 105-5/13 and OAL Docket Number EDU 08453-2013N; and

WHEREAS, a dispute also existed with regard to A.K.'s educational program for the 2012-2013 and 2013-2014 school years, culminating in the filing of a petition for due process with the Office of Special Education Programs ("OSEP"), which was assigned Agency Reference Number 2013-19718 and OAL Docket Number EDS 8502-13; and

WHEREAS, the parties, each having a desire to amicably settle any and all claims in all jurisdictions, asserted and unasserted, now hereby agree as follows:

1. The parties agree that upon execution of this Agreement, A.K.'s Individualized Education Program ("IEP") shall be revised to provide the following:

(a) The District shall ensure that A.K. receives additional instruction commensurate with his advanced abilities in mathematics, which shall focus upon introducing higher grade level instruction and concepts.

(b) The District shall assign to A.K. a shared paraprofessional aide, who shall also be assigned to other students in addition to A.K., during recess, lunch, and other unstructured periods of the school day including, but not limited to physical education classes, but excluding academic class periods. A.K. shall not be informed by any District or Board representative that he is being shadowed by a paraprofessional. The parties understand and agree that the shared paraprofessional aide shall not be assigned to A.K. exclusively on a 1:1 basis; and

(c) In the event of a report of HIB is made that relates in any way to A.K., the District shall consult with the Child Study Team and A.K.'s parents, as part of its investigation prior to making a determination as to whether any act of HIB occurred or imposing any consequences upon A.K. as a result of the HIB report.

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2. The parties agree that the Board shall not release or authorize the release of any document or student record, or any information contained therein, relating to the HIB incident involving A.K. unless specifically directed by court order or lawfully issued subpoena or otherwise required to do so by law.

3. A.K.'s principal shall provide to Petitioners a letter of recommendation for A.K. which Petitioners shall be permitted to submit to private schools.

4. The parties further agree that all documents relating to the HIB incident, the District's investigation, and this Agreement will not be deemed a disciplinary action includable in A.K.'s student record nor shall the HIB incident, the District's investigation, and this Agreement be considered a disciplinary action reportable to any third parties without a specifically directed court order or subpoena. Upon information and belief, there have been no other disciplinary actions involving A.K. since he has been enrolled in the District. In the event any District representative is asked about A.K.'s disciplinary history, all District representatives must state that A.K. has not been disciplined at any time in the District. The terms of this Agreement, once entered as a Final Decision with respect to the due process matter assigned Agency Reference Number 2013-19718 and OAL Docket Number EDS 8502-13, will become A.K.'s stay put placement under state and federal law.

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5. Petitioners understand and agree that by meeting its responsibilities pursuant to this Agreement, the Board has offered A.K. a free and appropriate public education for the 2012-2013 and, through the date of execution of this Agreement, 2013-2014 school years.

6. R.K. and N.K., on their own behalf and on behalf of A.K., and the Board mutually release and forever discharge each other, its/their officers, employees, administrators, agents and servants from any and all past, present or future claims, whether known or unknown to R.K., N.K., or A.K., arising out of events that have occurred prior to the date on which this Agreement is signed, including but not limited to the provision of an educational program and related services to A.K.

7. R.K. and N.K., on behalf of themselves and A.K., release and forever discharge the Board, its officers, employees, administrators, agents and servants from any and all past, present or future claims which they or A.K. have or might have against them, because of all damages, liabilities, losses or injuries to person or property, or both, whether developed or undeveloped, including attorneys' fees, resulting or to result from the educational program and related services provided to A.K. from the beginning of time through the date on which this Agreement is signed.

8. It is expresely understood and agreed that the parties reserve the right to bring a claim before any tribunal of competent jurisdiction to enforce their rights under this Agreement.

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9. The terms of this Agreement represent the compromise of disputed claims between the parties. This Agreement shall not be treated as an admission on the part of the Board that it has not offered A.K. an appropriate program and placement at any time or that either party has failed to act in accordance with any laws, statutes, regulations and/or codes.

10. Each party shall be responsible for its own attorney's fees and expert costs.

11. The drafting and negotiation of this Agreement have been participated in by each of the parties and their respective counsel and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship. The parties acknowledge that they have been represented by counsel throughout the settlement of this matter, throughout the negotiation of this Agreement, and at the execution of this Agreement, and that they have read and consulted with counsel regarding this Agreement and fully understand its requirements and limitations. The parties further acknowledge that they enter into this Agreement voluntarily and free of coercion.

12. This Agreement shall be governed by the laws of the State of New Jersey and constitutes a complete legal release of any and all claims that were or could have been raised by Petitioners against the Board

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regarding A.K. from the beginning of time until execution and/or entry hereof.

13. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified. Petitioners are not bound by this Agreement until it has been ratified by the Board. Upon ratification of this Agreement, the Board shall cause a copy of the relevant resolution to be forwarded to Petitioners. When ratifying this agreement, the Board will not identify A.K. or his family, and no member of the public will be permitted to review an unredacted copy of the agreement containing any personally identifying information before or after ratification.

14. This Agreement contains the entire agreement between the parties hereto and is intended to resolve any and all disputes and issues, known or unknown, between them as of the date of execution of this Agreement.

15. This Agreement shall be incorporated into an initial order by the Administrative Law Judge assigned to the petition of appeal from the Board's HIB decision relating to A.K., filed with the Commissioner under Agency Reference Number 105-5/13 and OAL Docket Number EDU 08453-2013N.

16. This Agreement also shall be incorporated into a final order by the Administrative Law Judge assigned to the due process matter

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regarding A.K. filed with the OSEP under Agency Reference Number 2013-19718 and OAL Docket Number EDS 8502-13.

WITNESS:

_____

DATED: _____

R.K. o/b/o A.K.

DATED: _____

WITNESS:

_____

DATED: _____

N.K. o/b/o A.K.

DATED: _____

WITNESS:

_____

DATED: _____

Westfield Board of Education

By: _____

DATED: _____

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WESTFIELD BOARD OF EDUCATION

302 ELM STREET
Westfield, New Jersey 07090-3199
(908) 789-4414
Fax No: (908)789-4180

RICHARD MATTESSICH President
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BRENDAN GALLIGAN
GINNY LEIZ
GRETCHAN OHLIG
MITCHELL SLATER

Certified Copy of Action Taken at the Board Meeting
December 10, 2013

Upon motion of Mr. Friedman, seconded by Ms. Ohlig, it was moved to approve settlement agreement between the parents of student 2110029, and the Westfield Board of Education.

ROLL CALL: Yes: Mrs. Biegler, Ms. Cary, Mr. Friedman
Mr. Galligan, Ms. Kurstedt, Mrs. Leiz,
Mr. Mattessich, Ms. Ohlig,
Absent: Mr. Slater

I HEREBY CERTIFY that the foregoing is a true and exact copy of the motion that was adopted at the Regular Meeting of the Westfield Board of Education on December 10, 2013.

Dana Sullivan
Board Secretary

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101-14

OAL DKT. NO. EDU 18471-13
(EDU 9182-12 and11368-10 ON REMAND)
AGENCY DKT. NO. 590-10/10

BOARD OF EDUCATION OF THE CITY OF MARGATE, ATLANTIC COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the Settlement Agreement (Agreement), and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On December 5, 2013, the Commissioner remanded this matter to OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge (ALJ) did not include the requisite approval of the Atlantic City Board of Education.

Upon review of the revised record on remand, the Commissioner finds that the Agreement contains the requisite Board approval. According to the Agreement the settlement payment was due on a date that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/18/14

Date of Mailing: 2/19/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 18471-13
(On Remand of EDU 9182-12 and EDU 11368-10)
AGENCY DKT. NO. 590-10/10

BOARD OF EDUCATION OF THE CITY OF MARGATE, ATLANTIC COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,
Respondent.

Robert A. Muccilli, Esq., for petitioner (Capehart & Scatchard, attorneys)

William S. Donio, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: December 23, 2013 Decided: January 2, 2014

BEFORE **W. TODD MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 20, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties prepared and submitted a Settlement Agreement and General Release indicating the terms thereof; a Resolution by the Board of Education of the City of Margate, Atlantic County; and a Resolution by the Board of Education of the City of Atlantic, Atlantic County, which are attached and fully incorporated herein.

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

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

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

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

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

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

January 2. 2014
DATE

W. TODD MILLER, ALJ

Date Received at Agency: January 2. 2014

Date Mailed to Parties: January 2. 2014

MH/ds

ATLANTIC CITY BOARD OF EDUCATION
Office of the Secretary

CitiCenter Building
1300 Atlantic Avenue – 5th Floor
Atlantic City, NJ 08401

Angela Brown
Board Secretary
(609) 343-7200 ext. 5020 - Fax (609) 347-1549

September 18, 2013

At the regular meeting of the Atlantic City Board of Education held on September 17, 2013, the following resolution was approved:

Resolution No. 13 9A 48: On a motion made by Mr. Cooper and seconded by Mr. Dooley, the Atlantic City Board of Education to rescind resolution 13 8A 114, from the August 19, 2013 meeting and replace as follows: At the call of the roll the vote was as follows: Mrs. Bailey-yes; Ms. Bassford-yes; Mrs. Byard-no; Mr. Cooper-yes; Mr. Dooley-yes; Ms. Holmes-yes; Mr. Koch-yes; Mr. Steele-abstain. Of eight members present, six voted in the affirmative, one in the negative and one abstained. The motion carried.

THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE ("Agreement") made this 17th day of September, 2013, by and between the Margate City Board of Education ("MBOE" or "Margate"), a body corporate and politic responsible for the governance of the public schools in the City of Margate, with offices located at 8103 Winchester Avenue, Margate, New Jersey, 08402, and the Atlantic City Board of Education ("ACBOE" or "Atlantic City"), a body corporate and politic responsible for the governance of the public schools in the City of Atlantic City, with offices located at 1300 Atlantic Avenue, Atlantic City, New Jersey; and

WHEREAS, Margate City School District has a send/receive relationship with the Atlantic City School District whereby it sends students in grades nine through twelve to Atlantic City and pays tuition to Atlantic City with respect to those students; and

WHEREAS, K.C. attended the ACBOE's public schools through the send/receive relationship between the MBOE and the ACBOE; and

WHEREAS, the parent of K.C. filed in December 2008 a due process petition against the Atlantic City Board of Education ("Atlantic City") titled F.M. o/b/o K.C. v. Atlantic City Public School Board of Education, (OAL Docket No.: EDS 723-09; Agency Reference No.: 2009-14300) alleging, among other things, failure to properly evaluate and plan for K.C.'s education; and

WHEREAS, K.C. sought from Atlantic City, among other things, compensatory education and reimbursement of costs in the amount of $220,846.00 alleged to have been incurred in connection with the due process litigation, inclusive of the costs of two unilateral placements totaling $163,277.00 made by the parent in connection with K.C.'s education; and

WHEREAS, ACBOE settled the due process litigation by entering into a settlement agreement in December 2009 with the parent of K.C. in which Atlantic City agreed to make settlement payments totaling $175,000.00 for certain of the expenses associated with the provision of educational and/or related services to K.C.; and

WHEREAS, ACBOE made the full settlement payment and in July 2010 issued a bill letter to Margate City Board of Education ("Margate") seeking reimbursement of the $175,000.00 payment; and

WHEREAS, Margate refused to reimburse Atlantic City for $175,000.00 settlement payment and in October 2010 filed a petition of appeal with the Commissioner of Education in a matter captioned City of Margate BOE, Atlantic

County v. City of Atlantic City BOE, Atlantic County, (OAL Docket No.: EDU 09182-2012 S; Agency Reference No.: 590-10/10) in which Margate sought an order that it did not have to pay Atlantic City's bill for $175,000.00;

WHEREAS, ACBOE in October 2012, following certain appellate court proceedings, filed a counter-claim for reimbursement of the $175,000.00;

WHEREAS, MBOE and ACBOE have reached a full and complete compromise of these matters, and wish to resolve them amicably and without the expense associated with further litigation;

NOW THEREORE Margate and Atlantic City agree as follows:

1 The MBOE will make a lump-sum payment to the ACBOE in the amount of $75,000.00 no later than thirty (30) days after the date that this Agreement is approved and executed by both Boards and adopted by the Administrative Law Judge presiding over the above-captioned case.

2. All claims and causes of action asserted in the matter captioned City of Margate BOE, Atlantic County v. City of Atlantic City BOE, Atlantic County, (OAL Docket No.: EDU 09182-2012 S; Agency Ref. No.: 590-10/10) will be withdrawn with prejudice by MBOE and ACBOE, respectively, within seven (7) days of the making of the payment described in paragraph 1 above.

3. Both the ACBOE and MBOE, for and in consideration of the undertakings as set forth herein, and intending to be legally bound, do hereby remise, release and forever discharge each other (inclusive of their respective past, present and future officers, members, employees and agents) of and from any and all manner of actions and causes of action, suits, debts, losses, claims and demands whatsoever in law or in equity, including but not limited to attorney's fees and costs, which they ever had, now have, or hereafter may have, by reason of or related directly or indirectly to the education of K.C., the litigation captioned F.M. o/b/o K.C. v. Atlantic City Public School Board of Education, (OAL Docket No.: EDS 723-09; Agency Reference No.: 2009-14300) and the litigation captioned City of Margate BOE, Atlantic County v. City of Atlantic City BOE, Atlantic County, (OAL Docket No.: EDU 09182-2012 S; Agency Ref. No.: 590-10/10), including but not limited to Atlantic City's claim for reimbursement of the $175,000.00 settlement payment made to the parent of K.C.

4. Both MBOE and the ACBOE agree and acknowledge that this Agreement does not constitute an admission of any kind.

5. This Agreement is contingent upon approval by the MBOE and ACBOE.

6. **This** Agreement shall be governed by the law of the State of New Jersey and shall not be modified or amended except by a writing duly executed and signed by the parties.

7. This Agreement contains the entire agreement between the parties hereto, and supersedes any prior or contemporaneous agreements, representations or understandings.

8. Except for paragraphs 1 and 3 which are deemed to be essential and material parts of this Agreement, in the event that any provision of this Agreement is deemed invalid, illegal, void or unenforceable. Such provisions shall be regarded as stricken from this Agreement and shall not affect the validity or enforceability of the remainder of the Agreement.

Respectfully,

Angela Brown

Angela Brown
Board Secretary

102-14

OAL DKT. NO. EDU 15196-13
AGENCY DKT. NO. 264-10/13

JESSICA MALTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. Upon review, the Commissioner notes that according to the Agreement the settlement payment was due on a date that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 2/18/14
Date of Mailing: 2/19/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 15196-13
AGENCY DKT. NO. 264-10/13

JESSICA MALTA,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

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

Heather Savage-Ford, Esq. for respondent (Elizabeth Public Schools)

Record Closed: January 8, 2014 Decided: January 8, 2014

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

This matter was transmitted to the Office of Administrative Law on October 23, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated December 23, 2013, and attached letter of Board counsel confirming that the resolution was duly passed by the Board.

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

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

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

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

January 8, 2014
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 1-10-14

Mailed to Parties: JAN 10 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OAL Docket EDU 15196-13 Agency Docket 264-10/13
Jessica Malta v. Elizabeth Board of Education

The parties in the above referenced matter have agreed to resolve all issues as follows:

1) the Elizabeth Board of Education has agreed to pay Ms Malta $1,026.66, pending Board approval during its scheduled Meeting on Monday, December 23, 2013.

2) If approved by the Board, good faith effort will be made to remit payment by January 15, 2014 which is the next pay period, but No later than the last pay period in January 2014.

3) If the Board does not approve the terms of the agreement herein, this matter shall be relisted for adjudication before the Office of Administrative Law.

4) If payment is furnished as ~~agreed~~ specified in the agreement herein, Ms. Malta agrees to waive all claims against the Board relating to the underlying payment/salary dispute.

Jessica Malta
JESSICA MALTA, PETITIONER
12/19/13
DATE

Heather Savage-Ford
Heather Savage-Ford, Esq.
Elizabeth Board of Education
12/19/13
DATE

NICHOLAS GOBERCHNAT, ESQ
DATE 12/19/13

C
O
P
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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education and Jessica Malta (JM) have discussed a resolution of an Office of Administrative Law matter (Agency Docket No. 264-10/13 OAL Docket No. EDU 15196-13); and

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case; and

NOW, THEREFORE, BE IT RESOLVED that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement on file in the Office of the School Business Administrator/Board Secretary, provided that it is fully signed by all parties.

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD DECEMBER 23, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

OAL Docket: EDU 15196-13 Agency Docket: 264-10/13
Jessica Malta v. Elizabeth Board of Education

The parties in the above referenced matter have agreed to resolve all issues as follows:

1) the Elizabeth Board of Education has agreed to pay Ms. Malta $1,026.66, pending Board approval during its scheduled meeting on Monday, December 23, 2013.

2) If approved by the Board, good faith effort will be made to remit payment by January 15, 20 which is the next pay period, but no later than the last pay period in January 2014.

3) If the Board does not approve the terms of the agreement herein, this matter shall be relisted for adjudication before the Office of Administrative Law.

4) If payment is furnished as specified in the agreement herein, Ms. Malta agrees to waive all claims against the Board relative to the underlying payment/salary dispute.

Jessica Malta
JESSICA MALTA, PETITIONER
12/19/13
DATE

Heather Savage-Ford, Esq.
Elizabeth Board of Educatio
12/19/13
DATE

NICHOLAS ROBERTSON, ESQ.
DATE 12/19/13

104-14

LISSETTE ALFONSO,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In August 2010, petitioner – formerly employed as a technology teacher in respondent's school district – appealed the decision of the respondent Board to terminate her employment through a reduction in force (RIF) in June 2010. Petitioner asserted that the Board terminated her employment in contravention of her tenure and seniority rights under *N.J.S.A.* 18A:28-5 *et seq.*, and sought reinstatement and back pay retroactive to the date of her termination.

The ALJ found that: petitioner failed to appear for a hearing in this matter on January 29, 2014, despite having received appropriate notice; attorney for the petitioner appeared at the hearing and confirmed on record her ongoing inability to reach her client, stating that the petitioner last communicated with her in October 2012. Accordingly, the ALJ concluded that petitioner had abandoned this matter and ordered the case returned to the Department for appropriate disposition.

Upon review, the Commissioner found that petitioner had filed no explanation for her failure to appear despite having had the opportunity to do so. Accordingly, this matter is no longer a contested case before the Commissioner, and was dismissed with prejudice.

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

Issued 2/26/14

OAL DKT. NO. EDU 10008-10
AGENCY DKT. NO. 351-8/10

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

The record of this matter – transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and including an advisement of petitioner's failure to appear at the scheduled January 29, 2014 OAL hearing – has been reviewed. Petitioner filed no explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 2/26/14
Date of Mailing: 2/26/14

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR
OAL DKT. NO. EDU 10008-2010
AGENCY DKT. NO. 351-8/10

LISSETTE ALFONSO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH,
Respondent.

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

Marvin Lehman, Esq., for respondent

Record Closed: January 29, 2014 Decided: January 30, 2014

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

STATEMENT OF THE CASE

Petitioner, Lissette Alfonso (Alfonso), who was formerly employed by the Board of Education of the City of Elizabeth (the Board) as a technology teacher, asserts that the Board terminated her employment in contravention of her tenure and seniority rights

under N.J.S.A. 18A:28-5 et seq. She seeks reinstatement and back pay retroactive to the date of her termination.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Alfonso filed her appeal with the Commissioner of Education (the Commissioner) on August 9, 2010. An answer was filed on behalf of the Board, and the contested case was transmitted to the Office of Administrative Law (OAL), on September 16, 2010.

In or about June 2010, the Board terminated several hundred employees pursuant to a reduction in force (RIF); more than eighty of these employees challenged their terminations as violative of the tenure laws. Discovery and settlement discussions relative to these cases were the subject of bi-monthly status conferences between counsel and me. In the aftermath of the RIF, many of the petitioners were reinstated by the Board or secured alternative employment, and most of the claims raised by these petitions have been recently resolved through settlement or withdrawal. Alfonso was among the petitioners who neither settled nor withdrew her claim and accordingly, a notice of hearing was issued on August 12, 2013, requiring Alfonso's appearance on January 29, 2014. She failed to appear.

Her attorney did appear and advised me that she has experienced ongoing issues in communicating with her client. These difficulties are not new. Indeed, via a Case Management Order dated May 15, 2012, I had directed counsel to supply me with a list of petitioners with whom they have been unable to communicate regarding the nature and extent of their claims. Alfonso was among these petitioners, per correspondence from her attorney dated May 23, 2012, and I had noticed a hearing that required her appearance on July 30, 2012. Alfonso did not appear at that time, but her attorney nonetheless asked that I not dismiss her claim. Via letter dated August 29, 2012, counsel advised that she had gotten in touch with Alfonso, who had advised that she indeed wished to pursue her claim against the Board.

Counsel advised me on the record on January 29, 2014, that she last communicated with Alfonso in October 2012. Alfonso had continued to be

uncooperative in supplying the information needed to pursue her claim, and her attorney had advised her in writing that she was prepared to withdraw the petition if her client's cooperation was not forthcoming. Counsel heard nothing further from Alfonso. Last week counsel again attempted to reach Alfonso via phone and email to alert her to the proceeding on January 29, 2014, but without success.

The hearing was scheduled for 9:00 a.m. and we waited for Alfonso to appear until 10:20 a.m. An additional twenty-four hours have elapsed, and I have not heard from Alfonso or her attorney with an explanation for her non-appearance.

ANALYSIS AND CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Alfonso has abandoned this matter and that it should be returned to the transmitting agency.

N.J.A.C. 1:1-14.4(a) provides that, if, after appropriate notice, a party does not appear in any proceeding scheduled by a judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. Alfonso failed to appear at the scheduled proceeding, and she failed to provide an explanation one day following her nonappearance. Accordingly, the Clerk should return this matter to the Department of Education.

ORDER

It is **ORDERED** that the Clerk return this matter to the Department of Education for appropriate disposition.

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

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

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

January 30, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: January 30, 2014

Date Mailed to Parties: JAN 31 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

109-14

ELIZABETH JIMENEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Board's elimination of her non-tenured position as Supervisor of Special Education in March 2010, as part of a reduction in force (RIF). Petitioner was employed by the district under separate one-year contracts for the 2007-2008, 2008-2009 and 2009-2010 school years. The Board contended that petitioner was properly terminated for reasons of economy. Petitioner asserted that she was terminated without a vote of the school board in violation of *N.J.S.A.* 18A:27-4.1(a), and without receipt of a formal statement of reason for her termination; accordingly, she maintained that she was wrongfully terminated. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; petitioner's arguments regarding the Board's failure to follow the dictates of *N.J.S.A.* 18A:27-4.1(a) are overly simplistic given the complexity of the situation, wherein Jersey City was under partial State intervention at the time of the RIF; under the unique circumstances, the process used to terminate petitioner's employment was proper; pursuant to *N.J.S.A.* 18A:28-9, the Board had every right to terminate petitioner as part of a reduction in force; petitioner failed to establish an entitlement to back pay; petitioner's claim to tenure is without merit, as she was discharged from employment prior to working the full length of time required by law to achieve tenure in Jersey City; and petitioner had no entitlement to a statement of reasons for her termination nor a hearing, as she was discharged mid-contract and therefore not protected under *N.J.S.A.* 18A:27-4.1(b). The ALJ granted the Board's motion for summary decision, and dismissed the petition.

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

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

Issued 3/04/14

OAL DKT. NO. EDU 5926-12
AGENCY DKT. NO. 123-5/12

ELIZABETH JIMENEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

The respondent's exceptions substantially reiterated the substance of her submissions at the OAL, recasting the arguments therein to support the contention that the Administrative Law Judge (ALJ) erroneously granted summary decision in favor of the Board. Specifically, the petitioner maintains that the ALJ wrongfully found that the Board acted properly and was not required to vote to terminate petitioner's employment. The petitioner also takes exception to the ALJ's determination that the Board was not required to provide the petitioner with a statement of reasons for her termination and a hearing before the Board. Therefore, the petitioner asserts that the ALJ erroneously dismissed the petition. In reply the Board also reiterated the positions advanced in its submissions at the OAL, and stressed that the petitioner offered nothing in her exceptions to justify the modification of the Initial Decision.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ that the Board is entitled to summary decision for the reasons thoroughly

set forth in the Initial Decision. The objections raised in the exceptions filed by the petitioner mimic the arguments previously raised before the ALJ and clearly taken into account by her in determining that the Board was entitled to summary decision. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/04/14

Date of Mailing: 3/05/14

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05926-12
AGENCY DKT. NO. 123-5/12

ELIZABETH JIMENEZ,
Petitioner,
v.
THE SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY, AND CHARLES EPPS, JR.
Respondents.

Julio Gomez, Esq., for petitioner (Gomez LLC, attorneys)

Howard Nirenberg, Esq., for respondents (Nirenberg and Varano, attorneys)

Record Closed: December 5, 2013 Decided: January 15, 2014

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

STATEMENT OF THE CASE

Petitioner, Elizabeth Jimenez (Jimenez), challenges the termination of her employment as a non-tenured supervisor of special education by respondent, Jersey City Public Schools (Jersey City). Jersey City replies that its actions relative to

Jimenez's employment were at all times a proper exercise of its discretion, and compliant with all applicable statutes and regulations.

PROCEDURAL HISTORY

This matter came before the Commissioner of Education (the Commissioner) via transfer from the Superior Court, Hudson County, where Jimenez had filed a four-count complaint on December 20, 2010. She alleged violations of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 et seq.; violations of her Equal Protection Rights as guaranteed by the New Jersey Constitution and the New Jersey Civil Rights Act, N.J.S.A. 10:6-2(c); and violations of her due process rights under N.J.S.A. 18A:27-4.1. On January 24, 2012, the Honorable Maureen Mantineo, J.S.C., entered an order dismissing the OPMA claims, and directing that the school law claims be transferred to the Commissioner. Judge Mantineo directed in her order that, after the completion of the "administrative action before the Commissioner of Education the matter can be returned to the Law Division of the Superior Court of New Jersey, if necessary."

Via letter dated May 3, 2012, the Department of Education (the Department) confirmed receipt of the file from the Superior Court, and the following day transmitted the matter to the Office of Administrative Law (OAL) as a contested case. A motion for summary decision was filed by Jersey City on July 24, 2012. Jimenez filed a cross-motion on August 22, 2012. She relied heavily on the Department's February 2012 determination that Jersey City had failed to satisfy Governance Indicator G-3 of the New Jersey Quality Single Accountability Continuum (QSAC) by improperly ceding the local board's authority to approve personnel recommendations to the superintendent of Schools. Upon reviewing his adversary's submissions, counsel for Jersey City conferred further with his client and alerted me to the fact that the district had appealed the Department's QSAC determination. He asked that I hold the motions in abeyance pending the outcome of that appeal and I felt it appropriate to do so, as to do otherwise could risk inconsistent determinations and confuse the issues in the case.[1]

[1] Jimenez unsuccessfully sought to intervene in the QSAC appeal.

Via letter dated December 12, 2013, the Department determined that Jersey City was indeed compliant with Quality Indicator G-3. On July 15, 2013, Jersey City renewed its motion for summary decision. Jimenez filed a cross-motion for summary decision on September 16, 2013. Jersey City replied via letter memorandum dated October 4, 2013. Oral argument was conducted on December 5, 2013, at which time the record closed.

ISSUES PRESENTED

The Superior Court complaint raises the following school law claims under N.J.S.A. 18A:27-4.1:

1. Did Jersey City violate Jimenez's rights by failing to have its local board publicly vote to terminate her; and if so, what should be the remedy?

2. Did Jersey City violate Jimenez's rights by failing to supply her with a formal statement of reason for her termination, and/or to afford her a "Donaldson Hearing"; and if so, what should be the remedy?

Counsel agreed at oral argument that Jimenez's due process, equal protection and New Jersey Civil Rights Act, N.J.S.A. 10:6-2, claims all flow from the alleged violation of her rights under N.J.S.A. 18A:27-4.1, and are viable only upon successful adjudication of Jimenez's school law claims.

FINDINGS OF FACT

Jimenez's Employment with the District

The following salient facts are not in dispute, and I **FIND**:

Jimenez was employed by Jersey City from June 25, 2007, until March 29, 2010, as a supervisor of special education. She supervised instructional programs for special education students and oversaw the work of the child study teams. During her final

year of employment, Jimenez was the highest paid special education supervisor. Her salary would have been $130,000 had she continued in her position during the 2010-2011 school year.

Jimenez's initial contract employed her for the period from June 25 2007, through August 31, 2008, and was terminable on sixty days notice. Jimenez was not given notice under N.J.S.A. 18A:27-11 that her initial contract would not to be renewed; accordingly, until her termination in 2010 the original contract automatically renewed on identical terms for the 2008-2009 and 2009-2010 school years. Had she been reemployed for the 2010-2011 school year, Jimenez would have earned tenure. But via letter from Executive Assistant of Human Resources Hermione McNeil dated March 29, 2010, Jimenez was informed that "as a result of the district's budgetary situation and due to economic reasons," her contract was being terminated effective immediately. In accordance with the contract terms, Jimenez was paid for sixty additional days, but she was asked not to report for work.

Jersey City has consistently asserted that Jimenez was terminated for reasons of economy. Superintendent of Schools Charles Epps made the decision which positions to cut based on a variety of factors, including tenure and seniority considerations and assessing "where you can save a dollar." Each department gave Epps recommendations for staff reductions; cutting one special education supervisor was the recommendation made by the co-directors of the special services department who determined that the greatest impact on the budget would come from eliminating the highest paid non-tenured supervisor, Jimenez. Three other non-tenured supervisors, in addition to earning less than Jimenez, were tenured special education teachers who would have had bumping rights upon their termination from their supervisory positions. Jimenez was not the only special education department staffer who was laid off; that year some thirty social workers were terminated as well. Other District departments likewise made reductions in staff.

In a certification filed in support of her cross-motion for summary decision, Jimenez does not so much challenge the District's rationale for her RIF, as the manner in which it took place. Jimenez asserts, and the record includes no evidence to the

contrary, that she received more than satisfactory performance reviews and thus fully expected to earn tenure. She relates that her termination was harsh and hurtful. On March 29, 2010, Jimenez was abruptly taken to her office by a security guard, told to retrieve her personal effects, and escorted out of the building in front of her peers and superiors. While she received a letter that attributed her discharge to budgetary constraints, Jimenez urges that the letter did not offer a satisfactory explanation for her termination. It did not specify the budgetary shortfalls that led to her lay-off, or explain why she was selected for termination rather than the various other supervisors in her department. Jimenez was afforded no opportunity to wind down her responsibilities or appropriately transition them to colleagues.

Letters to the superintendent of schools and to her direct supervisors requesting a statement of reasons for her discharge and a hearing went unanswered. Jimenez's termination was not made public via either a superintendent's report or discussion at a Board meeting as memorialized in Board minutes.

The District Take-Over and its Return to Partial Local Control

It is uncontroverted and I **FIND**:

By administrative order dated October 4, 1989, the New Jersey State Board of Education removed the local board of education in Jersey City and created a State-Operated School District. The local board's authority was placed entirely in the hands of a State-appointed superintendent of schools. This action followed a determination that Jersey City was failing to provide its students with a thorough and efficient education.

In 2007, the State Board adopted a resolution partially returning local control to Jersey City. The decision to do so came in the aftermath of an assessment of district performance in five key components of school effectiveness: operations management, personnel, instruction and program, governance, and fiscal management. The resolution noted that the district had been evaluated by a team of "highly skilled professionals," who had determined that it met requisite performance indicators in the

areas of governance and fiscal management; accordingly, these functions were returned to local control. (Nirenberg Certification, Exhibit K.)

A transition plan for the return of the governance and fiscal management functions was adopted on April 17, 2008. (Nirenberg Certification, Exhibit L.) That plan set forth with specificity the sort of activities that were now to be locally controlled; to include negotiating a contract with and evaluating the superintendent of schools; reviewing and revising the board policy manual; and planning and approval of the annual school budget. Epps testified at deposition that it was his understanding that since the district remained under State control in the area of personnel, he retained the exclusive authority to make personnel decisions, including the decision to hire, terminate, or non-renew professional staff like Jimenez. The deposition testimony of other top district officials, to include McNeil and board member Angel Valentin, was in accord.[2] I **FIND** that consistent with this understanding no board action was taken relative to the termination of Jimenez's contract.

QSAC is the current statutorily mandated system of school district assessment, which is completed by all New Jersey public schools. Quality Performance Indicator G-3 asks districts to reflect on their compliance with the following requirement:

> The school board approves appointments and transfers and removes or renews certificated and non-certificated officers and employees only by a roll call majority vote of the full membership of the board upon the recommendation of the Chief School Administrator and the board acts within 60 days of the Chief School Administrator's recommendation. (N.J.S.A. 18A:27-4.1)
>
> For Advisory Boards. The advisory board reviews appointments, transfers, removal or renewal of certificated and non-certificated officers and employees.
>
> [Hak Certification, Exhibit A.]

[2] Jimenez asserts that she later talked via telephone with Valentin; he explained that the Board had been "duped" by the superintendent into thinking it had no authority to act on personnel decisions.

Jimenez urges that her termination was at odds with this procedural requirement. But the certification of former counsel Paula Hak confirms that the Jersey City approach to personnel matters was transparent, and indeed, shared openly with the Department each time the district completed a performance review. Prior to November 2010, Jersey City's QSAC review was completed by field representatives from the Hudson County Superintendent's office.[3] A September 2009 Interim Placement Review Report reflects that the County Office marked Jersey City as compliant with indicator G-3. Notes on the document candidly share that "[a]t personnel committee meetings all areas are discussed but the final decision is the superintendent's . . . [t]he Board does not approve personnel recommendations by the CSA, it simply accepts certification . . . [r]ecommendations discussed at Personnel Committee level and results shared with the Board. No vote." (Hak Certification, Exhibit A.) The County Superintendent's office thus was well aware that the Jersey City Board was not voting on personnel matters and approved this approach to personnel decision-making by finding the district compliant with Indicator G-3.

In November 2010, for the first time after the board regained local control of governance in April 2008, Jersey City self-assessed as part of the QSAC evaluative process. Hak completed the required documentation for the district that year; she again ranked Jersey City as compliant for Indicator G-3, straightforwardly noting her understanding that, "[t]he Board does not have the power of personnel . . . [n]ot having local control in the area of personnel, the Board does not vote on these items and the CSA has final decision making power regarding personnel matters." (Hak Certification, Exhibit B.) Hak reiterated that Jersey City was functioning in this fashion during a subsequent interview with Executive County School Business Administrator for Hudson County William Takacs.

In October 2011, the Hudson County Executive Superintendent asked all county districts to complete a Statement of Assurance (SOA), an additional regulatory requirement designed to monitor school performance. This form also assesses compliance with the requirement that local boards vote on personnel matters; Jersey

[3] The Hudson County office is a part of the New Jersey Department of Education.

City responded "N/A," noting that "[t]he Board does not have local control over the area of personnel. As a result, it does not approve such actions." (Hak Certification, Exhibit C.) Hak certified that as of December 2011 no one from the Department or its Hudson County Office had ever questioned "or taken issue with the manner in which the Jersey City Public School District handled personnel decisions." It is uncontroverted, and I **FIND**, that at no time prior to December 2011 had Jersey City been advised that upon return of partial local control the Board was now authorized to vote on personnel matters such as appointments, transfers, removals, or renewals.

In or about January 2012, Jersey City first learned that the Department was questioning its procedures in the area of personnel. Correspondence between the Department and then Interim Jersey City Superintendent of Schools Franklin Walker makes reference to meetings in which Jersey City's placement on the QSAC continuum was discussed; preliminarily, the Department had questioned the practice of placing full authority for personnel actions in the hands of the superintendent. (Nirenberg Certification, Exhibit P.) Walker took exception on behalf of the district, citing the QSAC score referenced in the Hak certification. But on February 1, 2012, the Commissioner formally found Jersey City non-compliant on Governance Indicator G-3. Jersey City submitted a reconsideration request. (Nirenberg Certification, Exhibit S.) On December 12, 2012, the Commissioner concluded, based on the information supplied by Jersey City, that:

> As a result of this reconsideration review, the rating for G3 has been changed to reflect compliance. In February of 2012, the board was not informed that it had the authority to vote on personnel matters upon restoration of the governance indicator. This authority included board appointments, transfers, removals and renewals of certificated and non-certificated officers and employees. Since the board was never informed of this authority prior to February 2012, the district should have been rated compliant for indicator G3.
>
> [Nirenberg Certification, Exhibit V.]

Jimenez points to Board policies that were in effect at the time of her termination that specifically required Board action on personnel matters; asserting that accordingly,

the Board violated its own policies. She additionally makes note of the district policy relative to reductions in force, which provides as follows:

> Should it become necessary to reduce the number of employees in the district, the laws and regulations of the state shall be the controlling guides. If, in any case of such reduction, candidates for termination are non-tenured personnel only, the primary basis for selection for termination or reduction shall be the needs of the district's educational program and the individual's contribution toward achievement of that program based on properly completed observations and evaluations.
>
> [Gomez Certification, Exhibit X.]

John T.M. Chester, an executive assistant in the Business Division, clarified via certification that upon return of the governance function to local control, a policy manual was adopted for the district, as required by the district transition plan. The policy manual was based upon a model offered by the New Jersey School Boards Association and was intended to ensure that all mandatory policies were in place. But the policy manual did not address, nor was it intended to address, the unique circumstances of a district like Jersey City, which remained under partial State intervention.

CONCLUSIONS OF LAW

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

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

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

The Process Used to Terminate Jimenez's Employment

In support of her wrongful termination claims, Jimenez relies on N.J.S.A. 18A: 27-4.1(a), which provides in pertinent part:

> A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons.
>
> [Emphasis supplied.]

Jimenez argues that the statute clearly and unequivocally requires that the local board of education publicly vote to terminate employees; and of course, she is correct. Since

the Jersey City Board failed to vote here, Jimenez contends she was never properly terminated and is entitled to reinstatement, back pay, and tenure. See e.g. Martell-DiMaio v. Dennis Twp. Bd. of Educ., EDU 10500-07, Initial Decision (March 28, 2008), adopted, Comm'r (May 9, 2008), <http://njlaw.rutgers.edu/collections/oal/>. But Jimenez's arguments are overly simplistic and ignore the complexity of the situation Jersey City found itself in as a school district under partial State intervention. I **CONCLUDE** that the process used to terminate Jimenez's employment was proper under the totality of the highly unique circumstances presented here.

An appreciation of why Jersey City might have mistaken the parameters of its local authority must start with a review of the statutes and regulations that permitted the Commissioner to take control of its schools. Jersey City was a failing district when in 1989 the then applicable Public School Education Act of 1975 (PSEA), L. 1975, c. 212, as amended by L. 1987, c. 398, authorized the Commissioner to place the district under state control, removing the local board of education and stripping it of any authority for the operations of the school district. See In re Newark QSAC Appeal, A-6295-10T4 (App. Div. July 8, 2013), <http://njlaw.rutgers.edu/collections/courts/>. In 2005, the PSEA was amended and QSAC was established, "thereby altering the manner in which the State evaluated the thoroughness and efficiency of all public schools in the State . . . ." Id. at page *3. Under QSAC, public school districts are evaluated in five areas of district effectiveness. Ibid.; N.J.S.A. 18A:7A-10. A school district's capacity and effectiveness are assessed through the use of "quality performance indicators"; based upon district compliance with these indicators, the Commissioner assesses "district capacity and effectiveness and place[s] the district on a performance continuum that . . . determine[s] the type and level of oversight and technical assistance and support the district receives." N.J.S.A. 18A:7A-10.

Intervention is required where the Commissioner determines, based upon a variety of factors, that there exists an "insufficient local capacity to ensure that the public school district will provide a thorough and efficient education to the students in the public school district." N.J.A.C. 6A:30-6.2(b)(5). The regulatory language makes it plain that intervention will have nuances particular to each school district's strengths and deficits. Indeed, while the Commissioner will intervene in each of the five areas of

school district functioning during a complete take-over, the specifics of that intervention are discretionary and "may include" appointment of a State District Superintendent; appointment of one or more "highly skilled professionals" to provide oversight; and appointment of up to three additional members of the district board of education. N.J.A.C. 6A:30-6.1. The State District Superintendent is authorized by statute to "perform such duties and possess such powers as deemed appropriate by the Commissioner," including the authority to make personnel decisions relative to the employment and removal of professional and non-professional employees. N.J.S.A. 18A:7A-35; see also N.J.S.A. 18A:7A-38; N.J.S.A. 18A:7A-42(A)(3). Upon assuming State control of a local district, the Commissioner likewise retains broad discretion to determine when, and to what extent, it is appropriate to return school district operations to local control. In re Newark QSAC Appeal, supra, A-6295-10T4; N.J.S.A. 18A:7A-15.

A move to partial local control, as took place here, allows for even more discretion. The Department, in collaboration with the local district, must develop a formal plan that outlines the particulars of the transition process. N.J.A.C. 6A:30-7.2. The Commissioner fully retains the authority and discretion to determine the scope of the powers of a partially autonomous district. Indeed, even if governance is not returned to local control, the State Board of Education may, upon the recommendation of the Commissioner, "return some voting functions to the board of education as part of and in furtherance of the process of a transition to local control." N.J.S.A. 18A:7A-49(c); N.J.A.C. 6A:30-7.5. Jersey City's termination of Jimenez's employment must be considered against this statutory and regulatory backdrop. Precisely because the statutory scheme vests broad discretion in the Commissioner to determine the scope of his intervention, the local board must follow his lead in determining where its authority begins and ends.

It is thus significant that the formal plan that returned finance and governance to local control in Jersey City did not specify that a return to local control for any aspect of personnel action; and indeed, the district continues to perform poorly in the area of

personnel to date.[4] Consistent with the understanding that the State District Superintendent thus continued to retain authority to hire and fire staff, both the district and the County Office of the State Department of Education repeatedly ranked Jersey City compliant with governance indicator G-3, this despite the fact that the local board openly failed to ratify the superintendent's personnel recommendations. It was not until February 2012 that the Commissioner advised that the local board could and should vote on matters of personnel.

Accordingly, the Commissioner rightly determined that the failure of the Jersey City Board to act on personnel recommendations did not constitute non-compliance with QSAC Quality Indicator G-3. Indeed, Jersey City had been simply following the Commissioner's lead, as it had been required to do since 1989. I am thus likewise unable to conclude that Jersey City violated Jimenez's rights when it acted to terminate her for reasons of economy without formal board action. What transpired here must be viewed through the lens of simple common sense. Jimenez's termination came at a time of transition in a troubled school district that was operating under a unique governance model.[5]

Jimenez asserts that in reversing itself relative to Quality Indicator G-3 the Department never determined that Jersey City acted correctly in ceding personnel determinations to the superintendent, only that its lack of knowledge of its obligations should be excused under the circumstances. Jimenez cites well-established case law and urges that "ignorance of the law will not excuse non-compliance with its requirements." See State v. Moran, 202 N.J. 311, 320 (2010). But what happened here was not "ignorance of the law"; rather it was confusion regarding how much authority had been returned to a local board that for eight years had no autonomy whatsoever. I **CONCLUDE** that Jersey City acted properly when it terminated Jimenez.[6]

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[4] The Commissioner notes in his February 1, 2012, letter that the district remains only 63% compliant with the performance indicators under personnel in QSAC. (Nirenberg Certification, Exhibit R.)

[5] For this reason, the argument that local policy required board action on personnel matters is without merit; such policy would not supersede the authority of the Commissioner.

[6] It is noteworthy that the current statutory language vests a good deal of authority in the chief school administrator even in a normally functioning district. N.J.S.A. 18A:27-4.1. While the board acts on personnel, it does so only upon the recommendation of its superintendent.

Granting Jimenez the monetary relief she seeks would unjustly penalize a struggling school district and unfairly enrich her. Indeed, the technicalities of the termination process aside, it is well-established that Jersey City had every right to terminate Jimenez as part of a reduction in force. N.J.S.A. 18A: 28-9 provides that:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

The record offers ample evidence of a legitimate rationale for doing so relative to Jimenez's continued employment. Conversely, she proffered no evidence of any ulterior or proscribed motive for her discharge, instead focusing on her contention that the action of her employing school district was procedurally flawed. To the extent that Jimenez contends the district violated local policy governing reductions in force, her arguments are unpersuasive. Although the policy language elaborates on the considerations used in making difficult lay-off decisions, it nonetheless clearly and unequivocally directs that "the laws and regulations of the state shall be the controlling guides." (Gomez Certification, Exhibit X.) These laws and regulations give non-tenured staff such as Jimenez no seniority or other rights that would restrict the school district in deciding where to make needed staff cuts.

I thus **CONCLUDE** that Jimenez has not established an entitlement to back pay. Moreover, the law supports Jersey City's action in paying the sixty days owed Jimenez under her contract in lieu of permitting her to continue to work. Under N.J.S.A. 18A:27-9, upon termination of an employment contract on notice, "it shall be optional with the board whether or not the member shall continue to perform his duties during the period between the giving of the notice and the date of termination of employment thereunder." Although Jimenez's abrupt termination understandably felt cruel and harsh, Jersey City acted within its legal discretion to end her service immediately and thus deny her tenure. Indeed, it is well-established that "tenure is statutory and arises only by

passage of the time fixed by the statute, and the discharge of an employee before the passage of the required time bars tenure . . . ." Canfield v. Pine Hill Bd. of Educ., 97 N.J. Super. 483, 490 (App. Div. 1967), rev'd on dissent, 51 N.J. 400 (1968); Picogna v. Cherry Hill Bd. of Educ., 143 N.J. 391 (1995). Accordingly, I **CONCLUDE** that Jimenez's claims to tenure are meritless.

Jimenez's Right to a Statement of Reasons and a Hearing

Jimenez was terminated mid-contract, and accordingly, she had no entitlement to the procedural protections of N.J.S.A. 18A:27-4.1(b), which provides:

> An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal pursuant to section 2 of P.L. 1975, c. 132 (C.18A:27-3.2) and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment.

The Commissioner has confirmed that these statutory due process rights extend only to employees whose contracts have been non-renewed and has rejected claims that a statement of reasons and board level hearing must be afforded to employees terminated mid-contract. Wonsetler v. Woodbury Bd. of Educ., EDU 04504-11, Initial Decision (July 8, 2011), adopted, Comm'r (August 17, 2011), <http://njlaw.rutgers.edu/collections/oal/>. Jersey City additionally relies on Dore v. Bedminster Bd. of Educ., 185 N.J. Super. 447 (App. Div. 1982). There, where a local board failed to comply with the dictates of N.J.S.A. 18A:27-3.1 in evaluating a non-tenured staff member, the court held that the school laws afforded no remedy. Plaintiff's demand for reinstatement and back pay was rejected by the court. Jimenez makes the somewhat remarkable assertion that she was both terminated and non-renewed; this is a specious argument, but even if it had any merit, Dore makes it plain that the relief she seeks would nonetheless be unavailable to her. The court there emphasized a local district's "virtually unlimited discretion in hiring or renewing non-tenured teachers." Dore, supra, 185 N.J. Super. at 453; see also Sheridan v. Pitman Bd. of Educ., EDU 8068-03, Final Decision (December 1, 2004), <http://njlaw.rutgers.edu/collections/oal/>.

I **CONCLUDE** that Jimenez's claims that her rights were violated by Jersey City's failure to provide her with a statement of reasons for her termination and a hearing before the local board are without merit and should be dismissed.

ORDER

Counsel have stipulated that the remaining claims of the complaint are viable only upon successful adjudication of the school law claims raised by Jimenez. Having found the claims raised under N.J.S.A. 18A:27-4.1 and its interpretive case law to be without merit, it is hereby **ORDERED** that Jersey City's motion for summary decision is **GRANTED** and the petition of appeal is **DISMISSED**. Jimenez's motion for summary decision is **DENIED**.

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

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

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

January 15, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: January 15, 2014

Date Mailed to Parties: JAN 16 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

110-14

OAL DKT. NO. EDU 14665-11
AGENCY DKT. NO. 338-11/11

THOMAS LEE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/05/14

Date of Mailing: 3/05/14

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 14665-11

AGENCY DKT. NO. 338-11/11

THOMAS LEE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Philip Feintuch, Esq. for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Sandra N. Varano, Esq. for respondent (Nirenberg & Varano, attorneys)

Record Closed: December 27, 2013 Decided: January 16, 2014

BEFORE **CARIDAD F. RIGO** ALJ:

On September December 13, 2012, the above referenced matter was remanded to the Office of Administrative Law (OAL) for "perfection of settlement or adjudication of merits". The executed Stipulation of Settlement and Board Resolution were forwarded to the undersigned on October 3, 2012 and are attached hereto.

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

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

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

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

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

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

July 26, 2013

DATE

CARIDAD F. RIGO, ALJ

Date Received at Agency: 1-21-14

Date Mailed to Parties: JAN 21 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

lr

Attachment

SETTLEMENT AGREEMENT

Petitioner: Thomas Lee
Respondent: Jersey City Board of Education
OAL Docket No.: EDU 14665-11 N
Agency Dkt. No.: 338-11/11

PRELIMINARY STATEMENT

In the interest of closure and in the mutual resolution of their differences, the Jersey City Board of Education, Respondent, and Thomas Lee, Petitioner, enter into this Settlement Agreement. The parties sign this Agreement in exchange for the good and valuable consideration set forth herein, which, absent this Agreement, neither party is obligated to provide to the other and the adequacy of which is hereby acknowledged.

TERMS AND CONDITIONS

1. In exchange for the promises made by the Respondent in this Agreement, the Petitioner agrees to withdraw the Verified Petition filed before the Commissioner of Education of the State of New Jersey and transferred to the Office of Administrative Law, OAL Docket No.: EDU 14665-11N, Agency Dkt. No.: 338-11/11 and agrees not to institute any other claim or law suit arising out of the withholding of his salary increment for the 2011/2012 school year based on performance during the 2010/2011 school year, including but not limited to any claim, demand, cause of action, damage, charge, or complaint arising out of or under the New Jersey Law Against Discrimination, Title VII of the Civil Rights Act of 1964, the Federal Civil Rights Act of 1991, 42 U.S.C. 1981, 1983, 1985 and 1986, the Federal Family and Medical Leave Act, the New Jersey Family Leave Act, the Federal Equal Pay Act of 1963, the federal Fair Labor Standards Act, the New Jersey Civil Rights Act, the Americans with Disabilities Act, the New

Jersey Conscientious Employee Protection Act (CEPA), the New Jersey State and/or United States Constitution, any public policy claims, harassment claims and/or retaliation claims, as well as any claim, demand, cause of action, damage, charge, complaint, expense or compensation arising out of or under any Federal, State or local law or rule, constitution, regulation, executive order or guideline and any claim, demand, cause of action, damage, charge, complaint, and any claim that could have or should have been joined into the Verified Petition by operation of the entire controversy doctrine, including any and all claims for attorney's fees and costs.

2. The Respondent agrees that it shall pay to the petitioner the amount of Two Thousand One Hundred Dollars ($2,100), the amount of the increment withheld. At the time the petitioner's increment was withheld, he was at the top Step.

3. It is understood that this agreement does not constitute and shall not be construed as an admission of liability or wrongdoing by either party with respect to the claims set forth in the aforesaid Verified Petition, OAL Docket No.: EDU 14665-11N, Agency Dkt. No.: 338-11/11.

4. The parties understand the terms of this Agreement and enter into it voluntarily.

5. This document constitutes a final and complete statement of the Agreement between the parties. There shall be no modifications or amendments to this Agreement unless they are in writing, signed by the parties.

Witnessed or Attested by:

Thomas Lee

STATE OF NEW JERSEY, COUNTY OF HUDSON SS:

I certify that on NOVEMBER 12 2013, Thomas Lee came before me and acknowledged under oath, to my satisfaction, that this person(s):

(a) is named in and personally signed this document;

(b) signed, sealed and delivered this document as his or her act and deed.

AN ATTORNEY AT LAW OF N.J.

Witnessed or Attested by:

BY:
Jersey City Public Schools

Agenda Item Details

Meeting	Dec 19, 2013 - Regular Meeting, 6 p.m.
Category	9. Legal
Subject	9.04 Approval of Settlement Agreement
Type	Action (Consent)

WHEREAS, Thomas Lee, tenured teacher, filed a Verified Petition before the Commissioner of Education of the State of New Jersey alleging the District violated School Law when it withheld Mr. Lee's increment for the 2011/2012 school year; and

WHEREAS, this matter was transferred to the Office of Administrative Law for disposition; and

WHEREAS, the parties desire to settle all differences arising out of the withholding of Mr. Lee's increment effective September 1, 2011; and

WHEREAS, a settlement agreement has been negotiated which will fully settle all disputes arising out of this matter; and

WHEREAS, said settlement agreement does not constitute and shall not be construed as an admission of liability or wrongdoing by either party with respect to the claims set forth in the aforesaid Verified Petition; now therefore

BE IT RESOLVED that the Jersey City Board of Education does hereby authorize and approve payment in the amount of $2,100 in accordance with the terms and conditions set forth in the settlement agreement to fully satisfy the matter of Thomas Lee v. Jersey City Board of Education

111-14

OAL DKT. NO. EDU 4305-13
AGENCY DKT. NO. 52-3/13

ANEESAH ABDULLAH,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/05/14

Date of Mailing: 3/05/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04305-13

AGENCY DKT. NO. 52-3/13

ANEESAH ABDULLAH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondent.

Randi Doner April, Esq., for petitioner (Oxfeld Cohen, attorneys)

Cassia J. Beierle, Esq., for respondent (Netchert, Dineen, Hillman, attorneys)

Record Closed: January 13, 2014 Decided: January 17, 2014

BEFORE **RICHARD McGILL**, ALJ:

Aneesah Abdullah filed a petition with the Commissioner of Education alleging that the Board of Education of the City of Jersey City failed to pay full salary without loss of sick time for an injury sustained in the course of employment pursuant to N.J.S.A. 18A:30-2.1. The matter was transmitted to the Office of Administrative Law on March 26, 2013, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a written Settlement Agreement and General Release. Having reviewed the record and the settlement terms, I **FIND** as follows:

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

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

Therefore, I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the terms of the settlement, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

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

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

Jan. 17, 2014
DATE

RICHARD McGILL, ALJ

Date Received at Agency:

Date Mailed to Parties: JAN 23 2014

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

RECEIVED
2014 JAN 13 P 4:10
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

NETCHERT, DINEEN & HILLMANN
280 Baldwin Avenue
Jersey City, New Jersey 07306
(201)-656-3000
Attorney for the Defendant Jersey City Board of Education

ANEESAH, ABDULLAH *Petitioner,* vs. JERSEY CITY BOARD OF EDUCATION *Respondent.*	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW **OAL Docket No. EDU 04305-2013 N** **STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in controversy in the above-entitled action having been amicably compromised and settled, it is now stipulated and agreed by and between the parties, by and through their respective attorneys, that the matter be dismissed with prejudice and without costs in favor of or against either party. The undersigned hereby consent to the form and entry of the within Stipulation.

OXFELD COHEN, P.C.
Attorneys for the Petitioner,
Aneesah Abdullah

By: _____
RANDI DONER APRIL, ESQ.

Dated: ~~October ___, 2013~~ January 8, 2014

NETCHERT, DINEEN & HILLMANN, ESQS.
Attorneys for Respondent,
Jersey City Board of Education

By: _____
CASSIA J. BEIERLE, ESQ.

SETTLEMENT AGREEMENT AND GENERAL RELEASE

RECEIVED
2014 JAN 13 P 4:10
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

This Settlement Agreement and Release (hereinafter "Agreement") is executed the 6 day of January, 2014, between Petitioner, Aneesah Abdullah and Respondent, the Jersey City Board of Education.

1. NON-ADMISSION

The parties agree that this Agreement does not constitute an admission by any party of any violation of law or statute, that neither this Agreement nor the furnishing of consideration shall be deemed or construed for any purposes as evidence or an admission of liability or wrongful conduct of any kind.

2. SETTLEMENT

Petitioner, Aneesah Abdullah, agrees to settle and release all claims in the present and future against Respondent, the Jersey City Board of Education with regard to sick days/leave arising out of the February 12, 2010 and February 16, 2010 dates of accident, OAL Docket No. EDU-04305-2013 N, in consideration for Respondent's agreement to **restore thirteen (13) sick days** to Petitioner's yearly paid sick leave days, and to treat these thirteen (13) days as compensation days.

4. WITHDRAWL OF CLAIMS

Prior to return of sick days as further specified in paragraph 2, the parties, through their counsel, shall sign the Stipulated Order of Dismissal attached hereto as Exhibit A. The parties agree to withdraw any other claims, charges or complaints asserted against the other, in any form.

3. WAIVER AND RELEASE OF CLAIMS

The Petitioner, Aneesah Abdullah, hereby fully, unconditionally and without limitation waives and releases Respondent, the Jersey City Board of Education, and their direct and indirect parents, subsidiaries, and predecessors, and all of its and their respective present and future employees, directors, officers, attorneys, successors, and assigns, from any and all known and unknown claims, rights, and causes of action of any kind arising out of or in any way connected with the loss of sick time for absences resulting from claimed injury sustained in the course of employment related to February 12, 2013 and February 16, 2010 dates of accident, OAL Docket No. EDU-04305-2013 N, and their corresponding Claim Petition Numbers 2010-7080 and 2010-7079.

4. ENTIRE AGREEMENT

This Agreement contains the entire agreement and understanding between Petitioner and Respondent with respect to any and all disputes or claims that either party has, or could have, against the other party, as of the date this Agreement is executed, and supersedes all other agreement between the Petitioner and Respondent with regard to such disputes or claims. This Agreement shall not be changed unless in writing and signed by both Petitioner and Respondent.

5. FAIR REPRESENTATION

Petitioner represents and warrants that she has been represented fully, fairly, and without bias or conflict in connection with this Agreement by her attorney.

6. CONSULTATION WITH AN ATTORNEY

Petitioner represents and warrants that she has consulted with her attorney with respect to this Agreement, and reviewed with her attorney all the terms and conditions of this Agreement before signing this Agreement.

7. KNOWING AND VOLUNTARY AGREEMENT

The parties represent and acknowledge that they have had a reasonable amount of time to consider this Agreement and that, in executing this Agreement, they rely entirely upon their own judgment, beliefs and interests and the advice of their counsel, and they do not rely and have not relied upon any representation or statement made by the other party, or by any agents, representatives or attorneys of the other party, with regard to the subject matter, basis or effect of this Agreement or otherwise, other than as specifically stated in this Agreement. The parties specifically acknowledge that all releases contained herein are knowing and voluntary.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed:

Aneesah Abdulllah

Cassia J. Beierle, Esq.
Attorney for Respondent, Jersey City Board of Education

By: _____
Cassia J. Beierle

112-14

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

SYNOPSIS

In August 2010, petitioner filed an appeal of the termination of her employment as a world language teacher through a reduction in force (RIF) in June 2010, contending that the Board violated her tenure and seniority rights under *N.J.S.A.* 18A:28-5 et seq. Petitioner sought reinstatement and back pay retroactive to the date of her termination.

The ALJ found that: petitioner failed to appear for a hearing in this matter on January 29, 2014, despite having received appropriate notice; attorney for the petitioner appeared at the hearing and confirmed on the record that she had communicated regularly with her client, and had confirmed by telephone and email the day before the hearing that petitioner's appearance was mandatory if she wished to continue the pursuit of her claim; notwithstanding, the petitioner failed to appear, and offered no explanation for her non-appearance. Accordingly, the ALJ concluded that petitioner has abandoned this matter and ordered the case returned to the Department for appropriate disposition.

Upon independent review, the Commissioner determined that this matter is no longer deemed to be a contested case, and accordingly dismissed the matter with prejudice.

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

Issued 3/05/14

OAL DKT. NO. EDU 9849-10
AGENCY DKT. NO. 394-8/10

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

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, dismissing the petition for petitioner's failure to appear at the scheduled hearing, have been reviewed. The Initial Decision recites that petitioner's counsel, who attended the hearing on January 29, 2014, had advised petitioner of the hearing but had received no commitment from petitioner that she would attend same. Nor did petitioner contact her counsel or the OAL on the day of the hearing or the next day to explain her absence. As over thirteen days have passed without any communicaton from petitioner, this matter is no longer deemed to be a contested case before the Commissioner of Education and is hereby dismissed with prejudice.[1]

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/05/14

Date of Mailing: 3/06/14

[1] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR
OAL DKT. NO. EDU 09849-10
AGENCY DKT. NO. 394-8/10

NIEVES PITA,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH,

Respondent.

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

Marvin Lehman, Esq., for respondent

Record Closed: January 29, 2014 Decided: January 30, 2014

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

STATEMENT OF THE CASE

Petitioner, Nieves Pita (Pita), who was formerly employed by the Board of Education of the City of Elizabeth (the Board) as a world language teacher, asserts that the Board terminated her employment in contravention of her tenure and seniority rights

under N.J.S.A. 18A:28-5 et seq. She seeks reinstatement and back pay retroactive to the date of her termination.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

Pita filed her appeal with the Commissioner of Education (the Commissioner) on August 13, 2010. An answer was filed on behalf of the Board, and the contested case was transmitted to the Office of Administrative Law (OAL), on September 9, 2010.

In or about June 2010, the Board terminated several hundred employees pursuant to a reduction in force (RIF); more than eighty of these employees challenged their terminations as violative of the tenure laws. Discovery and settlement discussions relative to these cases were the subject of bi-monthly status conferences between counsel and me. In the aftermath of the RIF, many of the petitioners were reinstated by the Board or secured alternative employment, and most of the claims raised by these petitions have been recently resolved through settlement or withdrawal.

Pita was among the petitioners who neither settled nor withdrew her claim and accordingly, a notice of hearing was issued on January 10, 2014, requiring Pita's appearance on January 29, 2014. She failed to appear. It is uncontroverted that she was aware of the hearing date, because Pita's attorney appeared at the hearing and confirmed on the record that she had communicated regularly with her client; had made her aware of the January 29, 2014, proceeding; had confirmed with her client via telephone and email only the day before that the hearing was proceeding as planned; and had advised Pita that her appearance was mandatory if she wished to continue to pursue her claim. According to counsel, Pita's response was somewhat ambivalent and she made no commitment that she would appear at the hearing. Hence, counsel indicated that she was unsurprised by her non-appearance. At my request she checked her phone one last time to assure that Pita had not gotten in touch with her to explain her non-appearance. She had not done so.

The hearing was scheduled for 9:00 a.m. and we waited for Pita to appear until 10:20 a.m. An additional twenty-four hours have elapsed, and I have not heard from Pita or her attorney with an explanation for her non-appearance.

ANALYSIS AND CONCLUSIONS OF LAW

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Pita has abandoned this matter and that it should be returned to the transmitting agency.

N.J.A.C. 1:1-14.4(a) provides that, if, after appropriate notice, a party does not appear in any proceeding scheduled by a judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. Pita failed to appear at the scheduled proceeding, and she failed to provide an explanation one day following her nonappearance. Accordingly, the Clerk should return this matter to the Department of Education.

ORDER

It is **ORDERED** that the Clerk return this matter to the Department of Education for appropriate disposition.

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

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

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

January 30, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: January 30, 2014

Date Mailed to Parties: JAN 31 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

113-14

H.F., on behalf of minor children, S.D. and A.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of her children in August 2013. A hearing at the Office of Administrative Law (OAL) was scheduled for January 24, 2014, but petitioner failed to appear despite having received appropriate notice and provided no explanation for her nonappearance. Having received no explanation from petitioner for her failure to appear, the OAL returned the file to the Commissioner.

There being no explanation filed, the Commissioner dismissed the petition with prejudice. In so doing, the Commissioner noted that the Board's Answer in this residency matter contained a counterclaim for tuition which was left unresolved by the Administrative Law Judge. Accordingly, the matter was remanded to the OAL for resolution of the tuition issue.

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

Issued 3/05/14

OAL DKT. NO. EDU 12626-13
AGENCY DKT. NO. 186-8/13

H.F., on behalf of minor children, S.D. and A.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODLAND PARK, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of petitioner's failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with copies of the notification sent to the parties by OAL on January 28, 2014, providing petitioner thirteen days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed by petitioner, the petition of appeal is hereby dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for her nonappearance.

Notwithstanding the dismissal of the petition, the Commissioner notes that the Board's Answer in this residency matter contained a counterclaim for tuition which was left unresolved by the Administrative Law Judge. In that the record before the Commissioner contains no affidavit of a responsible Board official attesting to the amount of tuition claimed by the Board as a consequence of the ineligible attendance of petitioner's children in its schools, this matter must be remanded to the OAL for supplementation of the record in this regard and an appropriate recommended order regarding the payment of tuition.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 3/05/14
Date of Mailing: 3/05/14

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

114-14

OAL DKT. NO. EDU 9217-13
AGENCY DKT. NO. 122-6/13

AMY MARTIN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF LOPATCONG, WARREN COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Section 1 of the Agreement makes reference to a January 2014 effective date for the implementation of the settlement terms. That date has preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/05/14
Date of Mailing: 3/06/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09217-13
AGENCY DKT. NO. 122-6/13

AMY MARTIN,
Petitioner,
v.
TOWNSHIP OF LOPATCONG
BOARD OF EDUCATION, WARREN COUNTY
Respondent.

Albert J.Leonardo, Esq. for petitioner (Bucceri and Pincus, attorneys)

Jeffrey R. Caccese Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: January 24, 2014 Decided: January 24, 2014

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

This matter was transmitted to the Office of Administrative Law on July 1, 2013 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Township of Lopatcong Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated January 16, 2014.

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

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

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

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

January 24, 2014
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 1-27-14

Mailed to Parties

JAN 27 2014
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/rr

RECEIVED
2014 JAN -6 P 3:34
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS AGREEMENT is made by and between Amy Martin, 1504 Megan Circle, Stewartsville, NJ 0886 (hereinafter referred to as "Ms. Martin") and the Board of Education of the Township of Lopatcong, 263 Route 57, Phillipsburg, NJ 08865, its predecessors, successors, individual Board members, officers, directors, administrators, representatives, employees, attorneys, agents, and assigns, individually, jointly and severally (hereinafter collectively referred to as "Board") pursuant to the following terms and conditions:

WHEREAS, Ms. Martin was employed as a full-time (1.0) certified employee, which required her to work thirty-five (35) hours per week until the 2013-2014 school;

WHEREAS, Ms. Martin's employment was reduced to a part-time (.5) position for the 2013-2014, which required her to work seventeen and one half (17 ½) hours per week, as part of a reduction in force;

WHEREAS, Ms. Martin filed a petition with the Commissioner of the New Jersey Department of Education, captioned *Amy Martin v. Board of Education of the Township of Lopatcong, Warren County*, OAL Docket No. EDU-09217-13, Agency Docket No. 122-6/13, asserting that the Board violated her tenure rights (hereinafter "the Action");

WHEREAS, the Board has denied and continues to deny the allegations set forth by Ms. Martin in the Action;

WHEREAS, the parties in order to avoid the expense and uncertainty of continued litigation are desirous of amicably resolving the Action;

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

1. **SETTLEMENT TERMS**
   Ms. Martin and the Board agree that Ms. Martin's hours will be increased to thirty (30) hours per week (.85) by the Board effective January 1, 2014. Effective January 1, 2014, Ms. Martin will work seventeen and one half (17 ½) hours per week performing duties as a Media Specialist. Also, effective January 1, 2014, Ms. Martin will work an additional twelve and one half (12 ½) hours per week performing Response to Intervention Services/Academic Support for students in small groups. However, the Board reserves the right as management to change, assign, transfer, reassign, or modify job duties at its sole discretion to meet the needs of the District. Ms. Martin reserves the right to assert her tenure and seniority rights as to any future action as to her position. The Board also reserves its rights to assert any defenses, claims, and arguments in responses to a claim by Ms. Martin regarding her tenure and seniority rights in any future action. Ms. Martin waives the right to back pay or money damages related to the Action.

2. **HEALTH BENEFITS**
The Board agrees that Ms. Martin will receive health insurance benefits consistent with the collective negotiation agreement under which she is covered.

3. **JOB DUTIES**
Ms. Martin agrees and understands that by entering into this settlement agreement that the Board has the right and may require her to prepare lesson plans and be subject to Danielson observations. Ms. Martin further agrees and understands that her job duties may require her to instruct students without another staff member being present.

4. **STIPULATION OF DISMISSAL**
Ms. Martin agrees to dismiss the Action by executing this settlement. Said dismissal will be with prejudice as to her pending Petition regarding the reduction of her position at the start of the 2013-2014 school year but without prejudice as to her tenure and seniority rights as to any future reduction in position.

5. **NON-PRECEDENTIAL**
The parties agree that this settlement agreement is non-precedential, and, therefore, cannot be used in any subsequent proceedings to establish precedent or past practice.

6. **GENERAL RELEASE OF CLAIMS**
In consideration of the Settlement Amount set forth below and the other promises made herein, Ms. Martin and her respective heirs, executors, administrators, representatives, shareholders, directors, officers, employees, agents, attorneys, affiliates, parents, subsidiaries, predecessors, successors, assigns, and all persons acting by, through, under or in concert with any of them each release, the Board and its respective heirs, shareholders, directors, officers, employees, agents, attorneys, affiliates, parents, subsidiaries, predecessors, successors, assigns, and all persons acting by, through, under or in concert with any of them (the "Released Parties"), from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims of any nature whatsoever, known or unknown, which she now has, claims to have, own, hold or which she at any time heretofore had, held, or claimed to have, relating in any manner whatsoever to: (i) the Action; (ii) any employment relationship between Ms. Martin and the Board, and (iii) any other relationship by, among, and/or between Ms. Martin and the Board. Ms. Martin further understands, covenants, and agrees that she will not enter, permit to be entered or cause to be entered, directly or indirectly, any suit or other claim against the Released Parties related to the foregoing. Ms. Martin represents and warrants that she has not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand or cause of action, including any claim for attorneys' fees, against the Board or the Released Parties which relates to the Action and the other matters stated above.

Ms. Martin's release and discharge also includes, without limitation, any contract or tort claim or potential claim, and any claim arising under common law, such as claims for

breach of contract, defamation, breach of implied covenant of good faith and fair dealing, misrepresentation, libel, slander, invasion of privacy, negligence, interference with advantageous relations, infliction of emotional distress, loss of consortium, discrimination, retaliation, or wrongful termination.

This release shall not apply to any claim arising out of (a) the enforcement of this agreement; (b) any claim that arises after the date of this agreement; or (c) claims that may not lawfully be released, discharged, or waived. Ms. Martin does not waive her rights to tenure or seniority based on all of her prior employment with the Board.

7. **NO OTHER LEGAL ACTION BY THE PARTIES.**
The Parties confirm that no charge, complaint or action is pending in any forum or form, except the Action, which the Ms. Martin has agreed to voluntarily dismiss as noted above in its entirety. Further, Ms. Martin covenants and agrees not to bring any charge, complaint, action, suit, or administrative proceeding in any forum before any federal, state, or local administrative agency or in any federal, state or local court against any of the Released Parties for any actions that could or did arise or accrue prior to and including the date of this Agreement; provided, however, it does not interfere with or limit either of the Parties protected right to file a charge with or participate in an investigation by or proceeding before the Equal Employment Opportunity Commission or any similar state or local commission that investigates and enforces anti-discrimination laws. Nothing contained herein shall in any manner be deemed a waiver or extension of any applicable statute of limitations, whether administrative or otherwise. Nonetheless, Ms. Martin understands that, by signing this Agreement, she waives any rights she may have to recover money or other relief in any lawsuit or proceeding she brings or that is brought on her behalf by any agency or third party against any of the Released Parties based on events arising out of or relating to the Action through the date of this Agreement. Except where otherwise permitted under this paragraph, the Parties agree that any such action shall be dismissed with prejudice upon presentation of this Agreement. Nothing in this paragraph is intended to limit either of the Parties from instituting legal action for the sole purpose of enforcing this Agreement. This agreement shall not be interpreted as restricting Ms. Martin's right to challenge any future reduction in her position.

8. **NO OTHER COMPENSATION DUE.**
Ms. Martin understands and agrees that the Settlement represents benefits to which Ms. Martin might not be otherwise entitled but for her execution of this Agreement and her fulfillment of all of the promises contained herein and that no other compensation is due to her by the Board. Ms. Martin further acknowledges that she is not a "prevailing party" in the Action and that, in exchange for the consideration provided for by this Agreement, she waives any and all claims against the Board and the Released Parties for any attorneys' fees and/or costs relating to the Action.

9. **CONFIDENTIALITY**
In consideration for the Board entering into this Settlement Agreement, Ms. Martin promises and agrees that this Settlement Agreement, and the terms thereof, are

confidential and Ms. Martin further agrees never to disclose, nor permit her attorneys or agents ever to disclose, the terms of this Settlement Agreement except as may be provided for herein and as may be specifically and expressly permitted by the parties in writing or as the parties may be compelled to do so by state or federal law or regulation or by compulsory process of law and provided that in case of such requirement the disclosing party shall immediately notify the non-disclosing party of such requirement in writing.

Nothing contained herein shall prevent or restrict Ms. Martin from disclosing the terms of this Settlement Agreement to local, state or federal tax authorities, immediate family and/or professionals who advise Ms. Martin with respect to financial or legal matters after Ms. Martin has obtained their written agreement to respect the confidentiality provisions herein.

The prohibitions of this paragraph shall not apply to prevent disclosure of the terms of this Settlement Agreement by Ms. Martin in the following circumstances:

a. By written agreement between Ms. Martin and the Board;

b. When ordered by a court of competent jurisdiction or otherwise required by state or federal law or regulation;

c. When required to comply with obligations under this Settlement Agreement; and/or

d. To the Internal Revenue Service or to other taxing authority in connection with a taxing authority's investigation into or determination of the tax consequences of this Settlement Agreement.

If disclosure is required pursuant to (b) through (d) of this paragraph, Ms. Martin shall notify the Board in writing of such requirement immediately and at least seven (7) days before disclosure.

Ms. Martin acknowledges and agrees that an inappropriate disclosure by her of this settlement agreement or the terms herein will cause grave and irreparable harm to the Board. If a court of competent jurisdiction determines a breach of this confidentiality has occurred, Ms. Martin agrees to pay to the Board the attorneys' fees and costs of enforcing this Confidentiality Clause.

10. NON-ADMISSION

This Settlement Agreement shall not be construed as an admission of any wrongdoing of any kind whatsoever by either party, including the allegations set forth in the Action. The Board has specifically denied and continues to deny that they or Released Parties are liable to Ms. Martin for any damages whatsoever.

11. COUNTERPARTS AND FACSIMILES

The parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

12. SEVERABILITY

In the event that any section or part of this Agreement shall be found to be void or unenforceable, such section or part shall be deemed to be surplusage and the remainder of the Agreement shall remain in full force and effect.

13. GOVERNING LAW

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

14. ENTIRE AGREEMENT

This Settlement Agreement represents the entire understanding between the Board and Ms. Martin with respect to the subject hereof. This Settlement Agreement supersedes all prior written and oral understandings between the Board and Ms. Martin with respect to this subject. There are no representations which are not contained herein that have been made or relied upon by the Board and Ms. Martin in entering this Settlement Agreement. This Settlement Agreement may not be modified except by a writing signed by the Board and Ms. Martin. The Board and Ms. Martin acknowledge their obligations to act in good faith with respect to the performance of their obligations under this Settlement Agreement.

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

MS. MARTIN ACKNOWLEDGES THAT SHE HAS BEEN ADVISED THAT HER LEGAL RIGHTS AND RESPONSIBILITIES WILL BE AFFECTED BY EXECUTING THIS AGREEMENT AND THAT SHE ACKNOWLEDGES THAT SHE IS REPRESENTED BY HER OWN ATTORNEY AND HAS CONSULTED WITH HER ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT.

15. REVOCATION/RIGHT OF REVIEW

Pursuant to the requirement of the Older Workers Benefit Protection Act, 29 U.S.C. § 626 et seq., Ms. Martin acknowledges that she has been given the opportunity, if she so desires, to consider this Settlement Agreement for twenty-one (21) days before executing it. In the event that Ms. Martin executes this Settlement Agreement within less than twenty-one (21) days of the date of its delivery to her, Ms. Martin acknowledges that such decision was entirely voluntary and that she had the opportunity, if she had so desired, to consider this Settlement Agreement for the entire twenty-one (21) day period. Ms. Martin further acknowledges that for a period of seven (7) days from the date of Ms.

Martin's execution of this Settlement Agreement, she shall retain the right to revoke this Settlement Agreement by written notice to Jeffrey R. Caccese Esquire, Comegno Law Group, P.C., 521 Pleasant Valley Avenue, Moorestown, NJ 08057, and that this Settlement Agreement shall not become effective or enforceable until the expiration of such revocation period. Therefore, the consideration called for under paragraphs 1& 2 of this agreement above shall not be made until this Settlement Agreement has been fully executed and until after expiration of such revocation period.

16. **BOARD APPROVAL**
This settlement agreement is subject to the ratification and approval of the Board.

PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE CONTAINS A GENERAL RELEASE OF ALL CLAIMS

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

Amy Martin
AMY MARTIN

DATED: 12/18/13

BOARD OF EDUCATION OF THE TOWNSHIP OF LOPATCONG

WILLIAM A. BAUER
BOARD SECRETARY
DATED:

WILLIAM TAGGART
BOARD PRESIDENT
DATED:

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AMY MARTIN

DATED:

BOARD OF EDUCATION OF THE TOWNSHIP OF LOPATCONG

WILLIAM A. BAUER
BOARD SECRETARY
DATED:

WILLIAM TAGGART
BOARD PRESIDENT
DATED:

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF LOPATCONG, WARREN COUNTY, NJ AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Lopatcong in the County of Warren, NJ, convened in Regular Session on Tuesday, December 17, 2013, at 7:00 p.m. in the Instrumental Music Room of the Lopatcong Middle School, 321 Stonehenge Drive, Phillipsburg, New Jersey.

The following members of the Board of Education were present:

Mr. David Corrado
Mrs. Yvette Day
Mr. Terry Glennon
Mr. Bruce Hall
Mr. Robert McFarlane
Mrs. Lee Rozycki
Mr. William Taggart

The following members of the Board of Education were absent: Mr. Wade Caccese, Mr. Ernest Gallant

The following resolution was offered by Mr. Glennon and seconded by Mr. Hall and adopted by the Board of Education by the following Roll Call vote:

R-174-14 Accept and Approve Settlement Agreement (Attachment 13)
BE IT RESOLVED, the Board of Education, upon recommendation by the Superintendent, accepts and approves the settlement agreement in the matter captioned *Amy Martin v. Board of Education of the Township of Lopatcong, Warren County*, OAL Docket No. EDU-09217-13, Agency Docket No. 122-6/13.

ROLL CALL:

AYES: Mr. Corrado, Mrs. Day, Mr. Glennon, Mr. Hall, Mr. McFarlane, Mrs. Rozycki, President Mr. Taggart

NAYS: None

Motion carried

STATE OF NEW JERSEY)
COUNTY OF WARREN)
I, William A. Bauer, Secretary of the Board of Education of the Township of Lopatcong, in the County of Warren, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on **December 17, 2013**, has been compared by me with the original minutes as officially recorded in the minute book of said Township of Lopatcong, Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this **16th day of January, 2014.**
AFFIX SEAL:

Signature of Secretary

115-14

STATE BOARD OF EXAMINERS DKT. NO. 1112-201
AGENCY DKT NO. 8-8/13A

IN THE MATTER OF THE	:	
SUSPENSION OF THE CERTIFICATES	:	COMMISSIONER OF EDUCATION
OF MARY LOU FORSELL BY THE	:	DECISION
STATE BOARD OF EXAMINERS	:	

Order of Suspension by the State Board of Examiners, July 25, 2013

For the Respondent-Appellant, Michael T. Barrett, Esq.

For the Petitioner-Respondent State Board of Examiners, Caroline Jones, Deputy Attorney General (John J. Hoffman, Acting Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board of Examiners) that her actions warranted the suspension of her teaching certificates for a period of two years. Specifically, appellant maintains that the decision should be reversed because the penalty imposed by the Board of Examiners is unreasonably harsh in light of her lengthy career and otherwise unblemished record.

In reviewing appeals from decisions of the Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the Board's decision is supported by sufficient credible evidence in the record. Further, the Board of Examiners' decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

After full consideration of the record and all submissions, the Commissioner finds that the record adequately supports the Board of Examiner's determination that the appellant engaged in unbecoming conduct and that the suspension of the appellant's certificates was the appropriate penalty. In the underlying tenure matter, appellant was found to have engaged

> ...in conduct unbecoming a tenured educator and exhibited a lack of concern for the privacy of students. She failed to properly manage

> her classroom and in so doing allowed the posting of many entirely inappropriate pictures depicting matters not properly exhibited in a school classroom, pictures which, in many cases, included the images of students. She allowed students to leave class early and did so herself. She on more than one occasion failed to exhibit either the awareness of, or ability to carry out her responsibility to protect the privacy of her students and their families in regard to financial information to which she had become privy. Finally, she made remarks that were simply inappropriate in the context in which they were expressed, regardless of her right to hold such views as she might have in respect to matters regarding special education, disability issues and matters relating to personal family decisions. (Initial Decision at 25), (Commissioner's Decision at 2)

The Board's characterization of appellant's behavior as unbecoming conduct necessitating the suspension of her certificates is fully consistent with applicable law.

Moreover, the Board's decision makes clear that, in assessing the appropriate penalty, the Board not only considered the gravity of appellant's conduct, but also took into account appellant's otherwise unblemished career and willingness to accept responsibility for her conduct. These mitigating factors persuaded the Board of Examiners that a two-year suspension was more appropriate than revocation. As a result, there is nothing in the record to suggest that the Board's decision was arbitrary, capricious or unreasonable, and the Commissioner finds no basis upon which to disturb the decision of the Board of Examiners.

Accordingly the decision of the State Board of Examiners is affirmed for the reasons expressed therein.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 3/05/14
Date of Mailing: 3/06/14

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

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
MARY LOU FORSELL	:	ORDER OF SUSPENSION
_____	:	DOCKET NO: 1112-201

At its meeting of April 5, 2012, the State Board of Examiners (Board) reviewed a decision forwarded by the Acting Commissioner of Education that had dismissed Mary Lou Forsell from her tenured position with the West Windsor-Plainsboro Regional School District (WWP) for charges of unbecoming conduct, lack of professionalism and failure to respect the privacy rights of students. *In the Matter of the Tenure Hearing of Mary Lou Forsell,* Docket No. 50-2/11 (Acting Commissioner's Decision, January 9, 2012). Forsell currently holds a Teacher of Comprehensive Business Certificate of Eligibility With Advanced Standing, issued in July 1994 and a Teacher of Comprehensive Business certificate, issued in March 1997.

This case originated when WWP certified tenure charges of unbecoming conduct, lack of professionalism and failure to protect the privacy of students against Forsell. Specifically, the district alleged that Forsell displayed a huge collage in her classroom, comprised of more than one hundred photographs, many of which were objectionable. These photos had all been Photoshopped, many of which had students' faces visible. Many of the photos were drug or alcohol-related, homophobic, racially insensitive or insensitive as to economic status or ethnicity. The district also alleged that, during an observation of Forsell's class in June 2010, Forsell did not interact with the class for the first 20 minutes. In addition, two students were kissing during the class, other students were talking about a videogame and profanity was being used. At several times during the observation, Forsell left the classroom. Students began to leave the classroom with five minutes remaining in the period and Forsell, herself, left the room before the

discrimination and bullying" led ALJ Masin to conclude that Forsell's conduct warranted her removal from her tenured position. *Ibid.*

In a decision dated January 9, 2012, the Acting Commissioner of Education (Commissioner) concurred with the ALJ that WWP had sustained all but one of its charges against Forsell. (Acting Commissioner's Decision, slip op. at 2). Accordingly, the Commissioner ordered Forsell's removal from her tenured position in WWP and transmitted the matter to the Board for appropriate action regarding Forsell's certificates. (Acting Commissioner's Decision, slip op. at 3-4).

Thereafter, on May 17, 2012, the Board issued Forsell an Order to Show Cause as to why her certificates should not be revoked. The Order was predicated on the charges that had been proven in the tenure hearing. The Board sent Forsell the Order to Show Cause by regular and certified mail on May 24, 2012. The Order provided that Forsell's Answer was due within 30 days. Forsell filed an Answer on June 12, 2012.

In her Answer, Forsell admitted that WWP had certified tenure charges against her but disagreed with the characterization of the charges, including the allegation that she "allowed" inappropriate photos to be displayed in her classroom. (Answer, ¶ 3). Forsell also "vehemently contest[ed]" that there was sufficient or just cause for any action against her teaching certificates and requested that the matter be dismissed or transmitted to the OAL for hearing. (Answer, ¶ 9).

Thereafter, pursuant to *N.J.A.C.* 6A:9-17.7(e), on June 14, 2012, the Board sent Forsell a hearing notice by regular and certified mail. The notice explained that it appeared that no material facts were in dispute. Thus, Forsell was offered an opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause constituted conduct unbecoming a certificate holder as well as arguments with regard to the appropriate

sanction in the event that the Board determined to take action against her certificates. It also explained that upon review of the charges against her and the legal arguments tendered in her defense, the Board would determine if Forsell's offense warranted action against her certificates. Thereupon, the Board would also determine the appropriate sanction, if any. Forsell was also offered the opportunity to appear before the Board to provide testimony on the sanction issue. Forsell filed a response on July 25, 2012.

In that response, Forsell recounted her many positive evaluations and achievements in the district. (Hearing Response, pp. 2-4). Forsell stated that she had never been the subject of discipline prior to the tenure charges. (Hearing Response, p. 4). Forsell acknowledged that she had a collage in her classroom consisting of Photoshopped pictures and noted that she would purge the wall of distasteful pictures periodically. (Hearing Response, p. 4). She also admitted that she would remove photos when she passed the wall and noticed something distasteful but did not purge the collage "on a daily, or even weekly, basis." (Hearing Response, p.4). At the time of her classroom observation in June 2010, Forsell had been busy with end-of-the-year activities and had not purged the wall collage in several weeks. (Hearing Response, p. 4). In her Hearing Response, Forsell acknowledged that many of the photos were inappropriate and noted that she took responsibility for the collage at her tenure hearing. (Hearing Response, p. 5). Forsell also claimed that her conversation about the payment for prom tickets and a student's "special circumstances" were not public conversations and that there was no evidence that any third party overheard her conversation. (Hearing Response, pp. 5-6). Forsell denied that she made a derogatory comment about a special education student in the student's presence and denied making the "abortion" comment about another special education student to a colleague. (Hearing Response, p. 6). Finally, Forsell argued that there was no evidence presented that

demonstrated that she discriminated against classified students and that, but for the collage incident, her actions should not automatically result in any action against her certificates. (Hearing Response, pp. 6-7).

The threshold issue before the Board in this matter, therefore, is whether Forsell's conduct and her subsequent loss of tenure constitute conduct unbecoming a certificate holder. At its meeting of May 16, 2013, the Board considered the allegations in the Order to Show Cause[2] as well as Forsell's Answer and Hearing Response. The Board determined that no material facts related to Forsell's offense were in dispute since she did not deny that she had lost her tenured position as a result of the tenure proceedings brought against her. Thus, the Board determined that summary decision was appropriate in this matter. *N.J.A.C.* 6A:9-17.7(h). It is therefore ORDERED that the charges in the Order to Show Cause are deemed admitted for the purpose of this proceeding.

The Board must now determine whether Forsell's conduct, as set forth in the Order to Show Cause, represents just cause to act against her certificates pursuant to *N.J.A.C.* 6A:9-17.5. The Board finds that it does.

The Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. *N.J.A.C.* 6A:9-17.5. As the ALJ noted and the Acting Commissioner agreed, Forsell was guilty of conduct unbecoming a tenured educator by demonstrating a lack of concern for the privacy of her students and failing to manage her classroom properly. The Acting Commissioner also affirmed the ALJ's findings that Forsell had made inappropriate comments regarding "special

[2] As noted in Footnote 1, *supra*, the Board did not consider any allegations arising out of the classroom observation other than those related to the photo collage. The Board also mistakenly noted in paragraph 6 of the Order to Show Cause that Forsell was cited for chronic absenteeism; that allegation was not considered by the Board in its deliberations. Accordingly, when the decision refers to the Order to Show Cause, it should be understood that the above-mentioned allegations are excluded.

education, disability issues and matters relating to personal family decisions." (Acting Commissioner's Decision, slip op. at 2). There can be no dispute that Forsell's conduct, in its totality, falls short of that expected of a role model for students. However, the Board cannot conclude that it has been demonstrated that Forsell's behavior warrants the revocation of her certificates. Rather, her otherwise long and unblemished record, coupled with her willingness to accept responsibility for the display of inappropriate photographs in her classroom, merits a less severe punishment. The Board therefore determines that the appropriate response to Forsell's conduct is a two-year suspension of her certificates.

Accordingly, on May 16, 2013, the Board voted to suspend Mary Lou Forsell's Teacher of Comprehensive Business Certificate of Eligibility With Advanced Standing and her Teacher of Comprehensive Business certificate for a period of two years. On this 25th day of July 2013 the Board voted to adopt its formal written decision and it is therefore ORDERED that the two-year suspension of Forsell's certificates be effective immediately. It is further ORDERED that Forsell return her certificates to the Secretary of the State Board of Examiners, Office of Licensure, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

Date of Mailing: 8/1/13

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

116-14

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MONICA SCHVAMBERG, SCHOOL DISTRICT OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In May 2013, the Piscataway School District filed a petition requesting that the teaching certificate of respondent be suspended for unprofessional conduct in accordance with *N.J.S.A.* 18A:26-10 for failure to honor the terms of her employment agreement with the district. In June 2013, an Order to Show Cause was served upon respondent – a non-tenured teacher – requiring her to show cause why her teaching certificate should not be suspended for resigning her position as a learning disability teaching consultant six weeks after she began working in the district.

The ALJ found, *inter alia*, that: the purpose of *N.J.S.A.* 18A:26-10 is to provide notice to the school district that a member of its teaching staff will not complete the terms of his or her teaching agreement, thereby allowing the district time to arrange for a suitable replacement without adversely impacting students; at no time in this matter did the district consent to relieving respondent of her contractual duties; and, accordingly, the respondent unilaterally breached her employment contract with the district. The ALJ concluded that this action constitutes unprofessional conduct warranting a one-year suspension of respondent's teaching certificate.

Upon independent review of the record, the Commissioner concurred with the findings of the ALJ, and adopted the Initial Decision as the final decision in this matter. Accordingly, respondent's certificate was suspended for a period of one year from the date of the filing of this decision – a copy of which was forwarded to the State Board of Examiners for the purpose of effectuating this order.

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

Issued 3/5/14

OAL DKT. NO. EDU 9828-13
AGENCY DKT. NO. 135-6/13

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MONICA SCHVAMBERG, SCHOOL DISTRICT OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

Petitioner requests that respondent's teaching certificate be suspended for one year in consequence of her resignation – without petitioner's consent – prior to the completion of her contractual term of employment. Having reviewed the record, the Commissioner is persuaded that the Initial Decision of the Office of Administrative Law[1] should be adopted as the final decision in this case, for the reasons articulated by the Administrative Law Judge.

IT IS SO ORDERED.[2] [3]

COMMISSIONER OF EDUCATION

Date of Decision: 3/05/14
Date of Mailing: 3/06/14

[1] Neither party filed exceptions to the Initial Decision.

[2] A copy of this decision shall be forwarded to the New Jersey Board of Examiners for their review and action.

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09828-13
AGENCY DKT. NO. 135-6/13

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF MONICA SCHVAMBERG, SCHOOL DISTRICT OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY.

David B. Rubin, Esq., for petitioner School District of the Township of Piscataway, Middlesex County

Lisa M. Regan, Esq., for respondent Monica Schvamberg (Regan Law, attorneys)

Record Closed: December 6, 2013 Decided: January 21, 2014

BEFORE **MICHAEL ANTONIEWICZ,** ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 22, 2013, the Piscataway School District filed a petition with the Commissioner of Education of the State of New Jersey requesting that the teaching

certificate of respondent Monica Schvamberg be suspended for unprofessional conduct in accordance with N.J.S.A. 18A:26-10 for failure to honor the terms of her employment agreement with the district.

On June 1, 2013, the Commissioner signed an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending her teaching certificate. On or about July 10, 2013, respondent filed an answer to the Order to Show Cause contesting the matter. On July 12, 2013, the matter was transmitted to and filed with the Office of Administrative Law (OAL) as a contested case. On November 8, 2013, a hearing was held and the parties filed post-hearing briefs on or before December 6, 2013.

ISSUES

Did respondent engage in unprofessional conduct within the meaning of N.J.S.A. 18A:26-10? If so, should respondent's teaching certificate be suspended for one year?

FINDING OF FACTS

1. The Piscataway Board of Education appointed Monica Schvamberg as a learning disability teaching consultant at the Children's Corner School, effective January 25, 2013, via a contract signed by respondent on December 20, 2012.

2. The employment contract contained a start date of January 25, 2013.

3. Respondent was hired after an extensive interview process and was selected as one of two final candidates.

4. At the time of her hire, the respondent did not reveal to the petitioner that there were any issues going on in her personal life which might have a negative impact on her professional job duties.

5. On March 8, 2013, Schvamberg submitted a letter of resignation, effective March 12, 2013, to Catherine Sousa, the Human Resources Director. (P-2.) In addition, respondent took a sick day on Monday, March 11, 2013.

6. The contract signed by the respondent contained the following verbiage: "It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party given to the other 60 days notice in writing of intention to terminate the same." (P-1.)

7. The Piscataway School District responded to the respondent by informing her that she was required to work sixty more days after she gave notice of her intent to resign or face suspension of her teaching certificate. (P-3.)

8. Respondent responded to the petitioner on March 9, 2013, requesting a meeting in order to provide the petitioner with her reasons for her resignation. (P-4.)

9. After a meeting between Schvamberg and a representative from the petitioner (Phyllis Regnaud), Schvamberg submitted another letter stating that she felt she had no other option than to resign. (R-2.)

10. In the meeting petitioner advised respondent if she was willing to reconsider her letter of resignation. In addition, she was advised that she did not work long enough to qualify for either the federal leave of absence or New Jersey Family Leave, but she could request an unpaid leave of absence from the Board of Education and that in the past, the Board had granted such leaves to employees.

11. Respondent advised the petitioner that her mother was very ill and that she was the caregiver for her mother. Based on this information, the petitioner once again advised respondent that she could request an unpaid leave of absence from the Board of Education.

12. Other than her mother's illness being very stressful for her, the respondent did not advise of any other personal health problems she was having at this time.

13. After the above meeting, respondent re-submitted her letter of resignation via email, dated March 13, 2013. (R-2.)

14. Petitioner began the necessary proceeding seeking the respondent's suspension of her teaching certification for one year. (P-8; P-9.)

15. On May 21, 2013, petitioner sent an Order to Show Cause and supporting certifications to the Commissioner of Education seeking to have respondent's teaching certificate suspended pursuant to N.J.S.A. 18A:26-10. (P-8.)

16. On June 6, 2013, the petitioner served upon the respondent an Order to Show Cause from the Commissioner of Education seeking suspension of her teaching certification. (P-10.)

17. Petitioner suffered a net additional cost of $5,601.14 based on the respondent's resignation in a time frame of less than sixty days. (P-13.)

LAW AND ANALYSIS

The applicable statute for this case is N.J.S.A. 18A:26-10, which provides in pertinent part as follows:

> Any teaching staff member employed by a board of education or an approved private school for the disabled, who shall, without the consent of the board . . . cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

The purpose of N.J.S.A. 18A:26-10 is to provide notice to the school district that a member of its teaching staff will not complete the terms of the teaching agreement, thereby providing the district with time to arrange for a suitable replacement without adversely impacting students. The ultimate objective is to protect the students. Penns Grove-Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407.

The language of N.J.S.A. 18A:26-10 "is clear and explicit as to the requisite conditions for a cause of action to arise under its terms, namely, 1) a teaching staff member ceases to perform his [or her] duties before the expiration of the term of his [or her] employment, and 2) the board does not consent to the teaching staff member's action." In re Fesolowich, EDU 11608-05, Comm'r (September 14, 2006), <http://njlaw.rutgers.edu/collections/oal/>.

The Commissioner of Education has further explained that "[I]t is well-grounded in education law that determination of the sufficiency of a term of notice pursuant to this statute is dictated by the terms of the parties' employment contract and any resignation or termination must be in accordance with the terms of such agreement." In re Van Pelt, EDU 11556-07, Comm'r (May 29, 2009), <http://www.nj.gov/education/legal/>, aff'd, 414 N.J. Super. 440 (App. Div. 2010); In re Carrelle, EDU 1852-03, Comm'r (February 9, 2004), <http://njlaw.rutgers.edu/collections/oal/>.

A non-tenured teacher, such as the respondent herein, who violated the notice/termination requirements set forth in his or her contract of employment will general be found to be guilty of "unprofessional conduct" within the intent of N.J.S.A. 18A:26-10, warranting the suspension of the teacher's certificate. See In re Creekmur, EDU 4041-11, Initial Decision (November 21, 2011), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (January 4, 2012), <http://www.nj.gov/education/legal/>.

In Penns Grove-Carneys Point Board of Education v. Leinen, supra, 94 N.J.A.R.2d at 407, the ALJ discussed at length the sorts of circumstances warranting leniency:

Most cases have resulted in the suspension of any and all teaching certifications for the maximum, one-year permitted if the Commissioner finds the teacher guilty of violating N.J.S.A. 18A:26-10. (See In re Russo, 33 C.D. 92; Collingswood Borough Board of Education v. Cashel, 88 S.L.D. 1898; In re Matthews, 267 C.D. 88; Dunellen Borough Board of Education v. Drake, 87 S.L.D. 2016; In re Evans, 249 C.D. 87; In re Horter, 170 C.D. 97; Acken, 86 S.L.D. 2803; In re Langford, 142 C.D. 84; In Re Minnich, 218 C.D. 83; In re Cohen, 27 C.D. 83; In re Reehill, 66 S.L.D. 201; In re Finkelstein, 60 S.L.D. 75.) However, the court has held that "the Legislature did not intend the suspension of a teacher's certificate to be automatic even if the board's consent is not obtained." Mooney, at 814. The word "may" in N.J.S.A. 18A:26-10 implies that the Legislature intended that the Commissioner of Education consider all the circumstances presented in an individual's case. Mooney at 814; see also, Board of Education of the Township of Clinton v. Burgess, 83 S.L.D. 183, 190, regarding similar provision for tenured staff under N.J.S.A. 18A:28-8.

However, circumstances which justify giving relief to a teacher when she has not given the required statutory notice are rare. In Mooney the Commissioner held that Mooney should not be suspended because she had a compelling need to resign, she had given immediate notice to the Board in writing, and she had assisted the school by developing a program for the completion of the school year. She met with her replacement to review the program and provided final grades. The school was fortunate to be able to replace Mooney with the teacher who would have been chosen to fill her position regardless of whether or not Mooney had left a week later. Moreover, the Commissioner stressed that Mooney left her teaching position in New Jersey not to seek employment elsewhere in the State, but to be with her husband. He had been transferred unexpectedly to California. The Commission concluded that Mooney's resignation was not wrongful and her conduct did not warrant punishment.

Similarly, in Burgess, the Commissioner found circumstances which justified exercising discretion. Although Burgess did not give the required sixty (60) day notice, the Board told Burgess that "they would do all in their power to try to replace him" by the date he had requested. During the transition, Burgess prepared lesson plans, offered to meet on Saturdays with his replacement and left many of his personal items with his successor for use in the

> classroom. He discussed his plans with the principal and with other sixth grade teachers. The Commissioner emphasized that Burgess was not attempting to take employment at another school, but had acted in exemplary fashion under the circumstances which required his immediate resignation. Although Burgess made every effort to effect a smooth transition, neither the Board nor its school administrator acted upon the promise made to Burgess to do all in their power to replace him. The Commissioner concluded that the Board was obligated to take action to honor the promise made to Burgess. A fully qualified teacher, who was later chosen to replace Burgess, was available a week prior to Burgess's intended resignation. Nevertheless, action to approve her employment was delayed. Since no attempt was made, the Commissioner found no grounds for imposing a penalty on Burgess.
>
> The Commissioner exercised discretion in another case because mitigating factors were very strong. In re Rogers, Jr., 89 S.L.D. 1962, the Commissioner did not suspend the teacher's certificate for the entire year. Three factors influenced his decision. First, the Board was fortunate to be able to replace the teacher within one week. Second, the teacher honestly believed he was not "under contract" because his prior employment with the State did not require notice of resignation until work had begun. Finally and most significantly, the teacher was not motivated by a desire "to feather his own nest." Id. at 1966. The teacher chose a position with less pay under very difficult conditions because he felt more fulfilled when working with the profoundly and multiply handicapped. Ibid. Although the Commissioner felt suspension for a full year was inappropriate under these circumstances the teacher was still suspended for a three-month period . . . .

In this case the respondent was aware of the impediments to her taking on the position which she accepted and yet failed to advise the petitioner of same. Respondent was fully aware of the problems arising in her personnel life, yet choose to not disclose those issues to the School District. In addition, the amount of notice given to the School District was extremely short. This presented little time for the School District to properly address the loss of a teacher in this matter. Furthermore, the respondent made no effort to find a substitute or to provide any assistance to realize a smooth transition from her as the hired teacher to a new teacher taking over that position in her absence.

Despite being advised by the representatives from the School District that the respondent had the option of applying before the School Board for an unpaid leave of absence, Schvamberg did not apply for such a leave of absence before the Board of Education. Generally, the respondent took no steps to limit the impact of her resignation upon the School District. Based on this, the respondent needs to be held accountable for her actions.

Here, respondent entered into an employment contract for a school term set to begin January 25, 2013. She resigned by e-mail dated March 8, 2013, effective the following Tuesday, March 12, 2013. At no time did she receive the consent of the district relieving her of her contractual duties. I **FIND** that respondent unilaterally breached her employment contract with the district, and I **CONCLUDE** that such action constitutes unprofessional conduct.

Petitioner seeks a one-year suspension of respondent's teaching certificate, and cites multiple cases in support of such action. Prior precedent can be summed up as follows:

> Generally, the Commissioner of Education has imposed the full one-year suspension of a teaching certificate for leaving a district without adequate notice. Only in rare circumstances has the Commissioner seen fit to lessen the suspension period. When a suspension period has been for less than one year it has been for compelling reasons, or there have been significant mitigating factors justifying a lesser suspension. Alpine Bd. of Educ. v. Yuz, EDU 1116-06, Initial Decision (July 17, 2008), adopted, Commissioner of Education (September 23, 2008), <http://njlaw.rutgers.edu/collections/oal/>.

In this matter, respondent has not provided any compelling reason(s) or mitigating factors as to why her teaching certificate should not be suspended for one year. Respondent simply stated that she could not work for the Piscataway School District as a result of a personal mental health emergency, i.e., that her mother was diagnosed with breast cancer which resulted in the respondent having major depressive

disorder, recurrent moderate type, generalized anxiety disorder, stomach pain, and identified deficits in her primary support due to her mother's cancer. Respondent's action constitutes unprofessional conduct, and I **CONCLUDE** that her unprofessional conduct warrants a one-year suspension.

ORDER

It is hereby **ORDERED** that the teaching certificate of respondent, Monica Schvamberg, is suspended for a period of one year.

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

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

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

January 21, 2014
DATE

MICHAEL ANTONIEWICZ, ALJ

Date Received at Agency: January 23, 2014

Date Mailed to Parties: January 23, 2014

jb

APPENDIX

WITNESSES

For Petitioner:

Catherine Sousa

For Respondent:

Monica Schvamberg

Glenn Siegel, LPC

EXHIBITS

For Petitioner:

P-1 Employment Contract dated December 20, 2012

P-2 E-mail from M. Schvamberg to C. Sousa dated March 8, 2013

P-3 E-mail from C. Sousa to M. Schvamberg dated March 8, 2013

P-4 E-mail from M. Schvamberg to C. Sousa dated March 9, 2013

P-5 E-mail from C. Sousa to M. Schvamberg dated March 10, 2013

P-6 Letter from C. Sousa to Commissioner Christopher Cerf dated March 15, 2013

P-7 Letter from M.K. Duncan to C. Sousa dated April 2, 2013

P-8 Letter from D. Rubin to M.K. Duncan, forwarding proposed order to show cause and supporting certification dated May 21, 2013

P-9 Letter from M.K. Duncan to D. Rubin, forwarding signed order to show cause dated May 29, 2013

P-10 Letter from D. Rubin to M. Schvamberg forwarding signed order to show cause and supporting certification dated June 6, 2013

P-11 Letter from M. Schvamberg to C. Sousa, forwarding letters documenting reasons for resignation (undated), received June 26, 2013

P-12 Letter from C. Sousa to M. Schvamberg dated June 27, 2013

P-13 Calculation of extra costs incurred

For Respondent:

R-1 Emergency room records for M. Schvamberg dated March 4, 2013

R-2 Email from M. Schvamberg to C. Sousa dated April 13, 2013

R-3 Resume of Glenn Siegel, LPC

122-14

OAL DKT. NO. EDU 0657-14
(EDU11669-13 ON REMAND)
AGENCY DKT. NO. 156-7/13

VINCENT STASIO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

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

The Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Several sections of the Agreement reference actions which may have already taken place, and have therefore preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have either successfully implemented the settlement terms, or have agreed upon mutually satisfactory alternate dates for the effectuation of same. Assuming

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/13/14

Date of Mailing: 3/13/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00657-14
(On Remand of EDU 11699-13)
AGENCY DKT. NO. 156-7/13

VINCENT STASIO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,
Respondent.

Marissa A. McAleer, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Kim C. Belin, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: January 27, 2014 Decided: January 28, 2014

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

This matter was transmitted to the Office of Administrative Law on January 16, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, on remand of EDU 11699-13, as the result of the failure to prove a copy of the Broad resolution approving the settlement.

The parties have prepared and submitted that Settlement Agreement indicating the terms thereof, and have included a copy of the Resolution by the Board of Education of the City of Asbury Park, Monmouth County approving the settlement. The settlement and resolution are attached and fully incorporated herein.

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

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

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

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

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

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

January 28, 2014
DATE

SUSAN M.SCAROLA, ALJ

Date Received at Agency: 1/29/14

Date Mailed to Parties: 1/29/14

SMS/mel

SETTLEMENT AGREEMENT AND RELEASE

THIS AGREEMENT is made by and between Vincent Stasio (hereinafter referred to as "Petitioner"), residing at 20 ½ Parker Avenue, Manasquan, New Jersey 08736, and the Asbury Park Board of Education, a body corporate and politic responsible for the governance of the public schools in the City of Asbury Park, whose principal place of business is located at 603 Mattison Avenue, Third Floor, Asbury Park, New Jersey 07712, its predecessors, employees, attorneys, agents and assigns, individually, jointly and severally (hereinafter collectively referred to as "Board") pursuant to the following terms and conditions:

WHEREAS, Petitioner filed a Petition with the Commissioner of Education under Agency Docket No.: 156-7/13, asserting that the Board violated his tenure and seniority rights by assigning, hiring and/or retaining persons who were not tenured and/or less senior than him in positions to which he was entitled; and

WHEREAS, the Board filed an Answer denying the charges; and

WHEREAS, the Board voted on August 14, 2013, to rescind its prior action which went into effect in July 2013 and appointed another person to the position to which Petitioner asserted he was entitled, and also voted to abolish said position; and

WHEREAS, the Board has agreed to pay Petitioner back pay representing the prorated salary for the month of July and two weeks in August, 2013, during which another person was employed in the position to which Petitioner claimed he was entitled; and

WHEREAS, the parties agreed this resolves the underlying controversy between them in an amicable manner;

THEREFORE IT IS HEREBY AGREED by and between the parties as follows:

1. The Board has rescinded its prior action of creating a vice principal position at the Middle School.

2. The Board will submit a check payable to Petitioner in the amount of $10,419.83 which includes all tax and benefit deductions required by law as back pay within 30 days of the final signature to this Agreement.

3. In return for the Board's compliance with the above provisions, Petitioner agrees that the Petition filed in the matter captioned Vincent Stasio v. Bd. of Ed of the Asbury Park School District, under Agency Docket No.: 156-7/13, is to be withdrawn with prejudice by Petitioner within seven (7) days of the Board making the payment described in Paragraph 2 above.

4. Both the Petitioner and Board for and in consideration of the undertakings as set forth herein, and intending to be legally bound, do hereby remise, release and forever discharge each other (inclusive of their respective past, present and future

11. All parties to this Agreement acknowledge that they have read this Agreement in its entirety, have had the assistance of counsel in reviewing its terms, entered into it voluntarily or he has knowingly and voluntarily chosen not to seek such advice and fully understand the Agreement in all respects.

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

13. The parties agree that facsimiles of signatures will have the same force and effect as original signatures.

14. This Agreement is contingent upon Board approval.

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

WITNESS:

Attorney for Mr. Stasio

V. Stasio 12/02/13
Vincent Stasio Date

WITNESS:

Geoffrey Hastings
Board Secretary

Angela Ahbez-Anderson 11/13/13
Angela Ahbez-Anderson Date
Board President

CLAC 2277337.1

RECEIVED
2013 DEC -5 A 11:15
STATE OF NEW JERSEY

Asbury Park Board of Education

603 Mattison Avenue, 3rd Floor
Asbury Park, NJ 07712
(732) 776-2606, Ext. 2437
Fax (732) 988-7315

CERTIFICATE

I Geoffrey Hastings, Business Administrator/ Board Secretary of the Board of Education of the City of Asbury Park in the County of Monmouth, State of New Jersey, HEREBY CERTIFY that the foregoing annexed extract from the minutes of a meeting of the governing body of the Board of Education duly called and held on October 30, 2013 has been compared by me with the original minutes as officially recorded in my office in the Minute Book of the Board of Education and is a true, complete and correct copy thereof and of the whole of the original minutes so far as they relate to the subject matters referred to in the extract.

4. Settlement Agreement

Superintendent recommends that the Asbury Park Board of Education accept the terms of a settlement with Local Employee ID# 45315 for Agency Docket No.: 156-7/13, a copy of which shall be retained in the office of the Board Secretary. (Attachment C.4)

Motion to approve: Ms. Lesinski **Second**: Ms.Taylor
Aye: 8 **Nay**: 0 **Abs**: 0 Upon roll call the motion was unanimously approved.

IN WITNESS WHEREOF, I have here unto set my hand and affixed the corporate seal of the School District this 17th day of January 2014.

Geoffrey Hastings, Business Administrator/ Board Secretary

2014 JAN 29 A 11:35

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN

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Please Reply to Trenton

ANDREW F. ZAZZALI (1899-1969)

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JASON E. SOKOLOWSKI
WILLIAM A. PASCARELL (1934-2010)

*Also admitted Pennsylvania
**Also admitted New York
***Also admitted New York & D.C.
‡New York Only

January 27, 2014

RECEIVED
JAN 28 2014
OAL

Sent Via Fax to 609-689-4100 & Regular Mail

Honorable Susan M. Scarola, ALJ
Office of Administrative Law
P.O. Box 049
Trenton, New Jersey 08625-0049

Re: Vincent Stasio v. Asbury Park Board of Education
OAL Dkt. No.: EDU 11669-2013 S
Agency Dkt. No.: 156-7/13

Dear Judge Scarola:

As per my secretary's conversation with your secretary today regarding the above matter, enclosed please find a copy of Kim Belin's January 17, 2014 letter with enclosed Board resolution approving the Settlement Agreement, which was sent to Your Honor on January 17, 2014 (to P.O. Box 48 and not P.O. Box 49).

Thank you for your attention to this matter.

Very truly yours,

Marissa A. McAleer

MAM/cjrh
Encl.
cc: Kim C. Belin, Esq. (sent via fax to 856-795-8641 & regular mail)
Vincent Stasio

146999
21326-1668

JAN 24 '14 AM 11:29

COOPER LEVENSON
ATTORNEYS AT LAW

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KIM C. BELIN
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FILE NO. 58037/00008

January 17, 2014

2014 JAN 29 A 11:34

Honorable Susan M. Scarola
State of New Jersey
Office of Administrative Law
Quakerbridge Plaza - Bldg. 9
P.O. Box 048
Trenton, NJ 08625

Re: Vincent Stasio v. Board of Education of the City Asbury Park, Monmouth County
OAL DKT. NO.: EDU 11669-13
AGENCY DOCKET NO.: 156-7/13

Dear Judge Scarola:

This office represents the Asbury Park Board of Education (Board). As requested, enclosed is the Board resolution approving the Settlement Agreement in the above referenced matter.

Thank you.

Very truly yours,

Kim C. Belin

KB/dd
Enclosure
cc: Marissa McAleer, Esq.

CLAC 2406387.1

130-14

IN THE MATTER OF STERLING WATERMAN, :

BOARD OF EDUCATION OF THE CITY OF : COMMISSIONER OF EDUCATION

JERSEY CITY, HUDSON COUNTY. : DECISION

:

SYNOPSIS

The School Ethics Commission (Commission) found probably cause to credit allegations that respondent – a member of the Jersey City Board of Education – violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act and *N.J.S.A.* 18A:12-24.1(d) of the Code of Ethics for School Board Members through a series of events that occurred between October 2011 and February 2012 wherein respondent, *inter alia*, used his official position to secure unwarranted privileges for himself and his son, a student in one of the Board's schools. Respondent contended that the charges were frivolous. The matter was scheduled for hearing at the Office of Administrative Law (OAL) on two dates in October 2013. Although his attorney appeared on the hearing dates, the respondent failed to report and offered no explanation for his non-appearance.

The School Ethics Commission subsequently determined that, by virtue of his failure to appear, respondent admitted the factual allegations underlying the claims transmitted to the OAL for hearing. Further, the Commission determined that such admissions supported a finding that the respondent had violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act and *N.J.S.A.* 18A:12-24.1(d), and recommended a penalty of reprimand.

Upon review, the Commissioner – whose jurisdiction is limited to reviewing the Commission's recommended sanction – concurred that reprimand is the appropriate penalty for the violations found. Accordingly, the Commissioner directed that respondent be reprimanded as a school officer found to have violated the School Ethics Act.

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

Issued 3/17/14

AGENCY DKT. NO. 24-1/14

IN THE MATTER OF STERLING WATERMAN,	:	
BOARD OF EDUCATION OF THE CITY OF	:	COMMISSIONER OF EDUCATION
JERSEY CITY, HUDSON COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission (Commission) have been reviewed. The matter comes before the Commissioner pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1 to impose a sanction upon respondent, Jersey City Board of Education member, Sterling Waterman. In its decision, the Commission noted that Waterman failed to appear for hearing at the Office of Administrative Law. The Commission determined that, by virtue of his failure to appear, Waterman had admitted the factual allegations underlying the claims transmitted to OAL for hearing. The Commission further determined that such admissions supported a finding that Waterman had violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act and *N.J.S.A.* 18A:12-24.1(d) of the Code of Ethics for School Board Members. The Commission recommended that respondent be reprimanded for the violations.

Respondent was afforded thirteen (13) days from the date of mailing of the Commission's decision to file written comments for the Commissioner's consideration respecting the recommended penalty. No comments were filed.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is not reviewable by the Commissioner herein. Rather, the Commissioner's jurisdiction is limited to review of the sanction recommended by the Commission upon its determination that a

violation has occurred. Accordingly, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation that a reprimand is the appropriate penalty in this matter for the reasons expressed in the Commission's decision.

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

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/17/14

Date of Mailing: 3/18/14

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

IN THE MATTER OF STERLING WATERMAN *JERSEY CITY BOARD OF EDUCATION, HUDSON COUNTY*	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
	:	**Docket No. C10-12**
	:	**OAL Dkt. No. EEC 13641-12**
	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed before the School Ethics Commission (Commission) on March 21, 2012 by complainant, Terry Watkins-Williams. By letter dated March 26, 2012, the Commission notified the complainant that the complaint lacked certain requirements in that she failed to set out specific violations of the School Ethics Act in separate paragraphs as required. On April 2, 2012 the complainant filed an amended complaint, alleging that respondent, Sterling Waterman, a member of the Jersey City Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 *et seq*. Specifically, the complainant alleges that the respondent violated N.J.S.A. 18A:12-24(b), as well as N.J.S.A. 18A:12-24.1(c), (d), (i), and (j) of the Code of Ethics for School Board Members (Code). Complainant's narrative includes dates of violations that exceeded the 180-day filing requirement provided in N.J.A.C. 6A:28-6.5(a). Consequently, the Commission dismissed that part of her complaint, which included events beyond the 180-day limit and commenced its review with events occurring after September 23, 2011.

On April 30, 2012, the respondent filed an answer, which did not include a Certification under Oath. On May 18, 2012, the respondent amended his answer, alleging that the complaint was frivolous. By letter dated July 3, 2012, the complainant and respondent were notified that the Commission would review this matter at its meeting on July 24, 2012 in order to make a probable cause determination, in accordance with procedures set forth at N.J.A.C. 6A:28-10.9, as well as a determination on the allegation of frivolousness. The complainant was accorded an opportunity to respond to the claim of frivolousness, pursuant to N.J.A.C. 6A:28-7.2(b), but she did not do so.

At its July 24, 2012 meeting, the Commission found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(b). The matter was revisited again at its next meeting on August 28, 2012 to review alleged violations of the Code of Ethics for School Board Members. In addition ~~to its~~ prior determination, the Commission also found cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24.1(d) and dismissed all other allegations. Moreover, the Commission found that the complaint was not frivolous, in accordance with the standard set forth at N.J.A.C. 6A:28-1.2. Finally, the Commission voted to transmit the matter to the Office of Administrative Law (OAL) for a *de novo* hearing where the Commission prosecuted those allegations in the complaint, for which it found probable cause.

Thereafter, this matter was scheduled for hearings on October 30, 2013 and October 31, 2013 before the Administrative Law Judge (ALJ). Although the respondent's attorney appeared on both days, the respondent failed to report on either day, and as of November 4, 2013, he did not provide a reason for his non-appearance. The ALJ issued an Initial Decision dismissing the matter on November 1, 2013 and mailed same to the parties on November 4, 2013. Pursuant to N.J.A.C. 1:1-3.3(b) and N.J.A.C. 1:1-14.4, the ALJ returned the file to Commission to determine whether a violation of the Act occurred in accordance with N.J.S.A. 18A:12-29. Additionally, the Commission requested and obtained an extension of time until January 30, 2014 in which to consider the full record of this matter.

The Deputy Attorney General, prosecuting the complaint on behalf of the Commission, submitted exceptions on November 13, 2013. He maintains that a dismissal of the complaint was inappropriate since there had been no adjudication on the probable cause finding. Respondent argued in his reply exceptions, received November 25, 2013, that his non-appearance should not be construed as a waiver of defenses or his Answer as there is no provision to support such a penalty. He further argues that any of the alleged violations, on which the Commission did not previously find cause should be considered dismissed, and the Commission's decision considered final as to those issues.

At its meeting on November 26, 2013, the Commission rejected the ALJ's Initial Decision, dismissing the complaint and instead issued a default against the respondent for his failure to appear at the hearings. For his conduct as alleged in the complaint and pursuant to N.J.A.C. 6A:28-10.7(c)(2)(i), the Commission voted to find that Sterling Waterman violated N.J.S.A. 18A:12-24(b) of the Act and N.J.S.A. 18A:12-24.1(d) of the Code. In so finding, the Commission recommended a penalty of reprimand.

ANALYSIS

Pursuant to N.J.S.A. 18A:12-29(b) and N.J.A.C. 6A:28-10.7 et seq., upon a finding of probable cause, the complainant shall no longer be a party to the complaint. Where the Commission transmits a complaint to the OAL pursuant to N.J.A.C. 6A:28-10.1(c)2, the attorney for the Commission shall prosecute those allegations in the complaint which the Commission found probable cause to credit.

Where a matter is transmitted to the OAL and the respondent fails to appear before the OAL, the matter is returned to the Commission for disposition. At such time, the allegation(s) that the Commission found probable cause to credit shall be deemed admitted and the Commission may proceed to a determination of a violation on a summary basis. N.J.A.C. 6A:28-10.7(c)(2)(i). N.J.A.C. 1:1-14.4(a).

In early November2013, the ALJ returned the case to the Commission, noting the respondent failed to appear for the hearings scheduled on October 30, 2013 and October 31, 2013. The Commission's review of the record also reveals that the respondent failed to respond to requests from his counsel and refused to participate in the preparation of his defense. N.J.A.C. 1:1-14.4(a) states that the sanction for unreasonable failure to comply with any order from a judge or with any requirements of this chapter warrant, *inter alia* the suppression of a defense, exclusion of evidence or the imposition of any other appropriate case-related action. Respondent's conduct during the hearing process warrants the imposition of these sanctions.

Moreover, the respondent's failure to appear is deemed an admission of the factual allegations asserted in support of the two claims transmitted to the OAL for hearing. Consequently, the Commission finds a violation of N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A: 12-24.1(d).

DECISION

For the reasons set forth above, the Commission rejects the Initial Decision of the ALJ dismissing the complaint and issues a default against the respondent for his failure to appear at the hearings. The Commission also determines that by his conduct, the respondent has admitted the facts as alleged in the complaint and establishes a finding that the respondent violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A: 12-24.1(d).

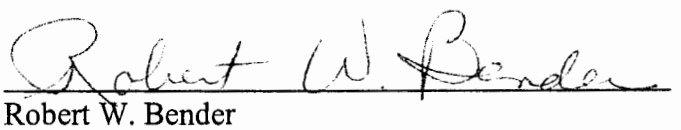
PENALTY

The Commission recommends that the Commissioner of Education impose a penalty of reprimand.

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

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

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



Robert W. Bender
Chairperson

Mailing Date: January 29, 2014

Resolution Adopting Decision – C10-12

Whereas, the Commission found probable cause to credit the allegation that the respondent violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(d) of the Code of Ethics for School Board Members; and

Whereas, the Commission transmitted the matter to the Office of Administrative Law for a *de novo* hearing; and

Whereas, pursuant to N.J.A.C. 1:1-14.4(a), the OAL returned the matter to the Commission, advising that the respondent did not provide an explanation for his failure to appear; and

Whereas, the Administrative Law Judge erred in dismissing the matter for respondent's failure to appear at the hearings; and

Whereas, after consideration of the full record, at its meeting on November 26, 2013, the Commission rejected the Initial Decision of the ALJ and issued a default judgment against the respondent; and

Whereas, at its meeting on November 26, 2013, the Commission voted to voted to find that Sterling Waterman violated N.J.S.A. 18A:12-24(b) of the Act and N.J.S.A. 18A:12-24.1(d) of the Code and recommended a penalty of reprimand; and

Whereas, the Commission finds that the within decision accurately memorializes its adoption of the ALJ's recommendations;

Now Therefore Be It Resolved that the Commission hereby adopts the decision and directs its staff to notify all parties to this action of its decision herein.

Robert W. Bender, Chairperson

I hereby certify that this Resolution
was duly adopted by the School Ethics
Commission at it public meeting on
January 28, 2014.

Joanne M. Restivo
Interim Executive Director
School Ethics Commission

131-14

DANA GREENE,

PETITIONER,

V.

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

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Pursuant to *N.J.S.A.* 18A:16-6.1, the petitioner – on February 14, 2012 – requested reimbursement in the amount of $68,425.79 from the respondent Board for the legal fees and costs expended in the defense of a criminal complaint against him which had been dismissed by the court. The Board denied the reimbursement, on the grounds that the request lacked proof of payment of the legal fees by the petitioner. As petitioner is a member by the New Jersey Education Association (NJEA), his legal fees and expenses were paid by the NJEA pursuant to its practice of providing a legal defense fund for its members. The petitioner filed the within appeal in March 2012, and his attorney subsequently revised the reimbursement amount to $46,176, representing a calculation of fees based on a reduction in the rates charged to reflect the NJEA unified hourly rate ($149 or $150 per hour) for firm associates, and a $250 per hour rate for services performed by the lead defense attorney. The Board contended, *inter alia,* that petitioner has no standing because the NJEA financed his defense, and as such petitioner has no costs to be reimbursed.

The ALJ found, *inter alia,* that: the petitioner in this matter was charged with a criminal offense that arose out of his official duties as a teacher, which was ultimately dismissed; it is undisputed that petitioner was completely exonerated of the charge; accordingly, under *N.J.S.A.* 18A:16-6.1, the respondent Board is legally obligated to indemnify the petitioner; hours related to both the unfounded investigation by the Institutional Abuse Investigation Unit (IAIU) and the municipal court criminal matter were reasonable for reimbursement; however, the reimbursement rate should be the NJEA rate in effect at the time of performance of the legal services, i.e.: either $149 or $150 per hour depending on date of service. The ALJ ordered that respondent reimburse the petitioner for legal fees immediately upon receipt of a revised bill, as follows: $694.01 for expenses; $676.78 for investigator fees; and 267.5 hours of attorney fees at the NJEA hourly rate of $149 for work performed from September 2010 to August 2011, and $150 for the period from September 2011 to August 2012.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ's determination that petitioner is entitled to reimbursement of reasonable attorney's fees from the Board, and found that the billed hours related to the IAIU investigation were part and parcel of the defense of the criminal complaint. However, the Commissioner found that: the ALJ summarily determined that the NJEA unified rate should be the reasonable rate at which the respondent must reimburse; in so doing, the ALJ failed to complete the required analysis of evidence in the record to determine whether the hours billed were reasonable; the record supports that the rates billed by the lead attorney were reasonable, but is devoid of evidence relating to the reasonableness of the billing for associate hours. Accordingly, the Commissioner adopted the decision of the OAL with modification, and directed the Board to reimburse petitioner for expenses and fees as itemized above, and for 47.8 hours of attorney work at $250 per hour.

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

Issued 3/20/14

OAL DKT. NO. EDU 04772-12
AGENCY DKT. NO. 57-3/12

DANA GREENE,	:	
	:	
PETITIONER,		
	:	
V.		COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
	:	
RESPONDENT.		
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions – filed in accordance with *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

This matter arises out of a claim by petitioner, pursuant to *N.J.S.A.* 18A:16-6.1, for reimbursement of legal fees and costs incurred in the successful defense of a criminal harassment charge filed against him in the Irvington Municipal Court. The criminal complaint was signed on March 8, 2011 and alleged that petitioner had made improper sexual advances toward a student during class at respondent's Mt. Vernon Avenue School. The allegations that formed the basis of the criminal complaint were also the subject of a related investigation by the Department of Children and Families, Institutional Abuse Investigations Unit (IAIU). Ultimately, the IAIU determined the allegations were unfounded, which determination served as a basis for dismissal of the criminal complaint on January 17, 2012.

Petitioner was represented by Timothy R. Smith, Esq., of the law firm of Caruso Smith Edell Picini, P.C. Smith and various associates of the Caruso firm performed legal services in connection with the matter from December 20, 2010 through January 27, 2012. Itemized billing records reflect a total of 267.5 hours expended on the matter, including 47.8 hours of work by Smith

and 219.7 hours of work by associates. In addition, $694.01 of expenses and $676.78 in investigator fees were incurred.

Petitioner is a dues-paying member of the New Jersey Education Association (NJEA). The Caruso firm participates in the NJEA Legal Services Program, pursuant to which NJEA provides a legal defense pool for its members. The fees and expenses associated with the legal services provided to petitioner by the Caruso firm were paid by the NJEA, at the then-applicable unified rate of $149 per hour for services performed prior to September 1, 2011, and $150 per hour for services performed from that date forward. The demand for reimbursement seeks a total of $46,176.00, inclusive of $694.01 of expenses, $676.78 in investigator fees, and payment for services at a rate of $250 per hour for all services performed by Smith, and at the applicable NJEA unified rate for services performed by associates of the Caruso firm.

The Administrative Law Judge (ALJ) issued an Initial Decision in which she determined that the petitioner was entitled to reimbursement from respondent for all reasonable counsel fees and expenses pursuant to *N.J.S.A.* 18A:16-6.1. In reaching that determination, the ALJ specifically found that the allegations underlying the criminal charge and the IAIU investigation arose out of petitioner's official duties as a teacher, and that petitioner had obtained a favorable result since the IAIU investigation was unfounded and the criminal charges were ultimately dismissed. The ALJ further determined that petitioner's attorney provided adequate proof that 267.5 hours were spent on this matter, and that the number of hours was reasonable; however, in calculating the recoverable fees, the ALJ reduced the hourly rate for services performed by Smith from $250 to the applicable NJEA unified rate – the same rate at which the associates sought to be reimbursed. In so doing, the ALJ took note of Smith's substantial skill and experience, and acknowledged that a $250 hourly rate would be warranted in other contexts. Nevertheless, the ALJ concluded that where, as here, Smith accepted the matter through the NJEA Legal Services Program at the applicable unified rate, the unified rate should also be used for reimbursement purposes.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ's determination that petitioner is entitled to reimbursement of reasonable attorneys' fees from respondent. Respondent does not dispute that petitioner meets the statutory requirements, pursuant to *N.J.S.A.* 18A:16-6.1, for reimbursement of reasonable counsel fees and expenses. Respondent, however, challenges the "reasonableness" of the legal fees at issue. More specifically, respondent argues in its exceptions that the ALJ should have excluded from petitioner's indemnification award those hours that were devoted to the IAIU investigation since they were not "inherently connected to the criminal proceeding." The Commissioner disagrees.

Pursuant to *N.J.S.A.* 18A:16-6.1, the board of education is required to reimburse legal fees associated with the defense of both criminal and quasi-criminal actions. Moreover, the record reflects that the IAIU investigation, and the results thereof, were an integral part of the successful defense of the criminal complaint against petitioner. Accordingly, the Commissioner finds that the hours devoted to the IAIU investigation were part and parcel of the Caruso firm's efforts in defense of the criminal complaint, and the ALJ properly included those hours in the reimbursement calculation.

Respondent further argues that the ALJ failed to consider the appropriate factors in determining that the Caruso firm's fee was reasonable. In analyzing a fee application, it is necessary to begin with the calculation of the "lodestar" – which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. *Rendine v. Pantzer*, 141 *N.J.* 292, 324 (1995). In order to complete the calculation, the reasonable hourly rate must be evaluated according to prevailing market rates. Therefore the court must compare the hourly rate sought to those of attorneys in the community with "comparable skill, experience, and reputation." (*Id.* at 337, citations omitted) Although the determination "need not be unnecessarily complex or protracted," the court must also ensure that the hourly rates are "fair, realistic, and accurate." (*Id.*)

The Commissioner finds that the ALJ failed to complete the required analysis *vis-à-vis* petitioner's fee application. In that regard, the ALJ began the analysis by reviewing the number of hours expended, and concluding that the number was reasonable. The ALJ failed, however, to complete the analysis by evaluating the evidence in the record to determine whether it supported a finding that the hourly rates charged by Smith and his associates were reasonable. Instead, the ALJ summarily determined that the NJEA unified rate "should be the reasonable rate at which the respondent must reimburse."

The notion that the NJEA unified rate must be used for reimbursement purposes where an attorney accepts a matter through the NJEA Legal Services Program has been rejected. *See Salaam v. Bd. of Educ. of the City of Irvington*, Commissioner's Decision No. 264-12, decided June 25, 2012, *aff'd*, Dkt. No. A-5592-11T4 (App. Div. 2014). Respondent is statutorily obligated to pay "reasonable" counsel fees. That obligation is not altered by the fact that NJEA financed petitioner's defense. Thus, the ALJ should have completed the analysis, and determined whether the evidence in the record establishes that the billing rate of each attorney that worked on Greene's case is reasonable considering the rates of other attorneys in the relevant community with comparable skill, experience and reputation.

The Commissioner is satisfied that Smith's $250 hourly rate is reasonable, given his considerable skill and experience, as established by information contained in his certification and the affidavit of Paul DaSilva, Esq. However, with respect to the associates who also appear in the time records submitted by petitioner, the Commissioner finds the record devoid of evidence which would allow a determination as to whether their experience, skill and reputation would justify a conclusion that the hourly rates charged for their time was "reasonable." Accordingly, the charges attributable to these individuals must be excluded from petitioner's indemnification award. *See Salaam, supra.*

With the exception of an untimely argument that the NJEA should have been joined as an indispensible party[1], the remainder of respondent's exceptions essentially recast and reiterate its arguments advanced below. In that it is determined that the ALJ fully considered and addressed them in her decision, further elaboration on these arguments is unnecessary here.

Accordingly, the recommended decision of the OAL, as modified above, is adopted as the final decision in this matter. The Board of Education of the Township of Irvington is hereby directed to reimburse petitioner for legal fees as follows: 1) expenses of $694.01; 2) investigator fees of $676.78; and, 3) 47.8 hours of attorney work at the hourly rate of $250.

IT IS SO ORDERED.[2]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/20/14

Date of Mailing: 3/21/14

[1] Since this affirmative defense was not raised below, it will not be considered by the Commissioner in reaching a final decision in this matter.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04772-12
AGENCY DKT. NO. 57-3/12

DANA GREEN,
Petitioner,
v.
IRVINGTON TOWNSHIP BOARD OF EDUCATION,
Respondent.

Adam M. Epstein, Esq., for petitioner (Caruso, Smith, Edell & Picini, attorneys)

Albert Asphall, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: April 19, 2013 Decided: June 19, 2013

BEFORE **TIFFANY M. WILLIAMS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioner, Dana Green, files the instant appeal seeking indemnification from the respondent, Irvington Board of Education in connection with a criminal complaint that was instituted against him and subsequently dismissed. The respondent refuses payment of petitioner's legal fees on grounds that he provided no proof that he had already paid his legal fees and therefore he lacks standing to seek indemnification in this appeal.

The matter was transmitted to the Office of Administrative Law (OAL) on April 12, 2012 and was initially assigned to Administrative Law Judge Tahesha Way. N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14F-1 to 13. The matter was reassigned to this ALJ and the parties consented to submit certifications and briefs in summation of legal arguments.

FACTUAL FINDINGS

Based on my review of the exhibits and briefs submitted by counsel, the following are **FOUND** as undisputed **FACT**:

1. On March 8, 2011, a criminal charge of harassment was signed against the petitioner, a tenured teacher employed by the respondent. The complaint alleged that the petitioner made several improper sexual advances towards a ten-year old student during art class at the Mt. Vernon Avenue School.

2. On January 17, 2012, the criminal charges were dismissed against the petitioner in the Irvington Municipal Court.

3. On or about February 14, 2012, the petitioner, through his attorneys, submitted a bill to the respondent demanding reimbursement of attorneys' fees in the amount of $68,425.79, in connection with the municipal court criminal matter (R-1), (R-2).

4. On February 23, 2012, the respondent denied the request on grounds that the request lacked proof of payment of the legal fees by the petitioner. (R-3).

5. On or about March 12, 2012, the petitioner filed a petition seeking reimbursement of reasonable attorney's fees under N.J.S.A. 18A:16-6.1. (P-1).

6. Subsequently, petitioner reconsidered and revised his demand to $46,176.00, which represented a calculation of fees based on reduction the firm's rates. Specifically, the demand includes (1) $694.01 of expenses, (2) $676.78 in investigator fees, (3) 47.8 hours of work by Timothy R. Smith, Esq. at an hourly

rate of $250 and 219.7 hours of work by associates, including 99.7 hours at the NJEA standard rate of $149.

7. Timothy R. Smith, Esq. is a partner with the firm Caruso Smith Edell Picini, P.C. and served as the lead attorney representing the petitioner in the municipal court matter. He has been licensed for 15 years and is admitted to practice in New York, New Jersey, the District of Columbia and various federal courts. He is a certified criminal trial attorney in New Jersey, of which less than 1% of attorneys in NJ hold this certification. (P-7).

8. Mr. Smith had tried cases of the first, second, third and fourth digresses, including disorderly persons and petty disorderly persons. He has handled hundreds of cases involving teachers charged in the municipal courts of New Jersey with a variety of offenses, including harassment allegations arising from their duties. Mr. Smith utilizes a rate of $250/ hour as a lower end rate on his billing spectrum. (P-7).

9. NJEA's unified rate for representing union members in criminal and civil matters was $149 per hour from September 1, 2010 to August 31, 2011, and $150 per hour from September 1, 2011 to August 31, 2012. (P-8).

10. Mr. Smith's representation of the petitioner was reflected in the itemized bill and was necessary to defend him against the criminal harassment charge as well as the related investigation by the Institutional Abuse Investigations Unit (IAIU) of the Division of Families and Children. The IAIU investigation was unfounded and served as a basis to seek dismissal of the criminal complaint. (P-7).

11. Mr. Smith directed associates and an investigator to perform work under his direction in connection with the petitioner's charges. (P-7).

12. NJEA paid the fees and expenses in connection with Mr. Smith's representation pursuant to their practice in providing a legal defense pool for their members. (P-5).

13. Petitioner is a dues paying member of the NJEA.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Pursuant to N.J.S.A. 18A:16-6.1, petitioner is entitled to reimbursement from the respondent for reasonable counsel fees and expenses in connection with a hearing, trial and appeals of any criminal or quasi-criminal action that may be instituted against him should the proceeding be dismissed or result in a final disposition in his favor. N.J.S.A. 18A:16-6.1. The two-part test to determine eligibility for reimbursement of expenses and counsel fees contemplates that: (1) any act or omission on which the criminal charges are based must arise out of and in the course of the performance of the duties of the employee; and (2) the charges must be either dismissed or result in a final disposition favorable to the employee. Bower v. Bd. of Educ. Of the City of East Orange, 149 N.J. 419 (1997). Moreover, the reasonableness of attorney fees is a calculation of the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Singer v. State, 95 N.J. 487, 499, cert. denied, 469 U.S. 832 (1984).

Based on the preponderance of the undisputed evidence, I **CONCLUDE** that the petitioner is entitled to reimbursement of reasonable attorneys' fees from the respondent. The credible evidence demonstrates that the petitioner was charged with a criminal offense arising out of his official duties as a teacher, which was ultimately dismissed. He was also the subject of a related quasi-criminal IAIU investigation which was ultimately unfounded. Respondents do not refute these facts nor produce any credible evidence to demonstrate that the petitioner did not successfully obtain a favorable result. To the contrary, it is undisputed that petitioner was completely exonerated. Accordingly, respondent's obligation to indemnify the petitioner was legally triggered.

Further, I **CONCLUDE** that the hours spent on both the IAIU and the municipal court matters were reasonable. However, I also **CONCLUDE** that the reasonable rate that should be applied is the NJEA rate in effect at the time of the performance of the legal services to the petitioner—$149 per hour from September 1, 2010 to August 31,

2011, and $150 per hour from September 1, 2011 to August 31, 2012. The NJEA notes in its memos to retained counsel, dated October 6, 2010 and November 2, 2011, that the applicable rate is a unified rate for civil and criminal matters. Therefore, notwithstanding Mr. Smith's experience as an elite certified criminal attorney, the reasonable rate that the respondent should expect to reimburse would be the stated NJEA rate. The fact that petitioner's counsel revised the demand from $68,425.79 to $46,176.00, based on a reduction in the associates' rates down to the NJEA rate, furthers the proposition that the NJEA rate was the reasonable rate. The petitioner provided no justification for reducing the associate rate but leaving Mr. Smith's rate at $250. While I credit Mr. Smith's experience as warranting a $250 per hour rate in other contexts, in this instance the reasonable rate would be the unified rare proscribed by NJEA. Unified or blended rates are typical for firms in representing bulk maters on behalf of one client where multiple attorneys with varying levels of experience will be working on the matter. In the instant case, the NJEA specifically developed a unified rate for both civil and criminal matters and that rate should be the reasonable rate at which the respondent must reimburse. In light of the decision to award fees at the NJEA rate, the issue of whether the $250 an hour rate by Mr. Smith is reasonable in light of the attorney affidavits submitted, need not be reached.

Further, I am not persuaded by the respondent's argument that the appeal wants of standing. The relevant statutory authority for reimbursement and its case progeny do not support a conclusion that reimbursement only follows if there is direct payment of the fee by the client first. Moreover, respondent failed to provide sufficient evidence that the bill was either not bona fide or a sham which would serve as the only basis to justify stopping the district from paying a bona fide bill. It is undisputed that the firm had a retainer agreement with NJEA to provide representation to its members and the respondent presented no evidence to refute this fact. Accordingly, standing lies and the respondent is obligated to provide reimburse under the guiding legal authority.

ORDER

It is **ORDERED** that the respondent reimburse the petitioner for legal fees constituting: (1) $694.01 of expenses, (2) $676.78 in investigator fees, and (3) 267.5 hours of attorney work, inclusive of Mr. Smith's and his associates' hours, at the NJEA hourly rate of $149 for work performed from September 1, 2010 to August 31, 2011 and at $150 per hour for work performed from September 1, 2011 to August 31, 2012. Petitioner is **ORDERED** to remit a revised bill to respondent reflecting the aforementioned rates immediately. Upon receipt, respondent is **ORDERED** to remit full payment immediately.

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

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

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

June 19, 2013
DATE

Tiffany M. Williams
TIFFANY M. WILLIAMS, ALJ

Date Received at Agency:

Date Mailed to Parties: JUN 21 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

rr

APPENDIX

WITNESSES

None

EXHIBITS

For Petitioner:

P-1 February 27, 2012 petition
P-2 Incident and Police Reports
P-3 Municipal Court Disposition
P-4 Affidavit of Paul DaSilva, Esq.
P-5 Client accounting ledger and proof of payments for NJEA
P-6 Revised Legal Bill
P-7 Certification of Timothy R. Smith, Esq.
P-8 Memoranda from NJEA dated, October 6, 2010.

For Respondent:

R-1 February 14, 2012 letter to Irvington Board of Education
R-2 Legal bill dated February 14, 2012
R-3 February 23, 2012 letter to petitioner
R-4 NJEA Memo
R-5 Certification of Julianna C. Blackburn, Esq.
R-6 Certification of Randy P. Davenport, Esq.
R-7 Certification of Kalifah Shabbaz, Esq.

134-14

A.K. on behalf of minor child L.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged, *inter alia*, that the respondent Board violated her son's due process rights relative to the imposition of a long-term suspension on L.K. following an incident that occurred on December 19, 2011. Petitioner sought to have any reference to a long-term suspension from December 20, 2011 to January 25, 2012 expunged from L.K.'s student records, and requested compensatory education for the period when he was denied educational services while on suspension. Respondent asserted that L.K. was not entitled to formal due process because he was given only a short-term suspension of five days, and that the Commissioner does not have jurisdiction to decide the claim for compensatory education since the petition was not filed with the Office of Special Education Programs (OSEP). The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: petitioner's appeal does not contest the basis for the discipline which was meted out in this matter, but rather challenges the respondent's imposition of a *de facto* long-term suspension without consideration of L.K.'s due process rights; summary decision in favor of petitioner is appropriate as it relates to petitioner's request that L.K.'s disciplinary record be expunged of any mention of a suspension exceeding five days for the alleged December 19, 2011 incident; however, summary decision cannot be granted regarding the request for compensatory education, as the petition does not allege a violation of the IDEA, and even if it did, the Commissioner lacks jurisdiction to decide a matter arising under the IDEA. Likewise, the Commissioner does not have jurisdiction to decide if L.K. is entitled to any compensatory education as a result of a violation of the IDEA or New Jersey special education laws. Accordingly, the ALJ ordered respondent to expunge any reference to a long-term suspension and verify that L.K.'s student record reflects that a suspension of only five days was imposed, for the period from December 20, 2011 through January 4, 2012. The ALJ dismissed the balance of the petition for lack of jurisdiction.

Upon a full and independent review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision, petitioner's motion for summary decision was partially granted, and respondent's cross-motion for summary decision was denied.

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

March 21, 2014

OAL DKT. NO. EDU 6071-12
AGENCY DKT. NO. 92-4/12

A.K. on behalf of minor child L.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner are petitioner's allegations that respondent's imposition of discipline upon her minor child, L.K., failed to satisfy due process and other requirements relative to long-term suspensions. The Commissioner notes that the question of whether L.K. committed an infraction was not adjudicated in the OAL and is therefore not at issue before the Commissioner. The instant controversy centers wholly upon the nature of the imposed discipline and whether respondent's actions complied with the category of discipline which was meted out. Upon review of the record and Initial Decision of the Office of Administrative Law (OAL),[1] the Commissioner concurs with the OAL that respondent violated L.K.'s rights.

It is undisputed that, although respondent may have intended to impose upon L.K. the minor discipline of five days of suspension, in actuality, L.K. was kept out of school for well over ten days – ultimately creating a long-term suspension. Thus, as the Administrative Law Judge (ALJ) found, L.K.'s *de facto* long-term suspension entitled him to, among other things, a formal hearing with proper notice, a formal decision by the board of education, and

[1] Neither party filed exceptions to the Initial Decision.

home instruction within five days of the beginning of the suspension. *See, N.J.A.C.* 6A:16-7.3, *N.J.S.A.* 18A:37-5, and *N.J.A.C.* 6A:16-10.2(b).

Since none of the above-mentioned rights were afforded to L.K., he was entitled to the relief prescribed in such cases as *Asia Robinson v. State-Operated Sch. Dist. of the City of Paterson*, Commissioner Decision No. 47-11, decided January 25, 2011, *aff'd.* Appellate Division, Dkt. No. A-2914-10T1, November 17, 2011. (stating that the remedies of reinstatement and expungement are possible if a suspension violates a student's due process rights); *see also N.J.A.C.* 6A:32-7.7 (providing for the ability to "expunge inaccurate, irrelevant or otherwise improper information from the student record"). Thus, the Commissioner concurs with the ALJ's recommendation that any document referencing a long-term suspension between December 20, 2011 and January 25, 2012 be expunged from L.K.'s school records. Since L.K. is currently attending school, there is no need to order the remedy of reinstatement.

Finally, the Commissioner is in accord with the ALJ's denial of petitioner's request for "compensatory education" for L.K. Setting aside the fact that L.K. appears to have been without educational instruction for no more than ten school days, the remedy of compensatory education has been judicially fashioned to compensate special education students for violations of the Individuals with Disabilities Education Act (IDEA), 20 *U.S.C.S.* § 1400 *et seq. See, e.g. Ferren C. v. Sch. Dist. of Philadelphia*, 612 *F.*3d 712, 717 (3d Cir. 2010) (Compensatory education . . . . is not defined within the IDEA and is a judicially created remedy. . . . The Court of Appeals for the District of Columbia has stated that compensatory education serves to "replace [] educational services the child should have received in the first place" and that such awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Reid v. District of Columbia*, 401 F.3d

516, 518, 365 U.S. App. D.C. 234 (D.C. Cir. 2005)). As the Commissioner of Education does not have jurisdiction to adjudicate challenges to the IDEA, he may not award remedies designed to compensate students for IDEA violations.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this case, petitioner's motion for summary decision is partially granted as set forth *infra,* and respondent's cross-motion for summary decision dismissing the petition is denied.

IT IS SO ORDERED. [2]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/21/14

Date of Mailing: 3/24/14

[2] This decision, as the Commissioner's final determination in the instant matter, may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6071-12
AGENCY DKT. NO. 92-4/12

L.K. AND A.K. ON BEHALF
OF MINOR CHILD, L.K.
Petitioners,

v.

NORTHERN BURLINGTON COUNTY
REGIONAL BOARD OF EDUCATION
Respondent.

Sean M. Benoit, Esq., for petitioners (Disability Rights New Jersey, attorneys)

Brett E.J. Gorman, Esq., for respondent (Parker McCay, attorneys)

Record Closed: January 27, 2014 Decided: January 27, 2014

BEFORE **JOHN F. RUSSO, JR.,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, L.K. and A.K., bring this matter on behalf of their minor son, L.K., asserting that respondent, Northern Burlington County Regional Board of Education ("Board" or "District"), violated L.K.'s due process rights in imposing a "long-term" suspension on the student. On April 5, 2012, petitioners filed a Verified Petition of Appeal ("Petition") with the New Jersey Department of Education, Bureau of

Controversies and Disputes ("Commissioner"), to which the respondent answered on May 8, 2012. In the six (6) Counts specified in the Petition, the petitioners contend that:

- **Count 1** – respondent imposed a long-term suspension without providing a formal hearing and written notice in violation of N.J.A.C. 6A:16-7.3.

- **Count 2** – respondent issued a long-term suspension without a formal decision by the Board of Education in violation of N.J.S.A. 18A:37-5.

- **Count 3** – respondent failed to provide home instruction within five (5) days of the start of the suspension in violation of N.J.A.C. 6A:16-10.2(b).

- **Count 4** – respondent failed to provide L.K. with formal due process as guaranteed by the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

- **Count 5** - respondent failed to provide L.K. with formal due process as guaranteed by Article I, Paragraph 1 of the New Jersey Constitution and N.J.S.A. 10:6-2.

- **Count 6** – the long-term suspension of L.K. without formal due process violated his right to a public education under Article VIII, Section IV, Paragraph 1 of the New Jersey Constitution.

For relief, petitioners seek to expunge any reference to a long-term suspension from December 20, 2011, to January 25, 2012, from all of L.K.'s school records. Petitioners also request compensatory education for the period when L.K., who is classified as eligible for special education services, was denied educational services while on suspension. In opposition, respondent asserts that L.K. was not entitled to formal due process because he was only given a short-term suspension of five (5) days and that this tribunal does not have jurisdiction to decide the claim for compensatory education because the Petition was not filed with the Office of Special Education Programs ("OSEP").

The matter was transmitted to the Office of Administrative Law ("OAL") on May 9, 2012, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -23. A pre-conference hearing was held on June 20, 2012, at which time a settlement conference was tentatively scheduled for July 12, 2012. By letter dated July 2, 2012, respondent requested an adjournment because the District superintendent was not available. The settlement conference was rescheduled for and held on August 9, 2012, however the parties were unable to reach a settlement.

Status conferences were subsequently held on September 12, 2012, and November 28, 2012. Pursuant to the briefing schedule agreed to by the parties during the November 28, 2012, phone conference, petitioners filed a Motion for Summary Decision on or about January 18, 2013. Respondent filed an Answer in Opposition as well as a Cross-Motion for Summary Decision on or about February 19, 2013, to which the petitioners replied on or about February 27, 2013.

FINDINGS OF FACT

I **FIND,** based upon a review of the Petition, Answer, and Cross-Motions for Summary Decision, the following relevant facts:

1. L.K. and A.K., the petitioners in this matter, are the parents of L.K., whose date of birth is April 6, 1999.

2. Petitioners are residents of the Board's school district and have remained so at all times relevant to the matter.

3. L.K. is classified for special education and related services under the Individuals with Disabilities Education Improvement Act, 20 U.S.C. §§ 1400 to 1482 ("IDEA"). His classification is Communication Impaired and he has been diagnosed with ADHD.

4. During the 2011-12 school year, L.K. was in the 7th grade and was enrolled in the Northern Burlington Regional School District. His Individualized Education Program ("IEP") placed him at the Northern Burlington Regional Middle School in a general education setting with pull out replacement services and a one-to-one assistant.

5. On December 19, 2011, L.K. is alleged to have verbally threatened his assigned one-to-one assistant by stating that he was going to get his older brother to beat the assistant up after school.

6. As a result of the allegation, on December 20, 2011, L.K. was suspended from school pending a re-entry meeting before the superintendant.

7. The District sent two letters, both dated December 20, 2011, to L.K.'s parents informing them that L.K was being immediately placed in out of school suspension pending a meeting with the superintendent and that such a meeting would be held on January 4, 2012, which was five (5) school days after L.K.'s suspension began.

8. L.K.'s parents never received the letters because both letters were addressed to a Fort Dix, New Jersey address and L.K.'s parents do not live in Fort Dix.

9. On January 3, 2012, L.K., the father, went to the Northern Burlington Middle School in person to meet with Ms. Treese, the assistant principal, and Ms. Sutter, his son's case manager, to discuss his son's suspension. A.K., the mother, participated in the meeting via a conference call.

10. L.K. was handed both of the December 20, 2011, letters that contained the wrong address and was verbally informed that his son was suspended until the meeting the following day with the superintendant on January 4, 2012.

11. L.K. verbally informed Ms. Treese and Ms. Sutter that he wanted to have an attorney present at the meeting with the superintendant. L.K. was then informed

that since he would be bringing an attorney, the meeting would have to be postponed.

12. By letter dated January 6, 2012, the middle school principal, Mr. Kearns, wrote to the parents at their correct address confirming a conversation that he had with the parents on the prior day, January 5, 2012. As a follow up to that phone conversation, it was Mr. Kearns' understanding that the parents were declining to meet with the superintendant at this time while they investigated and visited potential alternative placements recommended by the child study team.

13. As a result of the failure to have the re-entry meeting, Mr. Kearns stated in the letter that L.K. will "continue his suspension and home instruction will be provided."

14. On January 11, 2012, the home instruction commenced, which was ten (10) school days after L.K. was suspended.

15. An IEP meeting for L.K., the student, was scheduled and held on January 17, 2012. This meeting was attended by L.K.'s parents and the participants discussed L.K.'s suspension, possible placement at New Hope Academy, and the need for a manifestation determination meeting to be scheduled.

16. Following the IEP meeting, L.K.'s parents agreed to have L.K.'s records sent to the New Hope Academy, an out-of-district placement.

17. A manifestation determination meeting was scheduled for January 20, 2012, however, L.K.'s parents did not receive proper notification of the meeting and it was rescheduled for January 27, 2012.

18. On January 25, 2012, L.K. began school at the New Hope Academy.

19. Although never being issued a long-term suspension, prior to starting at New Hope Academy, L.K. effectively served a long-term suspension from December 20, 2011, through January 25, 2012, totaling 19 consecutive school days.

20. L.K. currently receives educational services at Newgrange, an out-of-district placement, which he has now attended since October 2012.

LEGAL ANALYSIS

Presently before this tribunal are cross motions for summary decision filed by both petitioners and respondent. The rules governing motions for summary decision in an OAL matter are embodied in N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 of the Rules Governing the Courts of New Jersey. Under N.J.A.C. 1:1-12.5(b), the motion for summary decision "... may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law. Failure to do so, entitles the moving party to summary judgment. Brill v. Guardian Life Ins. Co., 142 N.J. 520, 529 (1995). Moreover, even if the non-moving party comes forward with some evidence, the Courts must grant summary judgment if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986)). Under Brill, once the movant has presented competent evidence tending to show the absence of any genuine issue for trial, the nonmovant must do more than simply point to any fact in dispute. Id. at 529. Moreover, the nonmoving party cannot rely on disputed issues of fact that are insubstantial. Id. at 530. Rather, Brill requires the nonmovant to raise a factual issue substantial enough to sustain a reasonable conclusion in the nonmovant's favor if a hearing were held. Ibid.

As set forth more fully below, based upon the relief requested and the undisputed material facts, summary decision is appropriate, in part, for petitioners. Petitioners are entitled to summary decision on their request that L.K.'s disciplinary record be expunged of any record of a suspension exceeding five (5) days for the alleged December 19, 2011, incident. As to the request for compensatory education, this relief must be denied because the Petition does not allege a violation of the IDEA, and even if it did, this tribunal lacks jurisdiction to decide a matter arising under the IDEA where a due process petition was not filed with OSEP.

While the parties remain in disagreement as to the verbal threat allegedly made on December 19, 2011, the parent's Petition does not specify that the petitioners' are contesting the fact that any discipline was issued. Instead, in the six (6) Counts specified in the Petition, the parents only contest the procedures of the respondent in imposing a long-term suspension – specifically that the respondent violated L.K.'s constitutional rights when it imposed a long-term suspension and failed to offer home instruction within five days of the start of the suspension. Thus the material fact relevant to the Petition is not whether the alleged incident occurred, but simply whether L.K. was subjected to a long-term suspension in which his due process rights were violated. This is a critical distinction because this tribunal does not have jurisdiction to decide the basis of the suspension if it is not contested in the Petition. Instead, the heart of the matter is whether petitioners were denied appropriate due process.

Reviewing the procedures the respondent followed begins with the rule that formal due process rights are triggered by a long-term suspension. See R.R. v. Bd. of Educ. of Shore Reg'l H.S., 109 N.J. Super. 337, 347 (Ch. Div. 1970) (construing statutes that permit public school officials to impose serious sanctions, such as suspension or expulsion, to also require such officials to afford those students the procedural due process guaranteed by the Fourteenth Amendment). Accordingly, under New Jersey school law, when a school district suspends a student for more than ten (10) consecutive days, they are required to provide the student with formal due process procedures, including written notification to the parents of the charges and alleged facts and the opportunity for a formal hearing before the district board of

education. N.J.A.C. 6A:16-7.3. By contrast, a short-term suspension is governed by the less formal procedures specified under N.J.A.C. 6A:16-7.2. The Petition in this matter contains no allegation that the respondent violated N.J.A.C. 6A:16-7.2.

If a student's formal due process rights are violated, the student is entitled to a remedy, which can range from the immediate reinstatement of the student back in school to having the student's record expunged. See C.F. v. Bd. of Educ. of the City of Wildwood, 96 N.J.A.R.2d (EDU) 619 (order to reinstate a student who was suspended without being noticed of the charges against her or a timely hearing); Asia Robinson v. State-Operated Sch. Dist. of the City of Paterson, EDU 9407-09, Initial Decision (Dec. 14, 2010), adopted, Comm'r (Jan. 25, 2011) (stating that relief of reinstatement and expungement are possible if a suspension violated a student's due process rights); see also N.J.A.C. 6A:32-7.7 (providing for the ability to "expunge inaccurate, irrelevant or otherwise improper information from the student record").

In this case, as a matter of fact, petitioner was effectively suspended for 19 school days, which constitutes a long-term suspension because it was for more than ten (10) consecutive days. It is also undisputed that respondent failed to provide petitioners with a written notice of the facts alleged or the opportunity for a hearing before the Board. Thus, as a matter of law, I **FIND** that no material question of fact exists to determine the respondent violated N.J.A.C. 6A:16-7.3 by failing to comply with the formal due process procedures once L.K.'s suspension became a long-term suspension after it exceeded ten (10) consecutive days. Furthermore, the respondent cannot contest that L.K. was not assigned to suspension between January 5, 2012, and January 25, 2012, because the principal, Mr. Kearns, in his letter dated January 6, 2012, stated that L.K. would "continue his suspension" beyond the five (5) days imposed, pending an alternative placement. The principal states that L.K. cannot return to school because the parents have declined to meet with the superintendant. No authority under New Jersey school law has been identified for respondent to continue L.K.'s suspension, and thereby punish the student, for actions or inactions of the parents in not attending a re-entry meeting with the superintendant. Therefore, I **FIND** that after stating that L.K. would continue his suspension and conditioning his return to

school on his parents attending a re-entry meeting, the District ultimately subjected L.K. to a long-term suspension of 19 school days.

If L.K. was only suspended for five (5) days, respondent cannot deny that it was obligated to resume his education at the conclusion of that term. Of course respondent retained its rights to continue to pursue its dispute with the parents over a re-entry meeting, but this dispute should not have denied the student his right to receive a public education immediately at the conclusion of his five (5) day suspension. The actions of the parents in this matter do not relieve the respondent of its duty to provide L.K. with a public education at the conclusion of his suspension. Respondent cannot escape its liability for failing to provide L.K. with home instruction until ten (10) school days after the suspension began, in violation of N.J.A.C. 6A:16-10.2(b), by alleging that the parents are at fault for failing to attend a re-entry meeting. The respondent's obligation to provide a public education to the student must supersede any dispute it had with the parents.

As a matter of relief, it is undisputed that L.K. has already returned to school in an out-of-district placement, thus petitioners request that L.K.'s school record be expunged of any reference to an improper long-term suspension is the only possible relief remaining. On this issue, respondent contends that L.K. was only suspended for five (5) days. Accordingly, L.K.'s student record should already reflect the requested relief by containing no reference to a suspension longer than five (5) days. However, since the respondent did not certify the contents of L.K.'s record, I cannot determine that there is nothing to expunge. As such, petitioners are entitled to an Order that respondent expunge any reference to a long-term suspension and verify that L.K.'s student record reflects that a suspension of only five (5) days was imposed for the period of December 20, 2011, through January 4, 2012.

Petitioners also include in their Motion for Summary Decision that the District failed to provide L.K. with a timely manifestation determination. This issue was not included in the Petition in this matter, which contains no reference to the IDEA or any allegation that L.K. was denied a timely manifestation determination. This proceeding

is limited to the Petition transmitted by the Commissioner. However, assuming, arguendo, that the Petition was amended to include a claim that L.K. was denied a timely manifestation determination, the Commissioner, and thus this tribunal, would not have jurisdiction to decide the issue because it is the State Director of the Office of Special Education Programs who determines whether a local education agency has violated the requirements of state and federal laws regarding the provision of special education and related services. N.J.A.C. 6A:14-9.2. The final decision reached by OSEP under the procedures set forth in N.J.A.C. 6A:14-9.2 cannot be appealed to the Commissioner. Bd. of Educ. of the Lenape Reg'l High Sch. Dist. v. New Jersey Dep't of Educ., Office of Special Educ. Programs, 399 N.J. Super. 595, 606 (App. Div. 2008). The finality of the decisions respectively reached by OSEP and the OAL "is consistent with IDEA, which requires expeditious decisions on complaints [and] is also consistent with the State's adoption of legislation implementing IDEA ... and with the State Board's statutory authority to adopt regulations necessary to implement the school laws." Id. at 604.

Because the OAL is not a court, but an administrative agency designated to hear disputes transmitted from other agencies, it derives its jurisdiction from the transmitting agency. "The judge may render any ruling or order necessary to decide any matter presented to him or her which is within the jurisdiction of the transmitting agency conducting the hearing." N.J.A.C. 1:1-14.6(h). Since this tribunal derives its jurisdiction from the transmitting agency, the lack of jurisdiction for the Commissioner to decide the issue of a manifestation determination precludes this tribunal from exercising such jurisdiction in a case transmitted by the Commissioner and not OSEP. Accordingly, I **CONCLUDE** that, even if the Petition were amended to include a claim regarding the timeliness of the manifestation determination, this issue, as a matter of compliance with the IDEA, would not be properly before me and I would not have jurisdiction to decide such an issue in this case. For the same reasons, I further **CONCLUDE** that I do not have jurisdiction to grant the relief of compensatory education because this is a judicially created equitable remedy intended to "'compensate [the student] for rights the district already denied ... because the School District violated [the IDEA]....'" Ferren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712, 717 (3d Cir. 2010) (citations omitted). As

discussed, since this tribunal does not have jurisdiction to decide if respondent violated the IDEA or New Jersey special education laws because the Petition was not filed with OSEP, this tribunal does not have jurisdiction to decide if L.K. is entitled to any compensatory education as a result of any violation of the IDEA or New Jersey special education laws.

DECISION AND ORDER

Based on the foregoing, I **ORDER** that petitioners' motion for summary decision is **GRANTED**, in part, and **DENIED**, in part. Accordingly, respondent is **ORDERED** to expunge any reference to a long-term suspension and verify that L.K.'s student record reflects that a suspension of only five (5) days was imposed for the period of December 20, 2011, through January 4, 2012. Additionally, petitioners' Petition of Appeal is **DISMISSED** to the extent that it seeks compensatory education or alleges any violation of special education laws because, while the Commissioner has broad jurisdiction to hear and decide cases arising under the school laws, such jurisdiction does not extend to special education matters such as those raised in this case.

I further **ORDER** that respondent's cross-motion for summary decision is **DENIED**.

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

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

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



January 27, 2014
DATE

JOHN F. RUSSO, JR., ALJ

Date Received at Agency: February 4, 2014

Date Mailed to Parties: February 4, 2014

/bdt

137-14

JOEL BLEAH,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the non-renewal of his employment as a teacher of mathematics in respondent's school district, contending that he was employed under tenure and therefore could not be summarily terminated through non-renewal. Petitioner was initially employed by the district in September 2001 under a Provisional Certificate. His employment continued in August 2002 with the issuance of a Standard Certificate for Teacher of Mathematics, subtitled "Non-Citizen" at the bottom of the certificate, which expired in August 2007. Petitioner's standard certificate was renewed in September 2007. In May 2008, petitioner became a naturalized American citizen, and continued teaching in Newark schools. In May 2011, the Board informed the petitioner that his contract would not be renewed "based on performance." The Board asserted that petitioner had never achieved tenure in the district.

The ALJ found, *inter alia*, that: the petitioner achieved tenure when he became a naturalized citizen, since a Standard Certificate for Non-Citizens – when held by a citizen – is an appropriate certificate; the time the respondent employed the petitioner while a non-citizen may be tacked on to time the respondent employed the petitioner after he became a citizen; since respondent employed the petitioner continually from September 2001 through May 2011, petitioner was employed considerably longer than is required for the conferring of tenure under *N.J.S.A.* 18A:28-5(b); petitioner therefore acquired tenure before respondent notified him of the non-renewal. The ALJ concluded that petitioner was tenured in respondent's district when he was improperly non-renewed in May of 2011.

Upon independent review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, with further explanation. The Commissioner found, *inter alia*, that the petitioner, as a citizen, served the statutorily-required period of time for tenure in respondent's district, even *without* tacking on his pre-citizenship service. Accordingly, the Commissioner granted the petition and ordered the Board to restore petitioner's employment, together with back pay, benefits and emoluments to which he would have been entitled had he not been terminated in May of 2011.

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

Issued 3/24/14

OAL DKT. NO. EDU 10432-11
AGENCY DKT. NO. 226-8/11

JOEL BLEAH,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

Petitioner in the instant controversy requests reversal of the non-renewal of his employment, on the grounds that he had earned tenure prior to respondent's non-renewal decision. After consideration of the record, Initial Decision of the Office of Administrative Law, respondent's exceptions and petitioner's replies to same, the Commissioner adopts the Initial Decision with the following further explanation.

There is no disagreement between the parties as to the underlying facts of this matter. Respondent hired petitioner in September 2001, at which time petitioner received a provisional teaching certificate. While petitioner was not at that time a United States citizen, he had submitted to the Department of Education (the Department) an affidavit of intent to become a citizen. In August 2002, after a year of teaching mathematics in respondent's district, petitioner received a "Standard Certificate" for "Teacher of Mathematics," subtitled "Non-Citizen Certificate." (Joint Exhibit 5) That Certificate expired in August 2007, but was renewed. (*See* Joint Exhibit 7) Both certificates included the following provision:

> Has met all of the requirements established by the State Board of Education and is authorized to serve in the public schools of New Jersey

Examination of petitioner's performance observation reports and evaluations from the end of his fourth year of teaching forward reveals that each report and evaluation designated petitioner as tenured.[1] On May 5, 2008 petitioner became a United States citizen. However, three years and five days after petitioner attained citizenship, *i.e.*, on May 10, 2011, respondent's interim State District Superintendent wrote to petitioner stating that his employment contract would not be renewed for the 2011-2012 school year due to performance issues. (Joint Exhibit 9)

No reference was made in the May 10, 2011 letter to petitioner's citizenship status, but respondent now appears to contend that because – upon attaining citizenship on May 5, 2008 – petitioner had not immediately applied to replace his Non-Citizen Standard Certificate with a Standard Certificate for Citizens, he was somehow ineligible for tenure privileges.[2] In the Initial Decision, the Administrative Law Judge (ALJ) disagreed. Reminding the parties that tenure is bestowed by statute, *see, e.g., Spiewak v. Bd. of Educ. of Rutherford*, 90 *N.J.* 63, 72 (1982), and that the Tenure Act should be liberally construed to achieve its beneficent ends, the ALJ found that the statutory requirements for tenure had been satisfied by petitioner.

Crucial to an understanding of this controversy is the text of *N.J.S.A.* 18A:28-5(a), which is applicable to petitioner because his employment began before 2012. It provides as follows:

> The services of all teaching staff members employed prior to the effective date of *P.L.*2012, *c.*26 (*C.*18A:6-117 *et al.*) in the positions of teacher . . . and such other employees as are in positions which require them to hold **appropriate certificates issued by the board of examiners**, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect . . . , shall be under

[1] *See,* Joint Exhibit 7, wherein reports and evaluations dated June 16, 2005, January 12, 2006, June 20, 2006, December 19, 2006, June 15, 2007, June 25, 2008, June 25, 2009, October 15, 2009, April 15, 2010, June 22, 2010, November 16, 2010, January 14, 2011, February 24, 2011, April 15, 2011 and June 7, 2011, list petitioner as a tenured employee.

[2] Petitioner applied for a 'regular' Standard Certificate on August 2011, well before his non-citizen standard certificate was to expire, but after receipt of the non-renewal letter.

> tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:
>
> (1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (2) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> **(3) The equivalent of more than three academic years within a period of any four consecutive academic years.**
> [Emphasis added.]

The ALJ found that petitioner held an "appropriate certificate issued by the board of examiners" throughout his employment. (Initial Decision at 4) More specifically, the ALJ referred to the undisputed facts that petitioner had held a provisional certificate during his first year of service with petitioner and a Standard Certificate (for Non-Citizens) for his next nine years of service. Respondent argues that petitioner's Standard Certificate for Non-Citizens was not an "appropriate" certificate. In so doing, it ignores the express language of petitioner's certificate and also misconstrues statutory requirements.

As mentioned above, and as explained by the ALJ, petitioner's Standard Certificate expressly stated that he had met all of the requirements established by the State Board of Education and was authorized to serve in the public schools of New Jersey. There is nothing in statute or regulation that deems such a clear credential to be less than the "appropriate certificate" called for in *N.J.S.A.* 18A:28-5(a). Further, as pointed out by the ALJ, it cannot be disputed that, as of the date of petitioner's citizenship, his eligibility for a regular Standard Certificate was not in doubt. (Initial Decision at 10) Thus, the Commissioner turns to

consideration of 1) petitioner's achievement of citizenship and 2) petitioner's length of service in his position.

As to citizenship, petitioner achieved that on May 5, 2008. The precise wording of the statute (and regulation) which addresses the citizen requirement for tenure is "no teaching staff member shall acquire tenure unless he or she is, or until he or she shall become, a citizen of the United States." *N.J.S.A.* 18A:28-3; *N.J.A.C.* 6A:9-5.7(a)(5). It is notable that the statute and regulation simply mandate citizenship. They do not require – as a precondition to tenure – the replacement of a Standard Certificate for Non-Citizens with a regular Standard Certificate.[3] As petitioner became a citizen over three years before respondent's notice of nonrenewal, citizenship posed no bar to petitioner's tenure.[4]

The remaining consideration regarding petitioner's claim to tenure is his length of service. Petitioner worked in respondent's district under a Standard Certificate (for Non-Citizens) for nine years. Further, petitioner worked in respondent's district as a citizen for the equivalent of more than three academic years within a period of four consecutive academic years (*i.e.* three academic years plus five days within the academic years of 2007-2008, 2008-2009, 2009-2010 and 2010-2011). Thus, petitioner had met the tenure requirement for length of service – set forth in *N.J.S.A.* 18A:28-5(a)(3) – before the issuance of the non-renewal letter.

[3] Nonetheless, petitioner did apply for a standard certificate well before the expiration of his valid and "proper" Standard Certificate for Non-Citizens.

[4] The Commissioner is not persuaded by respondent's assertion that a ruling in favor of petitioner would create chaos. If a district wishes to ascertain whether an employee has become a citizen, it can simply ask for a copy of the employee's naturalization certificate.

Finally, the Commissioner approves of the ALJ's analogizing of petitioner's situation to those of the petitioners in *Ruiz v. Bd. of Educ. of Fort Lee,* Commissioner Decision No. 322-11, decided August 17, 2011, *aff'd* Appellate Division (July 8, 2013) and *Anson v. Bd. of Educ. of Bridgeton*, 1972 *S.L.D.* 638. In those cases the Commissioner held that, notwithstanding the fact that the petitioners only held provisional certificates, if they had actually satisfied the conditions imposed by the provisional certification, their service could count toward tenure.[5] The ALJ in this case reasoned that, similarly, notwithstanding the fact that the instant petitioner held a Standard Certificate for Non-Citizens, his actual satisfaction of the citizen requirement for tenure entitled him to tenure credit for his post-May 5, 2008 service.

Accordingly, the petition is granted, petitioner's employment in respondent's district shall be restored, and respondent shall provide petitioner with the back pay, benefits and emoluments to which he would have been entitled had he not been terminated.

IT IS SO ORDERED.[6]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/24/14

Date of Mailing: 3/25/14

[5] The respondent in the instant case misapplies the holding of the Appellate Division in *Ruiz.* The fact that petitioner Ruiz was ultimately denied tenure as a result of a determination that he had failed to satisfy the requirements of provisional certification does not negate the Commissioner's and Appellate Division's conclusions that individuals who have, in fact, satisfied the conditions of provisional certification may count their service toward tenure, regardless of whether they have received their Standard Certificates in a timely manner. Indeed, respondent's legal analysis throughout its exceptions fails to acknowledge the distinctions in the cited cases between earning standard certification and acquiring the document which evidences same.

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



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10432-11

AGENCY DKT. NO. 226-08/11

JOEL BLEAH,

Petitioner,

v.

CITY OF NEWARK, STATE OPERATED SCHOOL DISTRICT, CITY OF NEWARK

Respondent.

Eugene Liss, Esq. for petitioner

Bernard Mercado, Esq., for respondent (Newark Public Schools)

Record Closed: November 1, 2013 Decided: November 6, 2013

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

FACTS

The State Board of Examiners (the Board) issued the petitioner, a non-citizen at the time, a "Certificate of Eligibility as a Teacher of Mathematics in June 2001." (Joint Stipulation of Facts ¶ 1-2.) As a non-citizen, the petitioner submitted an "Affidavit of Intent to Become a Citizen." (Joint Stipulation ¶ 2.) After the respondent hired the

petitioner in September, 2001, the Board issued the petitioner a Provisional Certificate. (Joint Stipulation ¶ 3-4.) The following August, the Board issued the petitioner a "Standard Non-Citizen Certificate for Teacher of Mathematics which was scheduled to expire in August 2007." (Joint Stipulation ¶ 5.) The Board renewed the Standard Non-Citizen Certificate in September, 2007. (Joint Stipulation ¶ 7.)

The petitioner's first Standard Non-Citizen Certificate, issued in 2002, explained,

> [n]on-citizen Certificates are valid for five years. When United States citizenship is obtained the holder must apply for a standard certificate prior to the expiration date of the non-citizen certificate. If citizenship is not obtained, the holder must apply for renewal of the five year certificate prior to the expiration date of the non-citizen certificate. If this certificate expires prior to issuance of standard certification or renewal, the applicant is subject to the certification requirements in effect. Certification requirements are subject to change.
>
> [Joint Stipulation Ex. 5.]

The petitioner's second Standard Non-Citizen Certificate does not include similar language. (Joint Stipulation Ex. 7.) The face of both Standard Non-Citizen Certificates declare, "[the petitioner] has met all of the requirements established by the State Board of Education and is authorized to serve in the public schools of New Jersey . . . " (Joint Stipulation Ex. 5, 7.)

The petitioner became a citizen in May, 2008. (Joint Stipulation ¶ 8.) In May, 2011, the respondent informed the petitioner that his contract would not be renewed, "based on performance." (Joint Stipulation ¶ 9.) From 2005 until 2011, the petitioner's evaluations and observation reports noted that the petitioner was tenured. (Joint Stipulation ¶ 6.) Finally, in August, 2011, the petitioner applied for a Standard Certificate. (Joint Stipulation ¶ 11.) The Board issued the petitioner a Standard Certificate in October, 2011. (Joint Stipulation ¶ 12.), several months after the non-renewal of his contact in May 2011.

DISCUSSION

I. The petitioner achieved tenure when he became a naturalized citizen, because a Standard Non-Citizen Certificate, held by a citizen, is an appropriate certificate, and time the respondent employed the petitioner while a non-citizen may be tacked on to time the respondent employed the petitioner while a citizen.

Tenure is conferred by statute, not contract. Spiewak v. Bd. of Educ. of Rutherford, 90 N.J. 63, 72 (1982). To acquire tenure, "a teacher must comply with the precise conditions articulated in the statute." Zimmerman v. Bd. of Educ. of Newark, 38 N.J. 65, 72 (1962). However, "because of its remedial purpose, the Tenure Act should be liberally construed to achieve its beneficent ends." Spiewak, supra, 90 N.J. at 74. Nevertheless, "as the agency ultimately charged with implementation of the school laws, the [State] Board[] [of Education's] statutory interpretation is entitled to considerable weight, where not inconsistent with the statute and in harmony with the statutory purpose." Kletzkin v. Bd. of Educ. of Spotswood, 136 N.J. 275, 278 (1994) (quoting Kletzkin v. Bd. of Educ. of Spotswood, 261 N.J. Super. 549, 553 (App. Div. 1993)).

Pursuant to statute, teachers acquire tenure when employed, "in positions which require them to hold *appropriate* certificates . . . after employment in such district or by such board for . . . [t]hree consecutive academic years, together with employment at the beginning of the next succeeding academic year . . . " N.J.S.A. 18A:28-5(b) (emphasis added). The Board "issues three *categories* of educational certificate: the Instructional Certificate, the Administrative Certificate, and the Educational Services Certificate. Breitwieser v. State-Operated Sch. Dist. of Jersey City, 286 N.J. Super. 633, 638 (App. Div. 1996). Furthermore, the Board issues "three *types* of certificate." Ibid. First, the Board can issue a "standard certificate, a permanent certificate issued to persons who have met all requirements for State certification." Ibid.[1] See N.J.A.C. 6A:9-6.1.

[1] This Chapter was recodified since Breitwieser, without any significant change to the relevant provisions. See 35 N.J.R.

Second, the Board can issue a "provisional certificate, which is a temporary one-year certificate issued to those who have met the requirements for initial employment as part of a state-approved district training program or residency leading to standard certification." Breitwieser, supra, 286 N.J. Super. at 638. See N.J.A.C. 6A:9-6.2. Finally, the Board can issue an "emergency certificate, which is issued only in the field of educational services, teacher of the handicapped, teacher of the blind and partially-sighted, and teacher of the deaf and hard-of-hearing," and "only on the application of a public-school district when the district is unable to locate a suitable standard-certified teacher due to unforeseen shortages or other extenuating circumstances." Ibid. See N.J.A.C. 6A:9-6.2. Notably, though both parties refer to the petitioner's certificate as a "Standard Non-Citizen Certificate," no such designation appears in the relevant section of the New Jersey Administrative Code (Code). (Joint Stipulation ¶ 5.) See N.J.A.C. 6A:9.1-6. However, the term "Non-Citizen Standard" is included in the list of teacher certificates on the Department of Education's website, and is defined as, "[a] five-year certificate issued to an individual who has met all requirements for state certification, but is not a US citizen. This certificate can be renewed by showing progress toward US citizenship. Copies of official documentation from the INS would be required for an additional renewal." New Jersey Licensure & Credentials – Teachers, http://www.state.nj.us/education/educators/license/teacher/ (last visited June 18, 2012).

Here, the Board issued the petitioner a Provisional Certificate in 2001, after he was hired by the respondent. (Joint Stipulation of Facts ¶ 3-4.) Subsequently, the Board issued the petitioner a Standard Non-Citizen Certificate in 2002, which expired in 2007. (Joint Stipulation ¶ 5.) In 2007, the Board renewed the petitioner's Standard Non-Citizen Certificate, which expired in 2012. (Joint Stipulation ¶ 7.) Therefore, the petitioner held a Board issued Certificate throughout his employment with the respondent. (Joint Stipulation ¶ 3-5, 7).

4352(a) (October 6, 2003); 36 N.J.R. 469(a) (January 20, 2004); Breitwieser, supra, 286 N.J. Super. at 633.

Except as provided by statute, teachers must be citizens. N.J.S.A. 18A:26-1. Nevertheless, a non-citizen may obtain a teacher's certificate if he "has declared his intention of becoming a United States citizen and [] is otherwise qualified . . . " N.J.S.A. 18A:26-8.1; N.J.S.A. 18A:6-39. However the Board may revoke a non-citizen's certificate if "the holder thereof has abandoned his efforts to become a United States citizen, or has become disqualified for citizenship, or shall not have become a United States citizen, within five years of the date of its issuance." Ibid. The Code, in turn, provides, "[i]f the holder of the noncitizen certificate has not become a United States citizen within the initial five-year certification period, the certificate may be renewed for an additional five-year period upon demonstration that an application for citizenship is in process but has not yet been granted." N.J.A.C. 6A:9-5.7(a)(1). Furthermore, "[w]hen the certificate expires after the second five-year period, the certificate may be renewed for a third and final time upon demonstration that an application for citizenship continues to be in process and has been actively pursued by the applicant but has not yet been granted." Ibid. However, "[t]he Board can revoke any such certificate . . . if the Board is satisfied that the holder thereof has abandoned his or her efforts to become a United States citizen or has become disqualified for citizenship." Ibid. (citation omitted). Crucially, the same provision provides, "no teaching staff member shall acquire tenure unless he or she is, or until he or she shall become, a citizen of the United States. N.J.A.C. 6A:9-5.7(a)(5) (citing N.J.S.A. 18A:28-3.) Notably, the Code provision allowing certification of noncitizens was recently amended twice. See N.J.A.C. 6A:9-5.7(a)(5). First, in 2006, the Code was amended to allow one renewal of the Non-Citizen Standard Certificate after the initial five-year period. See 37 N.J.R. 4612(a) (December 19, 2005); 38 N.J.R. 2126(a) (May 15, 2006). Then, in 2009, the Code was amended again to allow second renewal, "if a citizenship application continues to be in progress and has been actively pursued by the applicant." See 40 N.J.R. 4856(a) (September 2, 2008); 41 N.J.R. 128(a) (January 5, 2009).

Furthermore, the statutory provisions permitting certification of non-citizens appear twice in Title18A, in Chapter 26, Certification and Qualifications, and Chapter 6, Educational System and Institutions. N.J.S.A. 18A:26-8.1; N.J.S.A. 18A:6-39. While

each provision largely mirrors the other, the provisions include one critical difference. Op. N.J. Att'y. Gen. No. 18 (Oct. 6, 1980).[2] If the teacher abandons efforts to achieve citizenship, the Board "may" revoke the certification pursuant to Chapter 26, but "shall" cancel the certification pursuant to Chapter 6. N.J.S.A. 18A:26-8.1; N.J.S.A. 18A:6-39. The Attorney General reviewed the legislative history to resolve this inconsistency. Op. N.J. Att'y. Gen. No. 18 (Oct. 6, 1980). While the provisions were both adopted in a recodification of Title 18 in 1967, Chapter 6 is "is substantially the same as an earlier statutory section," Chapter 26, "appears for the first time in the recodification . . . " Ibid. The Attorney General resorted to "the rule of statutory construction that the legislature should not be deemed to have enacted repetitious or surplus legislation," and concluded the legislature, "intended its latest and newest expression of legislative policy on the subject to govern." Ibid. Therefore, "[a] certificate may be revoked in the discretion of the Board of Examiners on a case by case basis if the holder shall not have become a citizen of the United States within five years." Ibid. However, "notwithstanding a decision by the Board of Examiners not to revoke the certificate of a noncitizen in an individual case, no person shall be deemed to have acquired tenure in the public schools unless he shall become a United States citizen." Ibid.

Here, the petitioner did not become a naturalized citizen until May, 2008. (Joint Stipulation ¶ 8.) However, the petitioner submitted an "Affidavit of Intent to Become a Citizen" to the Board in July, 2001. N.J.S.A. 18A:26-8.1; (Joint Stipulation ¶ 2.) Subsequently, the respondent hired the petitioner, and the Board properly issued a Provisional, and then Standard Non-Citizen Certificate to the petitioner. N.J.A.C. 6A:9-5.7(a)(1); (Joint Stipulation ¶ 4-5.) Furthermore, the Board properly renewed the petitioner's Standard Non-Citizen Certificate in 2007, for another five year term. N.J.A.C. 6A:9-5.7(a)(1); (Joint Stipulation ¶ 7.) Finally, the Board did not exercise its discretion to revoke the petitioner's Standard Non-Citizen Certificate. (See Joint Stipulation ¶ 10.) Critically, the petitioner became a naturalized citizen in May 2008. (Joint Stipulation ¶ 8.) Nevertheless, the petitioner failed to submit an application for a

[2] Available at http://www.nj.gov/oag/ag-opinions.htm.

Standard Certificate until August, 2011. (Joint Stipulation ¶ 11.) In May, 2011, the respondent notified the petitioner his contract would not be renewed. (Joint Stipulation ¶ 9.) Therefore, the petitioner held a Standard Non-Citizen Certificate, but had been a citizen for three academic years, when his contract was not renewed. (Joint Stipulation ¶ 7-9.) While the petitioner was employed for "[t]hree consecutive academic years" as a citizen, he was not employed "at the beginning of the next succeeding academic year . . . " Ibid.; N.J.S.A. 18A:28-5(b). Therefore, two distinct issues must be resolved in order to determine whether the petitioner acquired tenure. First, is whether the petitioner held an "appropriate certificate," for purposes of the tenure statute, when his contract was not renewed. N.J.S.A. 18A:28-5(b). The second issue is whether time the petitioner was employed by the respondent, while a non-citizen, can be "tacked on" to the time the petitioner was employed as a citizen. N.J.S.A. 18A:28-5(b).

A. The petitioner held an appropriate certificate for purposes of the tenure statute, because a citizen holder of a Standard Non-Citizen Certificate has fulfilled all of the requirements necessary to receive a Standard Certificate.

No provision of Title 18A, section of the Code, or case law discusses the process of acquiring tenure after a non-citizen becomes a naturalized citizen. See N.J.A.C. 6A:9-5.7(a)(5); Op. N.J. Att'y. Gen. No. 18 (Oct. 6, 1980). Instead, the relevant provisions merely state, "no teaching staff member shall acquire tenure unless he or she is, or until he or she shall become, a citizen of the United States." N.J.A.C. 6A:9-5.7(a)(5) (citing N.J.S.A. 18A:28-3.). Consequently, both the petitioner and respondent analogize to Breitwieser, a case analyzing Emergency Certification and tenure. Breitwieser, supra, 286 N.J. Super. at 639. (See Pet'r's Br. 11; Resp't's Br. 6-7.) Specifically, the respondent incorrectly suggests that a teacher can only acquire tenure after securing Standard Certification. However, as the Breitwieser court noted, "the 'proper certificate' which N.J.S.A. 18A:28-5 requires a teacher to hold when claiming tenure must be either a standard certificate or a provisional certificate." Ibid.

The Breitwieser court considered "whether a teaching staff member can acquire tenure for service under a permanent certificate combined with a prior period of service

under an emergency certificate in a different field." Breitwieser, supra, 286 N.J. Super. at 639.

First, the Breitwieser court noted, "[n]o matter how long a teacher serves under an emergency certificate, tenure is unavailable." Id. at 640. The court explained that teachers with emergency certificates are ineligible for tenure because,

> holders of emergency certificates 'have not fully satisfied the educational prerequisites for standard certification, nor are they entitled to automatic renewal of the privilege to teach accorded them by the emergency certification process. Because of the uncertainty surrounding continued eligibility to teach, the protection of tenure laws was not intended to extend to holders of substandard certificates and has not been so extended.'

[Ibid. (quoting Kubas v. Bd. of Educ. of Linden, 1980 S.L.D. 172.)]

Critically, the Breitwieser court noted a "teacher must either obtain or become eligible for a standard certificate in the appropriate field before the termination of employment." Id. at 643, n.2 (citing John J. Smith v. Bd. of Educ. of Atlantic County Vocational-Technical Sch., 1985 S.L.D. 704, 710, 717, adopted, Comm'r 1985 S.L.D. 720 (petitioner was eligible and filed an application for a Standard Certificate prior to notice of non-renewal, and therefore achieved tenure.)) See Veronica Smith v. Bd. of Educ. of Sayreville,1974 S.L.D. 1095, 1099, aff'd, St. Bd. 1975 S.L.D. 1160, aff'd, App. Div. 1976 S.L.D. 1170 (petitioner achieved tenure because she applied for Standard Certification prior to non-renewal, and was issued a Standard Certificate prior to the expiration of her contract).

Here, the Standard Non-Citizen Certificate is similar to the Emergency Certificate, because holders of Standard Non-Citizen Certificates are not "entitled to automatic renewal of the privilege to teach accorded them by the [Standard Non-Citizen Certification] process. Breitwieser, supra, 286 N.J. Super. at 640 (quoting Kubas v. Bd. of Educ. of Linden, 1980 S.L.D. 172); N.J.A.C. 6A:9-5.7(a)(1). As in Breitwieser,

"[b]ecause of the uncertainty surrounding continued eligibility to teach, the protection of tenure laws was not intended to extend to holders of substandard certificates and [should not be] so extended." Ibid. See N.J.A.C. 6A:9-5.7(a)(5). Therefore, a Standard Non-Citizen Certificate, held by a non-citizen, should not generally qualify as an "appropriate certificate[]" for purposes of the tenure statute. N.J.S.A. 18A:28-5(b). Indeed the petitioner's first Standard Non-Citizen Certificate specifically states,

> [n]on-citizen Certificates are valid for five years. When United States citizenship is obtained the holder must apply for a standard certificate prior to the expiration date of the non-citizen certificate. If citizenship is not obtained, the holder must apply for renewal of the five year certificate prior to the expiration date of the non-citizen certificate. If this certificate expires prior to issuance of standard certification or renewal, the applicant is subject to the certification requirements in effect. Certification requirements are subject to change.
>
> [Joint Stipulation Ex. 5.]

However, the petitioner in the instant case was certainly eligible for a Standard Certificate any time after May 2008, when he became a naturalized citizen. See Breitwieser, supra, 286 N.J. Super. at 643; John J. Smith, supra, 1985 S.L.D. at 710, 717; Veronica Smith, supra, 1974 S.L.D. at 1099; (Joint Stipulation ¶ 8.) Furthermore, the instant case is distinct from the Emergency Certificate eligibility cases in two ways. See John J. Smith, supra, 1985 S.L.D. at 710, 717; Veronica Smith, supra, 1974 S.L.D. at 1099. First, the petitioner, herein, did not submit an application for a Standard Certificate until after he was notified that his contract was not renewed. See Smith, supra, 1985 S.L.D. at 710, 717; Smith, supra, 1974 S.L.D. at 1099. (Joint Stipulation ¶ 9, 11.) Second, not only was the petitioner not entitled to an automatic renewal of his Standard Non-Citizen Certificate, he was not entitled to a renewal at all. See N.J.A.C. 6A:9-5.7(a)(1). Since he was a citizen by 2008, before his Standard Non-Citizen Certificate expired in 2012, he would not be able to demonstrate that, "an application for citizenship continues to be in process and has been actively pursued by the applicant but has not yet been granted." Ibid. On the other hand, the Board probably did not

have the power to revoke his Standard Non-Citizen Certificate after the petitioner became a citizen, because the Board could not logically determine, "the holder thereof has abandoned his or her efforts to become a United States citizen or has become disqualified for citizenship." Ibid. Therefore, petitioner's eligibility to teach was certain through September 2012, when his Standard Non-Citizen Certificate expired. (See Joint Stipulation ¶ 7.) Unlike the Emergency Certificate cases, while the petitioner did not apply for his Standard Certificate prior to receiving notice that his contract would not be renewed in May 2011, his eligibility to teach during the 2011-2012 school year was not in doubt. See Breitwieser, supra, 286 N.J. Super. at 643; (Joint Stipulation ¶ 7.) Furthermore, both of the petitioners' Standard Non-Citizen Certificates state, "[the petitioner] has met all of the requirements established by the State Board of Education and is authorized to serve in the public schools of New Jersey . . . " (Joint Stipulation Ex. 5, 7.) While the petitioner did not apply for a Standard Certificate until August 2011, his eligibility for a Standard Certificate was not in doubt. (See Joint Stipulation ¶ 11-12.) Indeed, after the petitioner became a citizen, he was not required to apply for a Standard Certificate immediately, but was permitted to apply any time "prior to the expiration date of the non-citizen certificate." Therefore, pursuant to the reasoning of the Emergency Certificate case, a Standard Non-Citizen Certificate held by a naturalized citizen is an appropriate certificate, for purposes of the tenure statute. N.J.S.A. 18A:28-5(b).

Furthermore, the cases that analyze eligibility for tenure under a Provisional Certificate are instructive. Most recently, in Ruiz, an Administrative Law Judge (ALJ) concluded "the provisional certificate as it is issued today is a substandard certificate that allows its holder to pursue the required mentoring and experience needed to qualify for standard certification. Only standard certification is the 'proper certification in full force and effect' contemplated by the tenure law." Ruiz v. Bd. of Educ. of Fort Lee, EDU 08187-10, Initial Decision, (May 19, 2011) <http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>. However, the Commissioner declined to adopt this view, and cited a case in which a teacher with only a provisional certificate, who had

satisfied all the requirements for standard certification, acquired tenure. Ruiz v. Bd. of Educ. of Fort Lee, EDU 08187-10, Final Decision, (August 17, 2011) <http://www.nj.gov/education/legal/commissioner/index.html> (citing Anson v. Bd. of Educ. of Bridgeton, 1972 S.L.D. 638, 639). Specifically, the Commissioner held in Anson, "[t]he holder of a provisional teaching certificate accepts a conditional requirement of earning four academic credits per year, and the validity of a provisional certificate cannot be questioned as it relates to tenure, so long as this requirement is met." Anson, supra, 1972 S.L.D. at 638. While the Ruiz respondent argued the Anson holding was superseded by significant changes in licensure requirements, the Commissioner noted, "[i]nsofar as respondent has not identified specific changes that might be germane to the present controversy, the Commissioner declines to regard Anson's holding as obsolete or in any way superceded [sic]." Ruiz v. Bd. of Educ. of Fort Lee, EDU 08187-10, Final Decision, (August 17, 2011) <http://lawlibrary.rutgers.edu/new-jersey-administrative-decisions-0>. Furthermore, the Commissioner analogized to the reasoning of the Emergency Certificate cases, and concluded such cases are "consonant with the holding in Anson that [the petitioner's] tenure was conditioned not just upon his years of service under provisional certification, but also upon his timely completion of the academic and professional requirements for standard certification." Ibid. The Commissioner ultimately remanded the case for fact finding, because the petitioner could not establish he completed the requirements for a Standard Certificate, and "under such circumstances there is no way to be sure that such a candidate will ultimately receive standard certification in the field." Ibid. (citing Breitwieser, supra, 286 N.J. Super. at 645).

Likewise, a Standard Non-Citizen Certificate includes a conditional requirement to obtain citizenship. N.J.S.A. 18A:26-8.19(a). Specifically, a holder of a Standard Non-Citizen Certificate must declare his intention to become a citizen, and pursue citizenship. Ibid. Conversely, the Board should only revoke a Standard Non-Citizen Certificate, "if the board is satisfied that the holder thereof has abandoned his efforts to become a United States citizen, or has become disqualified for citizenship, or shall not have become a United States citizen, within five years of the date of its issuance." Ibid.

Indeed, the statute only permits issuance of a Standard Non-Citizen Certificate to non-citizens "who [are] otherwise qualified." N.J.S.A. 18A:26-8.19(a). A Standard Non-Citizen Certificate includes no other conditional requirements, such as additional education requirements. See Anson, supra, 1972 S.L.D. at 638.

Here, the petitioner submitted an "Affidavit of Intent to Become a Citizen" in 2001. (Joint Stipulation ¶ 2.) Furthermore, the petitioner attained citizenship on May 5, 2008. (Joint Stipulation ¶ 8.) The petitioner's Standard Non-Citizen Certificate states the petitioner, "[h]as met all of the requirements established by the State Board of Education . . . " Finally, after attaining citizenship, the petitioner was merely required to, "apply for a standard certificate prior to the expiration date of the non-citizen certificate." (Joint Stipulation Ex. 5.) Petitioner was not required to apply for a Standard Certificate immediately after attaining citizenship, and in fact applied for a Standard Certificate over a year before his Standard Non-Citizen Certificate was set to expire. (Joint Stipulation ¶ 7, 11.) Therefore, like a Provisional Certificate, "the validity of a [Standard Non-Citizen Certificate] cannot be questioned as it relates to tenure, so long as [the citizenship] requirement is met." Anson, supra, 1972 S.L.D. at 638.

B. Time the respondent employed the petitioner, when he held a Standard Non-Citizen Certificate as a non-citizen, may be tacked on to the time the respondent employed the petitioner, as a citizen, because petitioner's service as a non-citizen is analogous to service pursuant to an Emergency Certificate.

The Breitwieser court analyzed the narrow issue of "whether prior service under an emergency certificate may be counted towards the service-period needed for tenure." Breitwieser, supra, 286 N.J. Super. at 640. The court began by analyzing "at least six reported instances, referred to as the K'Burg line of cases, [in which] a teacher has been allowed to tack emergency service to service under a standard certificate." Id. at 641 (citing John J. Smith, supra,1985 S.L.D. 704; Amato v. Hudson County Area Vocational-Technical Schs. Bd. of Educ., 1984 S.L.D. 1721; Salerno v. Bd. of Educ. of Newark, 1980 S.L.D. 439; Veronica Smith, supra, 1974 S.L.D. 1095; Givens v. Bd. of Educ. of Newark, 1974 S.L.D. 906, 907; K'Burg v. Bd. of Educ. of Lower Alloways

Creek, 1973 S.L.D. 636). The court concluded, "service under an emergency certificate may be counted towards the service needed for tenure only when that service is followed by the teacher ultimately obtaining a permanent certificate in the same field as the emergency certificate." Id. at 644. The court noted, "[w]e perhaps could hold that emergency service can never be service under "a proper certificate" for purposes of tenure, and such a holding would eviscerate [the Emergency Certificate tacking] cases. But such a harsh rule does not comport with the need to construe our teacher-tenure law sensibly and practically." Id. at 646

Here, the relevant provisions do not outline the process for calculating tenure after citizenship is acquired, but merely state, "no teaching staff member shall acquire tenure unless he or she is, or until he or she shall become, a citizen of the United States." N.J.A.C. 6A:9-5.7(a)(5); N.J.S.A. 18A:28-3. However, the petitioner obtained a permanent certificate "in the same field as the [Standard Non-Citizen Certificate]." See Breitwieser, supra, 286 N.J. Super. at 644. (See Joint Stipulation ¶ 5, 12.) Moreover, by May 2008, the petitioner had attained citizenship, and the Board could no longer revoke his Standard Non-Citizen Certificate pursuant to the criteria outlined in the Code. N.J.A.C. 6A:9-5.7(a)(1); (Joint Stipulation ¶ 8.) However, the respondent only employed the petitioner for three academic years after the petitioner became a citizen, one day short of the period required for tenure. N.J.S.A. 18A:28-5(b). Furthermore, prior to attaining citizenship in 2008, the petitioner's certification was revocable if the petitioner, "abandoned his or her efforts to become a United States citizen or has become disqualified for citizenship." N.J.A.C. 6A:9-5.7(a)(1). Therefore, the petitioner's employment with the respondent before May 2008, is analogous to the Emergency Certificate Cases. See Breitwieser, supra, 286 N.J. Super. at 641. As in Breitwieser, a non-citizen's "service under a[] [Standard Non-Citizen Certificate] may be counted towards the service needed for tenure only when that service is followed by the teacher ultimately obtaining a permanent certificate . . . " Id. at 641. Since the Board could not revoke the petitioner's Standard Non-Citizen Certificate after the petitioner became a citizen in May, 2008, for purposes of the tenure statute, the Standard Non-Citizen Certificate was a "permanent certificate[]." Ibid. See Part 1.A., supra. Consequently,

the years the respondent employed the petitioner as a non-citizen with a Standard Non-Citizen Certificate may be tacked on to the years the respondent employed the petitioner as a citizen. See Breitwieser, supra, 286 N.J. Super. at 641. Since the respondent employed the petitioner from September 2001 through May 2011, the respondent has employed the petitioner considerably longer than required by the tenure statute. N.J.S.A. 18A:28-5(b). Therefore, the petitioner acquired tenure before the respondent notified the petitioner of the non-renewal.

CONCLUSION

The petitioner acquired tenure, because the petitioner held a Standard Non-Citizen Certificate, and became a naturalized citizen, when the respondent decided not to renew the petitioner's contract. Moreover, while the respondent only employed the petitioner for three academic years after the petitioner became a citizen, one day shy of the period required by the tenure statute, the petitioner's previous employment as a non-citizen with a Standard Non-Citizen Certificate may be tacked on to calculate the time the respondent employed the petitioner for purposes of the tenure statute.

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

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

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

November 7, 2013

DATE

JEFFREY A. GERSON, ALJ

Date Received at Agency: 11/12/13

Date Mailed to Parties: NOV 12 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

APPENDIX

WITNESSES:

For Petitioner

None

For Respondent

None

EXHIBITS:

For Petitioner

P-1 June 20, 2001 letter from Luna E. Collazo, Senior Personnel Technician/Bilingual Personnel Support Services Unit to Joel L. Bleah stating that the Newark Public School District is pleased to extend an offer of employment for the 2001/2002 school year.

P-2 June, 2001 Certificate of Eligibility issued to Joel L. Bleah, Teacher of Mathematics and Provisional Certificate isused September, 2001 to Joel L. Bleah

P-3 2002-2003 Employment Contract between the Newark Public Schools and Joel Bleah dated May 1, 2002

P-4 2003-2004 Employment Contract between the Newark Public Schools and Joel Bleah dated May 1, 2003

P-5 2004-2005 Employment Contract between the Newark Public Schools and Joel Bleah dated May 1, 2003

P-6 2008-2009 Employment Contract between the Newark Public Schools and Joel Bleah dated May 1, 2008

P-7 Curriculum Vita of Joel Bleah

P-8 Alternate Route to Certificate Program of Joel Bleah dated July 11, 2001

P-9 Affidavit for Intent to Become a Citizen of Joel Bleah dated July 12, 2001

P-10 Non-Citizen Standard Certificate of Joel L. Bleah, Teacher of Mathematics issued September, 2007 by The State of New Jersey Department of Education, State Board of Examiners

P-11 Certificate of Naturalization dated May 5, 2008 which is within the Newark Public Schools personnel file

P-12 Standard Certificate of Joel L. Bleah, Teacher of Mathematics issued October, 2011 by the State of New Jersey Department of Education, State Board of Examiners

P-13 Teachers Observation Report dated September 25, 2001 – Satisfactory (4 pages)

P-14 Teacher Observation Report dated November 30, 2001 – Needs Improvement (5 pages)

P-15 Teacher Observation Report dated May 3, 2002 – Satisfactory (3 pages)

P-16 Teacher Observation Report dated October 10, 2001 – Satisfactory (4 pages)

P-17 Teacher Observation Report dated December 3, 2002 – Satisfactory (3 pages)

P-18 Teacher Annual Evaluation Report dated June, 2003 – (1 pages)

P-19 Formtive Teacher Observation dated October 29, 2003 – Proficient (3 pages)

P-20 Annual Teacher Evaluation Report dated June, 2004 – Basic (2 pages)

P-21 Annual Teacher Evaluation Report dated June, 2005 – Basic (2 pages)

P-22 Formative Teacher Observation dated Januaryn 5, 2006 – Basic (5 pages)

P-23 Annual Teacher Evaluation Report dated June, 2006 – Proficient (2 pages)

P-24 Formative Teacher Observation dated December 11, 2006 – Proficient (6 pages)

P-25 Annual Teacher Evaluation Report dated June, 2007- Proficient (2 pages)

P-26 Annual Teacher Evaluation Report dated June 24, 2008 – Proficient (2 pages)

P-27 Annual Teacher Evaluation Report dated June 23, 2009 – Proficient (2 pages)

P-28 Formative Teacher Observation dated October 15, 2009 – Basic (3 pages)

P-29 Formative Teacher Observation dated April 15, 2010 – Proficinet (3 pages)

P-30 Teacher's Annual Performance Evaluation dated June 16, 2010 – Proficient (2 pages)

P-31 Formative Teacher Observation dated November 12, 2010 – Basic (7 pages)

P-32 Formative Teacher Observation dated January 14, 2011 – Proficient (7 pages)

P-33 Teacher's Mid Year Performance Review dated February 23, 2011 – Basic (2 pages)

P-34 Formative Teacher Observation dated April 12, 2011 – Proficient (7 pages)

P-35 Teacher's Annual Performance Evaluation dated June 7, 2011

P-36 May 10, 2011 letter to Joel Bleah from Deborah Terrell, Interim State District superintendent stating that Mr. Bleah's employment with the Newark Public Schools will be terminated on June 30, 2011

P-37 May 18, 2011 letter to Deborah Terrell, Interim State District Superintedent from Joel Bleah requesting reasons for his termination;

P-38 August 9, 2011 communication between Joel Bleah and Joe Blundo regarding Mr. Bleah's termination and that he was not tenure and that decision was based on the fact that Mr. Bleah did not possess a Standard Certification at the time his Contract was not renewed for performance reasons

P-39 2009-2010 Newark Public Schools Achievement Through Teaching Excellence – A System of Teacher Observation and Performance Evaluation – A Guidebook for Teachers and Administrators

For Respondent

R-1A Foramative Teacher Observation Report dated November 12, 2010: Basic Rating

R-2B Memorandum form Department Chairperson David Scutari ("D/C Scutari") to Joel Bleah ("Bleah dated November 15, 2010 regarding the impropriety of showing movies during class/instructional time.

R-3C Formative Teacher Observation Report dated January 6, 2011; Proficient Rating.

R-4D Teacher's Mid-Year Performance Review dated February 23, 2011: Basic Rating

R-5E Formative Teacher Observation Report dated April 12, 2011: Proficient Rating

R-6F Letter from Principal Henry McNair ("Principal McNair") to Human Resource Services Director Joe Blundo dated May 10, 2011 requesting removal of Bleah for performance

R-7G Letter from Interim State District Superintendent Deborah Terrell to Bleah dated May 10, 2011 regarding non-renewal of Bleah's contract

R-8H Annual Teacher Evaluation Report dated June 7, 2011: Basic Rating

R-9I Certificate of Naturalization of Bleah dated May 5, 2008

R-10J Non-Citizen Standard Certificate Issued September 2007 and Expiring September 2012

R-11K New Jersey Department of Education Teacher Certification Information System Application Check Status dated September 19, 2011 showing Bleah's application for a Standard Certificate was filed on August 12, 2011 and still being processed.

R-12L New Jersey Department of Education Teacher Certification Information System Application Check Status dated November 3, 2011 showing Bleah's application for a Standard Certificate was issued as of August 12, 2011

R-13M Electronic Mail Correspondence from Bleah to Interim Human Resource Services Director Joe Blundo ("HRS Director Blundo") dated July 29, 2011 regarding Bleah's acceptance of non-renewal for performance

R-14N Electronic Mail Correspondence from HRS Director Blundo to Bleah dated August 9, 2011 regarding non-renewal

Joint

J-1 Joint Stipulation of Facts

138-14

PINELANDS LEARNING CENTER, INC., D/B/A, PINELANDS LEARNING CENTER HIGH SCHOOL,

PETITIONER,

V.

NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF ADMINISTRATION AND FINANCE,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The petitioner, Pinelands Learning Center (PLC) is a private, for-profit institution providing services to students with disabilities. PLC receives tuition from sending public school districts commensurate with its actual cost per pupil, as determined by a certified audit. Pursuant to governing regulations, certain specified items may not be included in the computation of the annual tuition rate for sending districts. The controversy herein involves the respondent Department's disallowance of $36,498 from PLC's audit for the 2006-2007 school year, reflecting compensation paid to Redonna Bowles (Bowles), a teacher of the handicapped who taught at PLC from September 1, 2006 to April 30, 2007 without a valid New Jersey teaching certificate. Petitioner contended that PLC substantially complied with the certification process, and that the delay in obtaining the required teaching certificate was due to errors on the part of the NJDOE, Office of Licensure and Credentials. Respondent asserted that PLC violated the provisions of *N.J.A.C.* 6A:23A-18.5 by knowingly employing an uncertified teacher, and failing to take the necessary steps to ensure that Bowles held a certificate prior to the start of the 2006-2007 school year.

The ALJ found, *inter alia*, that: the Department, pursuant to the doctrine of substantial compliance, should not have disallowed Bowles's compensation, as the purpose and intent of the underlying regulations was fulfilled as of September 2005, when her application for certification was perfected; the delay in issuance of the certificate was due to admitted missteps by the NJDOE; PLC is entitled to remedy under the excusable neglect doctrine; equity mandates that PLC be compensated for services it rendered; and the NJDOE conceded that Bowles was eligible to receive her certificate in September 2005, making possession of the certificate by the PLC "largely insignificant and an impermissible obstacle to the PLC receiving payment for services rendered". The ALJ concluded that PLC meets the requirements for relief under the substantial compliance doctrine, and ordered the determination of the NJDOE disallowing Bowles' salary for the period in question reversed.

Upon review, the Commissioner rejected the OAL's Initial Decision, finding, *inter alia,* that PLC did not comply with the mandate of *N.J.A.C.* 6A:23A-18.4(a)(22) to ensure that Ms. Bowles was properly certified at the start of the 2006-2007 school year; further, the ALJ improperly relied on *Archway Programs, Inc. v. Department of Education, et al.*, – a case with readily distinguishable circumstances – to determine that the doctrine of substantial compliance applied in this case. The Department's disallowance of $36,498 from PLC's 2006-2007 audit was affirmed.

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

Issued 3/24/14

OAL DKT. NO. EDU 12541-12
AGENCY DKT. NO. 220-8/12

PINELANDS LEARNING CENTER, INC., D/B/A, PINELANDS LEARNING CENTER HIGH SCHOOL,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF ADMINISTRATION AND FINANCE,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Department of Education, Division of Administration and Finance (Department), and the Pineland Learning Center, Inc.'s (petitioner) reply thereto.[1] In this matter, petitioner, an approved private school for students with disabilities (private school), challenges the Department's determination that the salary and fringe benefits of Redonna Bowles (Bowles) between September 1, 2006 and April 30, 2007 cannot be included in the school's calculation of the tuition rate for the 2006-2007 school year. The Department did not allow Bowles' salary and fringe benefits because it found that she did not possess the requisite certificate for her teaching position until May 2007. The Administrative Law Judge (ALJ) found that the Department's decision was arbitrary, capricious and unreasonable. The ALJ applied the doctrine of substantial

[1] After the time for filing exceptions expired, the petitioner submitted a "supplemental reply to exceptions" which offered additional proposed evidence, and the Department also filed a response thereto. The regulatory provisions do not permit the filing of a reply to exceptions beyond 5 days after the original exceptions are filed. Further, *N.J.A.C.* 1:1-18.4(c) specifically prohibits the presentation of evidence in exceptions that was not presented at the OAL. Therefore, the supplemental submissions submitted by both parties were not considered by the Commissioner.

compliance to the facts in this case and determined that Bowles' salary and fringe benefits for the entire 2006-2007 school year should be included in the calculation because: Bowles' certificate application was "perfected" in September 2005; the Department of Education, Office of Licensure and Credentials caused delays during the application process; and the purpose of the underlying regulations were fulfilled.

In its exceptions, the Department stresses that a finding by the Department that certain costs are non-allowable in the calculation of the tuition rate cannot be overturned unless it can be characterized as arbitrary, capricious or unreasonable. The Department maintains that pursuant to *N.J.A.C.* 6A:23A-18.5(a)(6) and (10), the salary and fringe benefits of a teacher who does not hold a proper New Jersey teaching certificate for her position is not allowable in the calculation of a private school's per pupil cost. Additionally, the Department emphasizes that it is undisputed that the petitioner was fully aware that Bowles' Teacher of the Handicapped Emergency certificate expired on June 30, 2006, and that she did not possess a standard Teacher of the Handicapped certificate at the beginning of the 2006-2007 school year. Further, pursuant to *N.J.A.C.* 6A:23A-18.4(a)(22), "[a]n approved private school for students with disabilities shall ensure that school staff ... hold the proper school certification ... to provide the services being rendered." Therefore, the Department maintains that it was the obligation of the petitioner to ensure that Bowles held a Teacher of the Handicapped certificate before the start of the 2006-2007 school year.

The Department also argues that the ALJ erroneously applied the doctrine of substantial compliance to allow the salary and fringe benefits of Ms. Bowles in the calculation of the tuition rate. The Department contends that the ALJ wrongfully relied on *Archway Programs, Inc. v. Department of Education, et al.*, OAL Dkt. No. EDU 6956-00 (decided

September 2, 2008), Adopted, Comm'r (December 4, 2008). Additionally, the Department reiterated the arguments advanced below contending that the petitioner did not satisfy the requirements necessary for the application of the doctrine of substantial compliance. Therefore, the Department requests that the Initial Decision be rejected.

In reply, the petitioner reaffirmed its position at the OAL, arguing that – when the case law is examined, along with the conduct of the Office of Licensure and Credentials – the ALJ correctly concluded that the doctrine of substantial compliance should be applied to allow the full 2006-2007 salary and fringe benefits of Ms. Bowles. Specifically, the petitioner maintains that there is no prejudicial effect to the Department or the sending districts because the students were properly educated by a qualified, and what should have been formulaically-certified teacher; the petitioner took steps to comply with the statute; the purposes of the statute were achieved because there is no dispute that Bowles was qualified, but rather when the qualification was clerically recognized by the Department; and because of the Department's clerical errors, there was a reasonable explanation as to why strict compliance was not achieved. Therefore, the petitioner requests that the Initial Decision be adopted as the final decision in this matter.

Upon a review of the record, the Commissioner finds that the Department's decision disallowing the salary and fringe benefits of Ms. Bowles between September 1, 2006 and April 30, 2007 in the calculation of the petitioner's tuition rate for the 2006-2007 school year was not arbitrary, capricious or unreasonable. Additionally, the Commissioner finds that the ALJ erroneously applied the equitable doctrine of substantial compliance in this case. [2]

[2] For the reasons discussed below, the Commissioner also rejects the ALJ's conclusion that the petitioner is entitled to relief in this case under the excusable neglect standard. Similarly, the Commissioner does not find that the petitioner is entitled to submit a quantum meruit claim.

The applicable regulatory provisions establish an intricate formula for the calculation of the tuition rate that can be charged to sending districts by private schools. *N.J.A.C.* 6A:23A-18.1-18.16. The regulations specifically identify certain costs that are not allowable in the calculation, including the salary and fringe benefits of a teacher who is not certified but is functioning in a position requiring certification. *N.J.A.C.* 6A:23A-18.5(a)6 and 10. Additionally, pursuant to *N.J.A.C.* 6A:23A-18.4(a)(22), "[a]n approved private school for students with disabilities shall ensure that school staff ... hold the proper school certification ... to provide the services being rendered."

Since it is undisputed that Ms. Bowles did not hold a Teacher of the Handicapped certificate when the 2006-2007 school year commenced[3], it is necessary to determine whether the petitioner established that the doctrine of substantial compliance should be applied to excuse the petitioner's noncompliance with the applicable regulatory provisions. The following factors must be considered when determining the applicability of the doctrine of substantial compliance: "(1) lack of prejudice to the defending party; (2) a series of steps taken to comply with the statute involved; (3) a general compliance with the purpose of the statute; (4) a reasonable notice of petitioner's claim; and (5) a reasonable explanation why there was not strict compliance with the statute." *Judith Berstein v. Board of Trustees*, 151 *N.J. Super.* 71, 76-77 (App. Div. 1977) (citations omitted). The purpose of the doctrine "is to avoid the harsh consequences that flow from technically inadequate actions that nonetheless meet a statute's underlying purpose." *Simone Galik, et al. v. Clara Mass Medical Center A Hospital Corporation, et al.*, 167 *N.J.* 341, 352 (2001) (citations omitted).

[3] Pursuant to the amended regulations, Teacher of the Handicapped Emergency certificates were no longer issued after the 2005-2006 school year, and individuals that were teaching in the field of special education under an emergency certificate could only do so until August 31, 2006. See, *N.J.A.C.* 6A:9-6.3 and *N.J.A.C.* 6A:9-11.3.

Upon review of the *Bernstein* factors, the Commissioner finds that the petitioner did not establish that it had taken any steps to ensure that Ms. Bowles had a Teacher of the Handicapped certificate at the start of the 2006-2007 school year. In the joint statement of facts submitted by the parties, the petitioner states that it was aware that Bowles' Teacher of the Handicapped Emergency certificate expired on June 30, 2006, and that it was also aware that she did not have a standard Teacher of the Handicapped certificate at the beginning of the 2006-2007 school year.

Under the regulations that govern the calculation of the tuition rate, it is the petitioner's obligation to ensure that Ms. Bowles held the proper certificate, not Bowles. As such, any steps that Bowles took during the certificate application process do not equate to steps taken by the petitioner for purposes of determining whether the doctrine of substantial compliance should apply, nor does it negate the general obligation on the part of the petitioner to ensure its teachers actually hold the proper certificates. *N.J.A.C.* 6A:23A-18.1-18.16. Notably, the petitioner did take steps to ensure that Bowles had a Teacher of the Handicapped Emergency certificate for the 2005-2006 school year. Thus, it is contradictory for the petitioner to also suggest that it had a reasonable explanation for failing to ensure that she likewise possessed a certificate at the beginning of the 2006-2007 school year.

Although the ALJ recognized the petitioner's obligation to ensure that Ms. Bowles held the proper certificate, he erroneously concluded that the underlying goals of the regulations were not compromised. The ALJ found it compelling that Bowles had essentially completed her application for a Teacher of the Handicapped certificate in September 2005, and since she eventually was issued the certificate, he concluded that neither the students nor the sending districts suffered any harm. However, by alleviating the regulatory obligation of private

schools to demand that the teachers hold the requisite certificates, the purpose of the provisions are undoubtedly affected. Regardless of whether, as petitioner argues, Bowles was eligible for a certificate and there were delays in processing her application, the fact remains that – in September 2006 – Ms. Bowles did not hold a certificate, and the petitioner had no way of knowing whether or not she would in fact be subsequently issued a certificate. Further, when a private school submits information during an audit, it is not the burden of the Division of Administration and Finance to conduct extraneous investigations to determine if a teacher is a candidate for certain certificates, but instead it is reasonable for the Division of Administration and Finance to simply check to see if a teacher possesses a certificate or not. The regulations require the school to ensure that the teachers have a certificate, not anticipate that a certificate will be issued in the future. *N.J.A.C.* 6A:23A-18.4(a)(22).

The Commissioner also finds that the ALJ improperly relied on *Archway, supra*, in determining that the doctrine of substantial compliance should be applied to this case. The circumstances under which the doctrine of substantial compliance was applied in *Archway, supra,* are readily distinguishable from this case. Significantly, the salaries in dispute in *Archway, supra,* where those for the 1998-1999 school year when the regulations governing emergency certificates were different, and during a time when there was a general shortage of special education teachers in New Jersey. The regulations in place at the time of the dispute in *Archway, supra,* (*N.J.A.C.* 6:11-4.3(b)) did not permit the filing of an application for an emergency certificate until August 1 for the next school year. *Archway, supra*, EDU 6956-00 at 66-67. In *Archway, supra*, the school had to hire staff to fill vacancies in July or during the school year if there was an unexpected vacancy in order to make sure that it had teachers who could comply with the students' Individualized Educational Programs (IEP). *Id.* Significantly,

in *Archway, supra,* the school had in fact taken steps to comply with the regulations by submitting an application for an emergency certificate for each of the teachers in question. *Id.* In this case, the petitioner took no action at the start of the 2006-2007 school year to ensure that Bowles held the requisite certificate. Additionally, there has been no evidence presented in this case showing that the petitioner was forced to employ Ms. Bowles to comply with the students' IEPs. As such, the application of the doctrine of substantial compliance in *Archway, supra,* does not dictate a similar result under the circumstances in this matter.

Accordingly, the Initial Decision of the OAL is rejected; and the Department's decision disallowing the inclusion of the salary and fringe benefits of Redonna Bowles – for the period between September 1, 2006 and April 30, 2007 – in the school's calculation of the tuition rate for the 2006-2007 school year is hereby affirmed.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/24/14
Date of Mailing: 3/25/14

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12541-12
AGENCY DKT. NO. 220-8/12

PINELANDS LEARNING CENTER, INC., D/B/A PINELANDS LEARNING CENTER HIGH SCHOOL,
Petitioner,
v.
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF ADMINSTRATION AND FINANCE,
Respondent.

Arnold Robinson, Esq., for petitioner (Robinson & Andujar, attorneys)

Lauren A. Jensen, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: November 13, 2013 Decided: December 23, 2013

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE

Petitioner Pinelands Learning Center (PLC) challenges a July 13, 2012, determination by the New Jersey Department of Education, Division of Administration

and Finance (NJDOE) that the salary and fringe benefits billed by the PLC to its sending districts for one of its teaching staff members be disallowed for the 2006-2007 school year. For the reasons discussed below; the determination of the NJDOE is **REVERSED**.

PROCEDURAL HISTORY

The petitioner requested a hearing and the matter was filed at the Office of Administrative Law (OAL) on September 13, 2012, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The parties agreed to disposition on cross-motions for summary decisions. Motions, briefs and supplemental submission were submitted in September 2013. After reviewing the submission, the undersigned ordered an in-person settlement conference for October 22, 2013. The settlement negations were unsuccessful. The undersigned requested a supplement certification from the NJDOE delineating why the application and issuance of a standard certificate for the teacher in question was delayed for over two years. This submission was received November 13, 2013.

STATEMENT OF FACTS

The NJDOE disallowed the PLC to bill its client districts for the salary and fringe benefits of Redonna Bowles[1] for the school year September 1, 2006 to April 30, 2007, due to problems connected with the issuance of her standard teaching certificate. The amount at issue is $36,498. The PLC claims that Bowles substantially complied with certificating process, that the NJDOE caused substantial delays in examining and issuing Bowles her certificate, failed to provide notice of its intent to delay the matter, and therefore the PLC should be permitted be compensated for her services (i.e. not punished due to NJDOE errors). The joint stipulation of facts and certification of Dr. Robert R. Higgins offer the following undisputed background.

[1] On July 18, 2013, the NJDOE abandoned similar claims against benefits billed to the PLC client districts for Teana Kelley and Melissa Moore.

The PLC is a private for-profit institution providing educational services to students with disabilities sent to it by public school districts. The PLC received students from twenty-two public school districts and had an average daily enrollment of public school placements students of 76.3 for 2006-2007. Each of those twenty-two public school districts was charged tuition for the student(s) it placed at the PLC.

In October 2003, Redonna Bowles was certificated as a teacher of the handicapped (TOH) by the State of New York. Bowles sought a certification from the NJDOE based upon reciprocity with New York.

On September 15, 2004, Redonna Bowles applied for a certificate for TOH with the NJDOE. The case was not assigned to an examiner until February 8, 2005 (five months), due to manpower issues at the NJDOE. Bowles made all lawfully required submissions by September 15, 2005. Bowles' application was sufficient to be approved, going forward from September 15, 2005. But no decision or certificate was issued until May 2007 (**almost two years later**), due to the NJDOE bureaucratic procedures, maternity leaves, manpower issues, and filing fees procedures. None of these were directly in the control of Bowles or the PLC. Nor did any of these bureaucratic issues relate to the merits of Bowles eligibility to be certificated in New Jersey. Finally, Bowles was not provided any notice of the internal problems, delays, filing fee issues, evolving within the NJDOE.

In September 2005, Bowles applied for an emergency certificate due to the NJDOE delay. This would have been unnecessary had the NJDOE timely and efficiently evaluated her application.

In October 2005, the NJDOE approved Bowles' application for an emergency certification as a TOH. The emergency certificate expired in June 2006.

Bowles' pending application for the TOH certificate was not timely approved, even though it was ready for disposition on September 15, 2005. Complicating matters, the NJDOE took the $75 application fee from Bowles' original (non-emergent) standard certificate application filed on September 15, 2004, and applied it to her emergent

certificate application. Indeed, Dr. Robert Higgins, Director of the Board of Examiner explained in his certification that "Bowles should have been issued her standard TOH certificate with a date of September 2005, instead of being issued an emergency certificate that was dated October 2005" (Higgins Cert. ¶ 23).

On February 7, 2005, Bowles was employed by the PLC as a TOH, under her emergency certificate. She was again employed at the PLC as a TOH for the 2005-2006 and 2006-2007 school years. Bowles did not apply for TOH emergency certificate for the 2006-2007 school year. Consequently, Bowles possessed neither an emergency certificate nor a standard certificate for 2006-2007. But she was fully eligible for a TOH certificate, with a completed application pending at NJDOE since September 15, 2005.

The PLC was required to ensure that Bowles held a TOH certificate before the start of the 2006-2007 school year. The PLC did not request a copy of Redonna Bowles' New Jersey TOH certificate before the start of the 2006-2007 school year.

Included in 2006-2007 certified actual cost per student ("CACPS") calculation were the salary and fringe benefit costs for Redonna Bowles. The PLC client districts were charged tuition for the 2006-2007 school year, and thereby paid for the salary and fringe benefits of Bowles, while she was not certificated but fully and completely eligible to be certified, but for the inaction of the NJDOE.

CONCLUSIONS

The PLC must comply with the administrative regulations relating to tuition rates and billing. N.J.A.C. 6A:23A-18.1 to -18.6. Pursuant to N.J.A.C. 6A:23A-18.2, the tuition charged to each of PLC's sending districts is determined by the certified actual cost per student ("CACPS"), as defined in N.J.A.C. 6A:23A-19.1.

N.J.A.C. 6A:23A-18.5 sets forth non-allowable costs for tuition. These include the salary of a professional staff that is not certified but is functioning in a position requiring certification in accordance with N.J.A.C. 6A:9 and N.J.A.C. 6A:23A-18.5(a)6.

The NJDOE asserts the PLC violated the aforementioned regulation, notwithstanding it severely delayed issuing the standard TOH certificate to Bowles.

The NJDOE admittedly made serious errors that significantly prejudiced Bowles and the PLC (See, Certification of Higgins). There was no notice to Bowles or the PLC regarding her filing fee transfer, or the NJDOE maternity leave or manpower issues. It was the NJDOE that substantially delayed the issuance of Bowles' certificate. Most importantly, Bowles was eligible to be certificated by the NJDOE in September 2005, which is well in advance of the billing period at issue herein (2006-2007).

This is a case of form trampling substance. Petitioner was equitability or effectively certified as of September 2005. The mere lack of a piece of paper stating that Bowles was certified, was not a substantive violation of the scope, intent or purpose of the applicable regulations as viewed by the unique facts of this case. The regulatory goal is to make sure that handicapped children attending the PLC receive a competent education from qualified instructors. The regulations also ensure that client districts are not billed for services that do not meet the NJDOE teaching standards. Neither of these safeguards was violated.

It is undisputed that Bowles was competent to teach handicapped children based upon her submissions to the NJDOE through September 2005, by the issuance of emergency certificate by the NJDOE, and based upon her licensure in New York. The delays thereafter were directly caused by the NJDOE and do not amount to a substantive violation.

The NJDOE claims the responsibility of the PLC is separate and distinct from that of Bowles and that notwithstanding its errors; and that the PLC remained responsible for ensuring it had a standard TOH certificate on file for Bowles. N.J.S.A. 18A:26-2; N.J.A.C. 6A:9-5.1(b). In a technical sense, the NJDOE is correct. But this conclusion ignores the other more compelling issues that remain in this case.

I would be more persuaded that the PLC committed a serious violation that must deprive it the right to bill its client districts for services if; 1) NJDOE was not the

substantial contributing cause that created this problem; and 2) if Bowles, in fact, lacked the appropriate credentials during the billing period in question, thus undermining the goal of the applicable regulations. But Bowles was more than qualified as a TOH by September 2005, and it was the NJDOE that put in motion a cascade of delays. Moreover, the NJDOE did not provide any notice to the PLC or Bowles that her filing fee was transferred and it was delaying a decision on her TOH certificate (See, Certification of Higgins).

The PLC asserts that the doctrine of substantial compliance must apply. The elements of this doctrine are:

1. The lack prejudice to the defending party
2. A series of steps taken to comply with the statute involved
3. A general compliance with the purpose of the statute
4. A reasonable notice of the claim
5. A reasonable explanation as to why there was not strict compliance with the statute.

Bernstein v. Bd. of Trustees of the Teachers' Pension & Annuity Fund, 151 N.J. Super. 71, 77 (App. Div. 1977).

This doctrine was applied in Archway Programs, Inc. v. N.J. Department of Education, OAL Dkt No. EDU 6956-00 (decided September 2, 2008); Adopted, Comm'r (December 4, 2008). Archway was a private school for the handicapped, much like the PLC. In Archway, the ALJ and Commissioner, invoking the doctrine of substantial compliance, permitted the salaries of several teachers without certifications to be billed to client districts pending review of their eligibility for certification.

The facts in this matter are even more compelling for invoking the doctrine of substantial compliance. These include, the status of Bowles' application being "perfected" as of September 2005, the NJDOE errors in failing to act on the application, the lack of notice to Bowles and PLC regarding the filing fees being the only issue holding up the application, substance being more important than form, the prejudice visited upon the PLC resulting in the loss of income due to a technical violation, and the purpose and intent of the underlying regulations being fulfilled as of September 2005. I

CONCLUDE that the PLC meets the requirements for relief under the substantial compliance doctrine.

The PLC is entitled to a remedy under excusable neglect standard. R. 4:50-1. Under this standard a party must show that the neglect was excusable under the circumstances. The Court is then called upon to review the circumstances and if necessary, use its discretion in order to avoid an unjust result. Mancini v. EDS, 132 N.J. 330, 334 (1993). Bowles submitted her application for certification with the NJDOE on **September 15, 2004**. It was reasonable for the PLC to expect a decision from the NJDOE by the **2006-2007** school year. The misfeasance by the PLC was de minimus; the denial of payment for competent services is extraordinarily prejudicial; and the underlying regulations were not offended because Bowles was eligible for a certificate two years before the billing period; and but for the delays caused by the NJDOE this case would not exist. For these reasons, I **CONCLUDE** that the excusable neglect doctrine is applicable and that equity mandates the PLC be compensated for services it rendered, to prevent an unjust result.

Finally, equity also permits the PLC to submit a quantum meruit claim regardless of the regulations, under the special facts of this case. The PLC provided the services of a competent and qualified teacher of the handicapped to its clients, and therefore it is entitled to be compensated for that service. Stated differently, the NJDOE cannot deprive the PLC its right to receive payment for services it competently rendered, merely because a teacher staff member did not hold a as piece of paper that the NJDOE delayed issuing after September 2005. The NJDOE concedes that Bowles was eligible to receive her certificate on September 15, 2005, making possession of the certificate by the PLC largely insignificant and an impermissible obstacle to the PLC receiving payment for services rendered.

ORDER

I **ORDER** that the determination of the NJDOE be **REVERSED** and the PLC be permitted to recover the salary and fringe benefits for Redonna Bowles, from its client districts, for the disputed years at issue.

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

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

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

December 23.2013
DATE

W. TODD MILLER, ALJ

Date Received at Agency: December 23.2013

Date Mailed to Parties: December 23.2013

/lam/ds

DOCUMENTS RELIED UPON

Joint Stipulation of Facts

Petitioner's Motion for Summary Decision and Brief, dated 8/27/13

Respondent's Opposition Brief and Cross Motion for Summary Decision, dated 9/13/13

Certification of Dr. Robert R. Higgins

142-14

IN THE MATTER OF THE TENURE	:	
HEARING OF DOMINIC COSTANZO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF LEBANON, HUNTERDON COUNTY	:	

SYNOPSIS

The Board certified tenure charges of conduct unbecoming against Dominic Costanzo – then employed as the tenured Superintendent of the Lebanon School District – on the basis of alleged retaliation and intimidation directed against his former administrative assistant – Leah Driscoll – after she allegedly lodged a harassment complaint against him. The charges also claim that respondent subsequently sought to deceive the Board of Education in connection with letters of support which respondent allegedly co-authored and pressured Driscoll to sign. The Board sought removal of the respondent from his tenured position.

The ALJ found, *inter alia*, that: respondent and Ms. Driscoll worked together amicably from the date of her hire in March 2008 until June 2011, during which time they became good friends who routinely joked and bantered with one another regarding each other's physical appearance or condition; the charges herein stem from a single verbal exchange in June 2011, to which Driscoll took offense and became upset; an administrative investigation was subsequently launched after Driscoll confided in another staff member, who then reported the incident to the President of the Board of Education; the Board bears the burden of proving by a preponderance of credible evidence that the respondent is guilty of conduct unbecoming a teaching staff member; in this matter, the Board failed to demonstrate sufficient credible evidence that respondent engaged in either retaliation or dishonesty as charged; Driscoll never filed a complaint against respondent and suffered no adverse consequence with regard to her position, salary or benefits; after the investigation ensued, respondent followed the advice of counsel to conduct himself in a business-like manner at the office, and his behavior did not constitute harassing, retaliatory, threatening, or intimidating conduct. Accordingly, under the specific charges, facts, and circumstances of this matter, the Board did not prove by a preponderance of credible evidence any of the allegations contained in the tenure charges. The ALJ ordered that the tenure charges be dismissed in their entirety.

Upon consideration and review of the full record of this matter, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. The Commissioner ordered that Dominic Costanzo be reinstated to tenured employment, together with any back pay and emoluments that are due him, less mitigation.

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

April 4, 2014

OAL DKT. NO. EDU 5782-12
AGENCY DKT NO. 100-4/12

IN THE MATTER OF THE TENURE	:	
HEARING OF DOMINIC COSTANZO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF LEBANON, HUNTERDON COUNTY	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The District's exceptions and respondent's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching his determination herein.

This matter involves tenure charges alleging unbecoming conduct brought by the Lebanon Borough School District against Dominic Costanzo, former Superintendent of Schools for the District. The charges allege that, between July and October 2011, respondent engaged in conduct unbecoming a teaching staff member when he undertook a pattern of actions designed to intimidate and retaliate against Leah Driscoll, his administrative assistant, for allegedly lodging a harassment complaint against him. The charges further allege that respondent thereafter sought to deceive the Board of Education, intending that it believe that Ms. Driscoll had written letters in support of respondent when, in fact, he had co-authored the letters and pressured her to sign them. The Administrative Law Judge ("ALJ") found that the District failed to prove any of the charges by a preponderance of the credible evidence and, therefore, dismissed the charges.

On exception, the District challenges each of the ALJ's factual findings, as well as the credibility determinations upon which they are based. The District maintains that the ALJ failed to fulfill his duties as an impartial fact finder, virtually ignoring Driscoll's testimony and relying entirely on the testimony of respondent's witnesses. The District further maintains that the ALJ

incorrectly attributed testimony to Driscoll, mischaracterized her testimony, took her testimony out of context, and overemphasized Driscoll's lapse of memory respecting trivial details. The District contends that Driscoll's testimony was generally consistent and was corroborated by the testimony of other witnesses and reliable circumstantial evidence. Finally, the District argues that, contrary to the ALJ's finding that respondent's testimony was "forthright," respondent's answers were evasive and inconsistent.

In reply, respondent urges the Commissioner to adopt the Initial Decision as the final agency decision in this matter. Respondent underscores that the ALJ's factual findings were largely driven by his credibility determinations, and that such determinations are entitled to the Commissioner's deference absent a finding that they are arbitrary, capricious, unreasonable, or unsupported by the record. Respondent argues that the ALJ's credibility determinations cannot be found to have been arbitrary, capricious, or unreasonable, since he painstakingly detailed his method for making credibility determinations. Respondent further argues that each of the ALJ's factual findings is supported by ample evidence in the record. Moreover, respondent identifies specific evidentiary support in the record for each of the ALJ's findings of fact.

Upon careful and independent review of the record of this matter, which included transcripts of the hearing conducted at the OAL between August 14, 2012 and June 7, 2013, the Commissioner concurs with the ALJ that the District has failed to establish that respondent is guilty of unbecoming conduct. The Commissioner finds the ALJ's fact-finding analysis and conclusions to be fully supported by the record and consistent with applicable law.

The Commissioner finds the District's exceptions unpersuasive, largely reflecting disagreement with the ALJ's credibility determinations. The ALJ had the opportunity to assess the credibility of the various witnesses who appeared before him, and made findings of fact based upon their testimony. In this regard, the clear and unequivocal standard governing the Commissioner's review is:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. [*N.J.S.A.* 52:14B-10(c)].

The Commissioner's considered review of the entire record – which includes transcripts of nine days of hearing – provides no basis for alteration of the ALJ's factual determinations. Rather, the Commissioner is satisfied that the ALJ appropriately measured the plausibility of content in deciding the credibility of witnesses, as well as the proper weight to assign to testimony and documentary evidence in reaching his factual findings and conclusions. Notwithstanding the District's contentions to the contrary, the Commissioner finds no basis in the record to reject either the ALJ's recitations of testimony or his determinations of witness credibility. Moreover, the Commissioner concurs with the ALJ's conclusion that the record as a whole does not support a finding of unbecoming conduct.

Accordingly, the Initial Decision of the OAL, finding that the District did not prove by a preponderance of the credible evidence that respondent engaged in unbecoming conduct is adopted for the reasons stated therein. It is hereby ordered that Dominic Costanzo be reinstated to tenured employment, with any back pay and emoluments that are due him, less mitigation.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/04/14

Date of Mailing: 4/04/14

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5782-12
AGENCY DKT. NO. 100 4/12

IN THE MATTER OF THE TENURE HEARING OF DOMINIC COSTANZO, SCHOOL DISTRICT OF THE BOROUGH OF LEBANON, HUNTERDON COUNTY.

Richard H. Bauch, Esq., for petitioner (Bauch, Zucker & Hatfield, attorneys)

Jeffrey D. Ullman, Esq., for respondent (Ullman, Furhman & Platt, attorneys)

Record Closed: October 4, 2013 Decided: January 2, 2014

BEFORE **ROBERT BINGHAM II**, ALJ:

STATEMENT OF THE CASE

Petitioner, the School District of the Borough of Lebanon, Hunterdon County (the District), charged respondent, Dominic Costanzo, a tenured superintendent employed by the District, with conduct unbecoming a teaching staff member on the basis of alleged retaliation and intimidation directed against his administrative assistant.

PROCEDURAL HISTORY

On April 17, 2012, the Board filed certified tenure charges, dated March 16, 2012, with the Commissioner of Education. Respondent filed an Answer to the charges on April 27, 2012, and the Commissioner transmitted the contested case for hearing to the Office of Administrative Law, where it was filed on April 30, 2012. The hearing commenced on August 14, 2012, and concluded on June 7, 2013, and the record remained open for post-hearing briefs. The record closed on October 4, 2013, following receipt of post-hearing submissions. The time for filing the Initial Decision was extended until January 2, 2014.

FACTUAL DISCUSSION

Many of the material facts are undisputed. Accordingly, I **FIND** as **FACT** the following:

Dominic Costanzo is employed as superintendent of schools of the Lebanon Borough School District and has an employment contract whose term commenced November 12, 2009. He has the following certificates and endorsements: (1) instructional certificate with the endorsement of elementary school teacher, issued August 1978; (2) administrative and supervisory certificate with the endorsement of principal/supervisor issued September 1986; and (3) a second endorsement as school administrator, issued March 1992. Respondent worked as a principal in the Lebanon Borough School District beginning in 2003. Leah Driscoll is employed by the Lebanon borough Board of Education. The preceding facts were stipulated by the parties.

Respondent is a tenured school principal who became superintendent of District schools in November 2009. In March 2008, Leah Driscoll was hired as his administrative assistant. Respondent had recommended her for the position, had been aware that she was pregnant at the time she was hired, and had accommodated an advancement of vacation and sick leave. Respondent and Driscoll worked together in close quarters within the Lebanon Borough school building. Between March 2008 and June 2011 they enjoyed a close working relationship and became friends. They also

often joked with one another and their banter occasionally included reference to each other's physical appearance or condition.

In early June 2011, respondent asked Driscoll whether she had gained weight or had become pregnant, or words to that effect. Driscoll took offense and became upset, as the comment was made in front of a teacher and Driscoll was in fact pregnant but not prepared to disclose it and had not informed respondent. Driscoll confided in another staff member, Pat Leonhardt, who then told the Board President Christine Burton. Consequently, an investigation was launched.

On July 14, 2011, Leonhardt notified respondent of the investigation, which was being conducted by Frank Custode, Esq., counsel at the law firm that represented the Board. Custode interviewed Driscoll, respondent, and two other school employees, and on August 17, 2011, he issued a report containing findings of fact and recommendations.

Between July 14 and October 6, 2011, Driscoll alleged various words and actions on the part of respondent that purportedly created a hostile work environment. The Board assumed control of the ongoing investigation and filed the following tenure charges against respondent. Ultimately, pursuant to the procedures under the Tenure Hearing Laws, N.J.S.A. 18A:6-10 to 18.1, the Board provided a sworn statement of charges to respondent specifying eight (8) charges as summarized below:

> **Charge I:** In this charge, the Board alleges, in pertinent part, that respondent engaged in harassing, retaliatory, threatening, and intimidating conduct when his attitude toward Ms. Driscoll changed after learning of her harassment complaint and that, as a result of her complaint, on July 18, 2011, respondent told Ms. Driscoll that "work is not getting done. I may have to hire someone else part-time and reduce your salary." When Ms. Driscoll replied that she would go to the Board on this, respondent told her that she "can't go to the Board . . . . I'm your boss."
>
> **Charge II:** In this charge, the Board alleges, in pertinent part, that on July 19, 2011, respondent attempted to push Ms. Driscoll out of her job because he drafted an advertisement for Ms. Driscoll's maternity-leave position for

Count 1

Thereafter, respondent acted "mad," or "cold . . . very tense" toward her (T1, 47.) On or about July 18, 2013, without explanation, he told her that "work wasn't getting done, and that he was going to have to reduce my salary." (T1, 48-9.) Driscoll felt angered and threatened. When she replied that it was his work that was not getting done and that she would fight him "tooth and nail" and "go to the Board with this," he said, "You can't go to the Board. I'm your boss." (T1, 49-50.) According to Driscoll, after he "simmered down," she "think[s]" that he said "Well, we'll have to figure something out. Maybe we can shift things around." (T1, 49-50.)

On cross-examination Driscoll testified that she and respondent joked a lot and the topics included appearances, such as his bald head, but she felt that his comment about her weight went too far. On or about June 10 or 11, she told respondent of her pregnancy and that she was not particularly happy about it.

By July 18, 2011, he had become "cold" by no longer smiling, making eye contact, saying "good morning," or asking about her day or events in her life. Admittedly though, she may have described respondent has "business-like" instead when interviewed by the Board'\'s investigating attorney, Frank Custode. Driscoll was upset with his tone and the tense environment; however, "it wasn't him being nasty." (T1, 150.) Though respondent did raise his voice when asking whether she was involved, after Leonhardt had called, he had not yelled at her any more that summer. And she did not recall him using any foul language. Also, in July when she went to speak to him to clear the air, respondent never said that she could not approach him; it was, instead, her perception of the situation.

Driscoll also testified that she spoke with respondent relative to feeling stressed because she had to do with things that were not her job, such as being told to "handle things" relative to other employees,[2] and felt overwhelmed with the extent of work.

[2] Driscoll gave the example of having to deal with an employee who arrived late.

They had discussed the possibility of bringing on an additional staff member that, she believed, would involve shifting an in-house staff position rather than paying an additional salary. But relative to any reduction of her salary, they did not speak of adding another employee that would require the District pay more money. And she did not at all understand, or ask respondent about, his alleged statement about figuring out a way to shift some things or some money around, and "didn't take it to mean anything." (T1, 168.) Further, Driscoll did not recall telling Custode that she inferred that alleged statement to mean that he would not try to reduce her salary, but testified that, in any event, she was unclear. Neither her salary nor her benefits were ever reduced and no tenure charges were filed against her.

Driscoll further described that in June or July she was very emotional and "hormonal," specifically, easily upset about things that might not otherwise have upset her. Further, her husband's unemployment and the threatened foreclosure of their home admittedly affected her emotional state at the time. However, she was not imagining the "tone" in the office (T1, 192) and believes that she perceived things as they were, though she agrees that she is not the best person to determine whether her state affected her perception of events. (T2, 14-15.)

Count 2

On or about July 19, 2011, respondent asked when she planned maternity leave to which she replied, Thanksgiving through June. He composed an advertisement for, she believes, a twelve-month position with benefits, and that made her feel like her job was threatened. She worried because she was pregnant and her husband was unemployed.

On cross-examination Driscoll testified that, when respondent asked her about maternity leave, she gave him an approximate period of time that was between Thanksgiving and June, but the exact time of her absence was uncertain. Respondent prepared an advertisement (R-25) and asked her to proofread it but it was not discussed in substance. The advertisement was for a full-time twelve-month secretary position, including benefits, that required secretarial and computer experience. Driscoll

Though potentially embarrassing for respondent, it was not until after the mail incident that he stated, "You're killing me. You're ruining me. You're ruining my reputation." However, according to her affidavit, regarding the problem with the mail he stated, "It's all your fault. You are ruining my reputation and my career."

Count 5

On the following Sunday Board President Christine Burton telephoned Driscoll and instructed that she not return to work on Monday. Driscoll arranged with Burton to work at another location, the Clinton business office, and Driscoll did not have any direct communication with respondent until October 3. At that time, she spoke with a co-worker, Karen Ivin, and was transferred to respondent at his request. He was upset and wanted to talk to resolve the situation, in other words, make things better at work.

Consequently, they met at the Readington Diner. Driscoll testified that at that time, three months from giving birth, "I was mentally shot from all this." (T1, 80-81.) She described her emotional state as "not good." He was upset as well. She believes that he said she could return to work, but testified, "It's very convoluted in my mind that period of time, because I was just an emotional - - I was very stressed out." (T1, 83.) In any event, she returned to the Lebanon office on or about October 5.

On October 5 preparations were being made for a Board meeting when, according to Driscoll, the following occurred.

> I'm not sure what happened. I know that we -- I let him know that -- or we were -- this is hard for me to remember, but I know that he wanted me to write a letter to Christine, because -- I was in the agreeance [sic], because I thought, you know, I would do anything to help his situation at that point. I just wanted this out of my life. So, we worked on a letter for Christine . . . I think I relayed my feelings. He drafted a letter. I made changes to it.
>
> (T1, 84-85.)

According to Driscoll, he made suggestions as to the contents of the letter. He wanted her to mention that they had a good working environment, and might have asked her whether she thought that he was a good boss. He emailed a letter to her and she made some changes.[4] After making the changes, Driscoll believes that she signed the letter (P-6) and put it in Burton's mailbox.

On cross-examination Driscoll testified that on October 3 at the Readington Diner she volunteered to write a letter to the Board, but does not believe that two letters were discussed. As to whether she was in school the next day, Driscoll testified "I have a bad recollection of that week." However, she believes that on October 5 they worked on the letter to Christine Burton in respondent's office, though at some point she made changes at her desktop, as the best she could recall. When letter writing was discussed, "it wasn't plural,"—discussion of a second letter came up sometime later. However, at paragraph 16 of her affidavit, which does not mention the Readington Diner, it reads "Mr. Costanzo asked me to sign a letter to Board President Christine Burton as well as another letter that he wanted me to read aloud at a Board meeting." (T3, 115-116.) Driscoll explained that they spoke about the Burton letter Burton on October 3 and spoke about both letters on October 5. Furthermore, though she testified that she had never read the second letter before her testimony on August 14, 2012, her affidavit at paragraph 18 states that "A true and accurate copy of the second letter dated October 5, 2011, is attached hereto as Exhibit C." (T3, 118-120.) As to how she could swear that the second letter, attached to her affidavit as Exhibit C, was a true and accurate copy if she had never read it before her testimony on August 14, 2012, Driscoll testified, "I guess I didn't . . . . I guess it's just what I believed it to be." (T3, 120.)

[4] Specifically, she inserted the word "intentionally" into the sentence "Dominick would never do anything to hurt me." They each authored "some things" in the letter, but she did not write the letter (P-5) and does not list her name as Leah E. Driscoll. In the second paragraph, she changed "There are no issues between Dominick and me" to "There don't have to be any issues." In the third paragraph, she changed "I know Dominic, and he has never done anything to hurt me," to include "intentionally." She changed "There aren't any issues," because there were. She believes that she deleted last sentences, "Dominick is a true professional. He treats everyone with kindness and respect," because that was the manner in which he ended sentences for evaluations. Also, she inserted: "we need to get together and talk this out," and "I have no idea how my responses could have created such a problem for Dominic. My responses were not unfavorable." She also wrote, "My intention is to sit down with Dominic and work out this misunderstanding so we can get back to work."

Count 6

October 6, 2011, Driscoll spoke with respondent, but the only thing that she can recall is that she signed a letter that he handed her that she did not read. (P-7.) According to Driscoll, she was concerned about losing her baby and does not remember the specifics. However, respondent appeared "sad" and "sullen." (T2, 105.) Driscoll thinks that he wanted her to read it at the Board meeting. She told him that she could not and he requested that she have a teacher, Rich Costa, read it. She complied and left a voicemail for Costa. Subsequently, she replied to Board member Jackie Caruthers that she did not in fact write the second letter (P-7), and told the same thing to both Burton and Caruthers on the following day, October 7.

On cross-examination Driscoll testified that she believed she worked at the school on October 6, the day of the Board meeting, but left for a doctor's appointment. She had the understanding that Costa read the second letter, that either she or respondent had placed in his mailbox, at the meeting. On October 7, she spoke with a teacher about having signed a letter that she had not read and was advised to disclose the matter. She subsequently spoke with Jackie Cruthers and Christine Burton but does not recall whether she told them that she did not write either letter. In any event, she did not compose the first letter but contributed by making changes to it.

Also, Driscoll made handwritten notes voluntarily, and notes made by respondent as well appear beneath Driscoll's notes. Driscoll's notes indicated that the two had talked and reconciled, and that she was ready to resume work in harmony. Her notes also posed a question whether they could settle the matter with Burton but no meeting with either her or the Board ensued despite her willingness to have had one. Her notes further state, "want to resolve, believe miscommunication was the demise" (R-6) and that admittedly was Driscoll's actual sentiment. Finally, Driscoll gave a sworn statement in December 2011 but did not feel any pressure at that time to retract previous statements supportive of respondent.

On re-direct-examination, Driscoll testified that respondent gave her the second letter (P-7) and asked her to read it at the Board meeting. She signed it within about

two seconds. She wrote her personal notes because she "wanted this whole issue to go away . . . [T]his was a harrowing experience. I hated all of it and I felt guilty. I felt horrible. I just wanted it to end . . . . I didn't want to have to deal with this anymore." (T3, 168-169.) On re-cross-examination, Driscoll testified that she chose not to read the second letter when respondent gave it to her.

Christine Burton, then Board president, testified that during the summer of 2011 she learned from Pat Leonhardt, business administrator, of the allegation by Driscoll that respondent had asked her whether she was pregnant or had gained fifty pounds. Burton arranged with Leonhardt to confer with the Board attorney who recommended that an investigation be conducted. Frank Custode, Esq. conducted the investigation and filed a report recommending that respondent participate in training. However, that did not occur, as another incident came to Burton's attention.

On or about September 17, 2011, Driscoll told Burton about an incident involving the mailing of test scores, in which respondent told her, "It's all your fault. You're ruining my reputation in my career." Driscoll told Burton that being in the office was making her upset and Burton arranged for her to work in the Board's Clinton office. On September 22, she met with Driscoll who reiterated that information at that time.

Burton and another Board member, Greg Pardo, met with respondent on September 20, 2011. He denied the above-alleged statement and did not understand the purpose of the investigation. He shared handwritten notes made by Driscoll on September 8 (P-4). Burton described his demeanor as very angry and upset, red in the face, and absolutely not himself. Consequently, Burton raised concerns about her confidence in respondent based upon what she perceived as a "lack of judgment, the fact that he took no responsibility for his actions, didn't show any remorse." (2T, 216-217.)

Burton testified that she was shocked to receive Driscoll's letter dated October 5, 2011, because it contradicted what had transpired, as she came to believe it, based upon Driscoll's description and reaction regarding the circumstances. Rich Costa, a teacher, read the second letter dated October 5, 2011, (P-7) at the Board meeting and it

was in support of respondent. No one had indicated whether respondent had any part in writing it. However, Driscoll subsequently told Burton that respondent created a letter that he wanted her to sign because there would be a Board meeting on October 6. Driscoll said she looked at the letter, edited it and signed it. However "she did not make any edits or deletions to P-7. She simply signed it." (T2,234.)

According to Burton, the Board sustained tenure charges based upon "the retaliatory actions, the lack of judgment as affirmative action officer, the abuse and misuse of his power as the chief school administrator and deceiving the Board . . . ." (T2,234.)

On cross-examination Burton acknowledged that respondent typically is not a person who becomes angry and upset. She has no personal knowledge of exactly what happened between respondent and Driscoll between June and October 2011. She also has no personal knowledge about what Driscoll told her regarding the facts and circumstances surrounding creation of the letters. Burton also acknowledged that in or about December 2010, the District had hired a substitute secretary named Amy Pardo to assist in the Board office, and she did work there at times in 2011. Burton also confirmed the existence of Driscoll's position being a full-time twelve-month position.

Burton further testified that the recommendation made by Custode was reviewed but no formal Board action was taken with regard to the recommendation. Burton first explained that no action was taken because the matter was confidential, but conceded that the confidential nature of the matter did not in any way prevent the Board from formally acting upon the Custode's recommendations.

Frank Custode, Esq., is employed as counsel at the Porzio law firm where the principal, Vito Gagliardi, is the Board's attorney. Custode testified that he has a background in employment-discrimination matters, and was assigned by Gagliardi to conduct the investigation as an impartial fact-finder, becausehe had no dealings with the school district personnel. He interviewed Driscoll, respondent, Karen Ivan (nurse), and Jerry Haag (custodian).

Custode's report reflects the following. On July 20, 2011, Driscoll informed him that respondent had asked whether she was pregnant or had gained fifty pounds. At the time, he did not know that she was actually pregnant. She was angered and told him the comment was inappropriate. A week later she told him that she was pregnant but not ready to tell anyone, and apologized for "freaking out" at him and he said "okay." (R-19 at 3.) Thereafter, however, she was bothered because his attitude became "distant and business-like," which she felt created "an uncomfortable work atmosphere." (R-19 at 3.) She confided in Ms. Leonhardt, but Leonhardt reported the matter and the investigation ensued. On July 14, when Leonhardt informed them of the investigation, respondent remarked something to the effect of it having to do with her and she told him that she had never filed a grievance or complaint against him. She thought that he was upset because she was pregnant, and he had made a comment like "I haven't been disrespectful, it's all professional. I can't joke around with you anymore." (R-19 at 3.)

On July 18, respondent had an attitude and stated that things were not getting done and he might have to take away some of her responsibilities and reduce her salary. She threatened to go to the Board and, later he commented "maybe we can figure out how to shift some money around." Also, on July 19, 2011, respondent created an advertisement for a twelve-month maternity-leave position and when she questioned him about it, he said something to the effect of "I need to be covered."

Custode's report reflects the following regarding his interview of respondent. Respondent described his relationship with Driscoll as "friendly" and her job performance as "good," though there were times when she did not follow up on issues or keep filing updated. He acknowledged asking her, in early June, "Leah did you gain weight or are you pregnant?" He denied asking whether she had gained fifty pounds and said that the statement was in response to her asking about his weight, and that they often joked about each other's weight. Days later she said that she was sorry if she had hurt his feelings but she was upset because she thought that she may be pregnant. He congratulated her but she said that it was "not good," there were certain health risks. He advised her to see a doctor.

On July 14, Leonhardt notified him of a complaint but without details. He acknowledged the possibility that it may have been related to the pregnancy comment to Driscoll, though that was not his first thought. He did ask Driscoll whether it was her and she said no. Since July 14, "he has conducted himself differently, meaning strictly professional, and does not joke around with anyone anymore."[5] (R-19 at 6.) Further, the issue of splitting her job responsibilities had been discussed over the years, and they had discussed the need for rationalizing to the Board hiring another person, which could ultimately result in a reduction of her salary. He agreed that she had become upset when the issue of a possible salary reduction was mentioned. Finally, respondent acknowledged raising the question of the length of her expected maternity leave and preparing an advertisement for the position. He wanted to have someone available for training as soon as possible had to be sure that he had "security in place." (R-19 at 6.)

On August 2, 2011, Karen Ivan, the school nurse, described respondent, her direct supervisor, as someone with a "friendly demeanor," a "good sense of humor," and "very family oriented." She described Driscoll as "nice" and "friendly." Driscoll and respondent had a friendly relationship and respondent was supportive of Driscoll and her baby. Ivan learned of the pregnancy-related comment from Driscoll, who seemed embarrassed by it. Ivan was aware that Driscoll was pregnant, because Driscoll had told her, but Driscoll had said she did not want to tell respondent until after the school year ended. Ivan stated that she never witnessed respondent engaged in any type of behavior that she thought was discriminatory, harassing, or inappropriate. (R-3 at 7.)

On August 2, 2011, Jerry Haag, school custodian, described respondent as having a "concerning" demeanor and providing a "positive" work experience. He described Driscoll as "very open." She and respondent had a friendly working relationship but they took care of business as well. He became aware of the pregnancy-related comment when Driscoll, who was upset, told him about it as she left

[5] According to the report, he acknowledged being concerned about Driscoll and "everyone" in the District because he "wants to know who his enemies are." (R-19 at 6.)

the building.[6] Haag stated that he had never witnessed respondent engage in any type of behavior he thought was discriminatory, harassing or inappropriate. (R-19 at 7.)

Custode's report concluded that respondent's pregnancy-related comment was isolated and did not rise to the level of and actionable hostile work environment or any unlawful pregnancy discrimination. However, his conduct after the comment "may be construed" as retaliatory in nature. (R-19 at 9.) Custode recommended that respondent attend harassment, discrimination, and anti-retaliation training. It was further recommended that respondent and Driscoll meet, with Board counsel, respondent's counsel, and the Board president if preferable, to "discuss the issues and their working relationship going forward" especially in light of the "sensitivity of their job functions and the frequency of their daily interaction." (R-19 at 9.) By letter dated September 7, 2011, Custode informed Babiak of the report's conclusions and recommendations. According to Custode, the training did not take place because of an objection by respondent's counsel and a new alleged incident had occurred in the interim. Burton and Board member Greg Pardo conducted follow-up interviews and, buy supplementary report dated October 6, 2011, (P-11) Custode recommended consideration of disciplinary action by the Board in consultation with special counsel.

Patricia Leonhardt, former business administrator and secretary for the Board, and current Board secretary for Warren Township BOE, testified that on July 7, 2011, Driscoll came to her office and described an uncomfortable exchange wherein respondent made a pregnancy-related comment. Her relationship with him changed afterward, particularly after she later informed him of her pregnancy. Leonhardt advised her to speak with respondent, but Leonhardt also informed Burton who mentioned that pregnancy was a "protected class" and the Board attorney should be contacted. Leonhardt thus contacted the Board attorney and consequently facilitated the investigation by arranging for interviews to be conducted at the Board's Clinton Township office, and notifying respondent accordingly.

[6] Driscoll's description of respondent's comment to both Haag and Ivan referenced gaining weight or being pregnant, but nothing relative to gaining fifty pounds.

On July 18, 2011, Driscoll called Leonhardt and said respondent had commented about a reduction in her work hours. Leonhardt advised her to add that information to the investigation. In September 2011, Leonhardt received a call from Driscoll, who was crying and said respondent had made some "pretty heavy comments to her, that she was ruining everything for him." (T3, 153.) Leonhardt then went and consoled her because "she was feeling guilty." (T3, 154.)

Leonhardt admittedly had not witnessed any of the incidents that Driscoll had reported. She did not recall any specific conversation with respondent about getting assistance for Driscoll at work, but recalls that at some point Amy Pardot had been brought in to provide back up support.

Respondent's Witnesses

Richard Costa testified that he is a certified physical education and health teacher, and special education teacher, and was a staff member at Lebanon between September 2009 and June 2012, during which time he taught special education. At that time, respondent was his supervisor and the superintendent of Lebanon Borough School.

On October 6, 2011 Driscoll contacted him and asked whether he would be present at the Board meeting. He told her he had not planned on going. She told him that she would not be able to attend but had a letter that she wanted to be read there. She asked if he would read it for her and he agreed. She said that it would be in his mailbox in the school's main office, the same building in which the Board meets. Costa retrieved the letter from the mailbox, read it at the meeting, and then gave it to the Board president, Christine [Burton]. The next day, he saw Driscoll and she asked how it went, and wanted to know whether he read the letter and "how was their response?" (4T 8/22, 9). He told her that the response was "quiet" and asked her if everything was all right. She said, "Yeah, I had a doctor's appointment, I couldn't make it." (T4, 9.)

On cross-examination, Costa testified that respondent was his seventh-grade science teacher and subsequent soccer coach, and Costa later worked at a middle

school where respondent was vice principal. Additionally, Driscoll admittedly had spoken to him between five and ten times about arriving late to school. Further, he was last employed with the Board on June 30, 2012, because his contract was not renewed. At the time, he was told that there was insufficient need for two special education teachers. He did not appeal. He currently teaches special education in Montville and respondent, among others, provided a recommendation for his current teaching position.

Costa testified that all of his testimony, in every particular, was true to the best of his knowledge and ability.

Andrew Babiak testified that his first contact with respondent regarding representation was around July 14, 2011. On that date, respondent had received a notice about an unspecified investigation and around July 25; he received a notice informing him of a related meeting on July 27. Upon receiving an e-mail from respondent regarding the meeting, Babiak sent an e-mail dated July 26, 2011, to Vito Gagliardi, Esq. asking about the nature of the investigation (R-20). On July 27, respondent and Babiak attended the meeting with Frank Custode, who was conducting the investigation.

At the meeting it became clear that the investigation was about a complaint alleging discrimination by respondent against an administrative staff member, Leah Driscoll. Babiak's understanding was in that during the summer 2011, respondent and Driscoll worked together and were the only administrative staff at Lebanon. Thus, respondent had concerns regarding interaction with Driscoll, as did Babiak.

On August 3, 2011, Babiak sent an e-mail to Gagliardi (R-29) regarding Babiak's prior call to him seeking input on how to address the work environment because respondent and Driscoll had to work together where one had accused the other of impropriety; it did not seem tenable. The e-mail stated, "I've informed [respondent] to generally remain in his office. I have no other practical advice to offer." By that, Babiak meant that there did not appear to be any other solution to them working together, and Babiak did not want respondent to face further accusations. Babiak did not recall

whether the charge included an accusation of respondent being "cold," but it included something about an effect on what had been a good relationship between them.

On August 23, 2011, Babiak sent an e-mail to Custode (R-30b) due to a concern over the passage of time with respondent and Driscoll still working in the same environment and a lack information regarding status of the investigation. Babiak received a letter from Custode dated September 7, 2011, with conclusions from the investigation (R-3) and he notified respondent by the quickest means of communication (unspecified). Babiak had expected a reconciliation, because Custode's letter indicated that the Board was in agreement with the recommendations and conclusions. Nonetheless, on September 26, 2011, Babiak sent an e-mail to Gagliardi (R-31) regarding the "need to have secretarial staff in Lebanon addressed ASAP" because respondent was overwhelmed with the amount of work and Babiak was not sure whether staffing had been addressed or whether Driscoll was coming to work. Further, Babiak had conversations with Gagliardi which included a comment by Gagliardi that the Board was not satisfied with respondent, was not going to renew his contract, and that the decision had preceded the subject complaint.

On cross-examination, Babiak testified that during the July 27 conference with Custode, he believes that he heard respondent say that he suspected the complaint involved Driscoll somehow, but he was not 100 percent sure. He further testified that Gagliardi was his contact in matters involving the Board's clients, but he nonetheless expected that Custode would make the investigation report. And respondent was the source of information that Babiak had conveyed in his September 26 e-mail to Gagliardi (R-31) regarding the "need to have secretarial staff in Lebanon addressed ASAP."

Dominic Costanzo testified that as superintendent his responsibilities included evaluating staff members, ensuring bills were submitted to the business administrator, and completion of all State and county reports. He had first hired Driscoll in 2004 or 2005 as a substitute teacher on an as-needed basis. She left to teach at a private school, but when respondent's secretary took another job, Driscoll applied for what then became a twelve-month year-round position. When she was hired in March 2008, she

made him aware that she was pregnant. She requested and he recommended the accommodation of advancing sick and vacation days, which the Board authorized.

Background

Costanzo described their relationship as "excellent" between 2008 and 2011, and they "became good friends." (T5, 39.) He helped her with transportation to the store, hospital, and her daughter's school. He gave her $400 to help financially and neither sought nor expected repayment. There was usually banter in the small main office and they both joked about things like his bald head.

In June 2011 during lunch in a conference room, Driscoll was "a little edgy" and he said something to the effect of "Did you gain fifty pounds?" or "Did you gain weight, are you pregnant?" in hopes of having her "joke back with me," but it backfired. (T5, 42.) A teacher, Amy Adamaitis, was present and Driscoll became visibly upset. He asked what was wrong. She told him that she did not think it was a nice comment and he apologized. He admittedly should not have said it. She later explained that she was upset because she thought she might be pregnant. He congratulated her but she said it was not good, that it was unplanned, and there were medical issues. He advised that she make a doctor's appointment and she did.[7] Thereafter, he "gave her some space," not wanting to approach her about it, but their relationship did not change.[8] In the end of June, he found out that she was actually pregnant when he overheard some of the teachers talking.

On July 14, the business administrator, Pat Leonhardt, telephoned respondent and told him someone had filed an affirmative action complaint against him,[9] though she could not tell him who it was or what it was about. Respondent called Burton but she did not divulge the particulars and indicated that he might want to get an attorney.

[7] According to respondent, Driscoll initially wanted to get a pregnancy kit from Walmart.

[8] According to Costanzo, they had even discussed her joining his family for a reunion at Lake George in the summer, but he only went for one day and she did not attend.

[9] Respondent was the District's affirmative action officer but, as the complaint was against him, Leonhardt was fulfilling that role for the first time.

Respondent thus engaged Andrew Babiak, Esq., as his attorney for purposes of the affirmative action investigation.

On July 27, 2011, respondent and Babiak attended a scheduled interview conducted by Frank Custode, Esq., who informed respondent for the first time that Driscoll was the source of the investigation. Prior to that time he did not know that she was involved, as she had denied any connection.

On cross-examination respondent testified that in early June 2011, he neither noticed a weight gain nor suspected pregnancy and believes that his actual statement was, "Leah, did you gain weight or are you pregnant?" The statement was made in a joking manner and not intended to be hurtful, as they had joked all the time. As to whether he thinks it appropriate for the workplace, respondent testified that he should not have said it, but their relationship was such that they would joke about things including physical appearance.

Respondent denied being unhappy about her pregnancy and feeling that it would impact his responsibilities. After learning of the investigation, respondent considered the possibility that his comment to Driscoll was related. But when he asked her about it and she denied involvement on July 14, when he learned of the investigation, he believed her.

After July 14, respondent changed his conduct but not against Driscoll. He was quiet and followed the advice of his counsel. He had given her space after she had initially mentioned pregnancy by being, as he could best describe it, "quiet" and not inquiring, but was not cold toward her. (T6, 125). Also, after July 14, the work environment did not become less pleasant. They still communicated about school business, though he "joked a lot less, it was more businesslike" (T6, 131). That was not the result of the affirmative action investigation but rather "the result of the advice of my counsel."[10] At some point he communicated with Babiak about Driscoll, but doesn't

[10] Responded testified that he had initially spoken with Babiak on July 14 and relayed the fact that he had been informed of an affirmative action investigation. He does not recall whether they discussed the

know if that was before July 27, and he does not recall if before July 18 they discussed respondent's intent to speak with her about work not getting done. However, respondent did make personal notes that indicate he had communicated with Babiak relative to the investigation and that specifically mention Driscoll. The notes (R-33) bear the date July 26, 2011, but respondent believes the date is mistaken, and should correctly be July 27, the date he met with Babiak and they met with Custode. Other notes (R-32) dated July 27 reflect some of respondent's questions for Babiak relative to the investigation as well as notes respondent took during the meeting with Custode. Respondent generated even more notes after the meeting with Custode (R-34), reflecting additional questions for Babiak relative to interaction with Driscoll in terms of getting work done. At the time he was not sure that he could trust her, as she was connected to the investigation and was acting different, more quiet.

After the meeting with Custode, he discussed with Babiak his concern as to how to conduct school business in the somewhat small and isolated office setting. Babiak advised him to be cautious, do his job, act professional, make sure people were around, and to close his door if needed to limit contact with Driscoll. (T6, 183). His general advice was to do his job and not talk to anyone about the complaint. He may also have provided advice about not taking any retaliatory action against Driscoll.

Count 1

Respondent typically would say "Hello, how are you" rather than "Good morning," but does not recall whether he greeted Driscoll on the morning of July 18, 2011. He did not, however, have any negative attitude toward her. Rather, he was quiet and kept to himself, because he had a lot on his mind and was concerned about the complaint.

Also, during that approximate time he did not tell her that "work is not getting done. I may have to hire someone else part-time and reduce your salary." Rather, she had been overwhelmed and he said, "You know, things need to get done." (T5, 56.) They discussed the fact that her having a higher salary, which she desired, could not be

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possible reasons for the investigation at that time, as he did not know what the investigation was about, or whether he mentioned Driscoll's name.

justified to the Board in light of the work-load issue, and that perhaps someone could be brought in to help.[11] However, splitting responsibilities would likely mean a reduction in salary, as it was likely that only one salary would be spread between both employees. Nothing said was meant to threaten her position, as they were friends and worked well together and he wanted her there. Additionally, she was a tenured employee in July 2011 and respondent had no power to alter the salary of a tenured staff member.

On or about July 18, there was also a discussion in which she said that it was respondent's work that was not being done, which to him bordered on insubordination. He had addressed to her the fact that files were not being maintained in an orderly and confidential manner and had spoken to her about it previously.

On cross-examination respondent testified that on July 18, he had a conversation with Driscoll in his office about work not getting done, but did not recall what he said to her at that time. When attention was brought to his prior testimony, he testified that he may have said, "You know things need to get done," but was not certain that was the exact phrasing. He further clarified that he did not suggest splitting her job and decreasing her income, rather he suggested she needed help. Respondent absolutely denied that any discussion about splitting her job responsibilities and a potential reduction in salary, to accommodate an additional assistant, was a threat to her job security. The initial conversation, regarding help in the office, was not unfriendly and respondent was not upset at the time. The subsequent conversation, when Driscoll alleged his work was not getting done, occurred after she had left but then re-entered his office. That conversation was "moving toward unfriendly" and her statement had concerned him. (T5, 27-28.)

Count 2

Regarding maternity leave, Driscoll was unable to say definitively the time period that she would be out, but it was important to have timely coverage and an orderly

[11] At some point, Amy Pardo was in fact brought in to assist Driscoll with office tasks on an as-needed basis. (R-27.)

transition. He asked her to use the same advertisement from when she was hired (R-12) to advertise for maternity-leave coverage, since it was the same position. The result was an advertisement for the same position (R-25) that only differed with regard to the return date of September 30, 2011, respondent's title as superintendent, and the phrase "maternity leave position."

On cross-examination respondent explained that he prepared to post an advertisement for a "maternity leave" twelve-month position because Driscoll's position was in fact a twelve-month position, rather than to specifically accommodate a transition, which he did want but was something different. He and Driscoll discussed it but it was never posted.

Count 3

In August 2011, respondent prepared and presented to Driscoll a memorandum regarding filing and confidentiality. (P-3.) It was intended to demonstrate his seriousness about the issue after he noticed that a number of items, including confidential files, had not been properly filed or maintained as her job required and as he had discussed with her on prior occasions. According to respondent, she often did not take responsibility for things and shifted blame to others. He did not, however, deem it necessary to place the memo in her personnel file.

On or about September 7, 2011, respondent received a letter indicating that the Board had concluded its investigation, and had accepted the recommendation of Mr. Custode that he and Driscoll meet with Board counsel to discuss the issues and their future working relationship. However, the meeting never occurred and he does not know why.

On September 8, the date of the alleged incident, he had a conversation with Driscoll in his office and explained that he had been quiet because of the complaint and the information from Custode that she had filed it. She assured him that she had not filed a complaint and that things had become twisted around. She voluntarily wrote questions (P-4) and wanted him to speak with his attorney about them.

Also, on or about September 8, he did speak with her about leaving a staff member's personnel file at her desk. It was the same situation that he had just spoken to her about a couple of weeks earlier. And this was a second incident involving the same file. His discussion with her about the file had nothing to do with the complaint or the investigation.

On cross-examination respondent testified that on August 18, 2011, he discussed with Driscoll the memorandum regarding file maintenance and security and gave her a copy, which did not require her signature as it was not an evaluation. He adamantly denied that it was prepared to discredit her after he was suspended. On September 8, the day following Custode's recommendation, he brought to Driscoll's attention, in a professional manner, the issue of having left out a file. Respondent does not recall whether he had first received Custode's recommendation. But Driscoll was upset and began to talk and write notes about the investigation, which respondent allowed because she was crying, not because he was desperate for a favorable outcome to the investigation.

Count 4

In September respondent had given Driscoll the charge of mailing to parents the test score results for the New Jersey Assessment of Skills Knowledge test, or NJ ASK test, with a cover letter. He thought she mailed them but parents began to telephone and visit inquiring as to the whereabouts of the test results. She confirmed posting the mail and respondent discovered that she had placed them in the mailbox which the custodian knocked down and the mail and ended up in the school, not the post office.[12] Consequently, an instant alert was issued notifying parents of a mix up with the mail. Respondent felt it reflected poorly upon him particularly at a time when his contract was up for renewal. Driscoll said it was the custodian's fault and respondent told her,

[12] Further, there had been occasions when Driscoll actually mailed items at the post office and it was not unusual for them to get stamps there.

"You're killing me, what are you doing to me? Because you're killing me. You're not helping me on any of this. You're doing the opposite. I don't understand." (T5, 129)

On cross-examination respondent testified that it was customary to take bulk mail to the post office and he had assumed that is what Driscoll had done with the test scores. Respondent was upset but did not scold Driscoll, though he blamed her over the fact that the test scores had not reached the parents. Respondent was also upset with the custodian and spoke with him about the incident.

Count 5

Between September 19 and October 3, 2011, Driscoll did not work in the building. On October 3 respondent requested that Karen Ivan call Driscoll with an inquiry relative to classroom coverage. When he then spoke to her, she asked whether they could meet at the Readington Diner to talk.[13] He met her there and she asked what she could do to help resolve the situation. At her request, he called his attorney, who was unavailable, and left a message. Driscoll thought that perhaps they could write a letter. She wanted to write a letter to the Board or to Christine Burton, and started to make notes. (R-6) She then said, "I want to ask -- these of the questions you should be asking your attorney." (T5, 132.) Respondent did not ask her to write anything in particular. Rather, she was upset because she thought the whole thing was "ridiculous." Her handwriting included the notation, "Would it be beneficial to write a letter to Board."[14]

Respondent testified that Driscoll returned to the school on October 5, and in the privacy of his office "we wrote the letters . . . . She wanted to do the Board and wanted to write one to Christine Burton, Board President." (T5, 137-138.) According to respondent, Driscoll wanted to personally deliver Burton's letter (P-6). Respondent e-mailed it to her house, as she had to leave work early. She was going to sign it and place it in Burton's home mailbox. Thus, he did not see her sign that letter.

[13] According to respondent, he had never been there before.

[14] Before the left restaurant, respondent's attorney returned his call and they spoke, but the testimony does not delve into the content of their conversation.

On cross-examination respondent testified that in September 2011, he was frustrated after Driscoll's worksite changed because the coverage was sporadic and running the office was difficult. On October 3, Ivan called Driscoll early in the day at respondent's request due to an issue with assignment to the office of a substitute who had requested to be assigned to the classroom. Then, he spoke with Driscoll who asked that he meet her at the diner and, ignoring the advice of counsel, he did so. When they met, she was upset with the Board. Respondent absolutely denied pressuring her into helping him with the Board. At that time he informed her that she could return to the Lebanon administrative offices, knowing that his instruction in that regard was contrary with to that given to her by the Board President. His understanding was that she would call Christine Burton and he contacted Babiak.

On October 5, 2011, she returned to work at Lebanon Borough School and respondent agreed with her suggestion that she write a letter supporting his reappointment. Respondent denied asking her to return to the building for his benefit or to sign letters on his behalf. Respondent also denied sending an email to Driscoll (P-5) to make it appear that she drafted the letter contained therein. According to respondent, regarding composition of the letter, "It was mostly her. I mean, I might have put a line in it. That's about it." He may have also "contributed words," if she asked for a word, but the only specific line that respondent put in the letter was "Where is this coming from?" She was dictating and he was typing, not him writing it and reading it for her approval.

Respondent does not recall whether he informed either Burton or the Board that he drafted the letter with Driscoll, but had no intention of leading the Board to believe that she wrote the letter on her own.

Count 6

Driscoll did not read the letter to the Board because she began to have contractions and would arrange for either Amy Adamaitis or Rich Costa to read it. She called respondent and said that she spoke with Costa, and instructed respondent to

leave the letter in her mailbox and that Costa would to read it to the Board. The content of the letter had been discussed on October 5 and it contained what she wanted. However, on October 6 respondent and Driscoll met again at the Readington Diner where they had sodas and she signed that letter (P-7). She appeared to read the letter, and they discussed it, before she signed it. A receipt dated October 6 from the diner (R-8) reflects his payment for the beverages. The time on the receipt, 17:16:56, or 5:16:56 p.m., reflects approximately the end of their meeting from which she was going to the doctor's office for an appointment. Respondent did not do anything to get her to sign the letter. Respondent attended the Board meeting on the evening up October 6 and witnessed Costa read the letter.

Driscoll's absence after September 19 created administrative difficulties, given the extent of her responsibilities. Respondent contacted Babiak who, in turn, sent an email to Vito Gagliardi regarding the need for secretarial support for respondent. (R-31.) However, that issue remained unresolved through October 6, the last that respondent had seen of Driscoll and when, at the Board meeting, respondent was suspended. Respondent further testified that he has had an impeccable record and had never had any issues with staff, parents, or students.

On cross-examination respondent denied drafting and typing the letter intended to be read at the Board meeting. (P-7.) He also denied that he presented it to Driscoll in the Board office and that was the first time she ever saw it. He also denied requesting that she read it aloud at the Board meeting.

On redirect-examination respondent further testified that the contents of Babiak's email dated July 26, 2011, to the Board's attorney, Vito Gagliardi, were true: that on July 14 respondent received a message from the business administrator that he was subject of an unspecified affirmative action complaint and, on July 25, was informed of a scheduled interview on July 27 at the Clifton Township business office with someone from the Porzio law firm named Frank. He met with Babiak on the morning of the July 27 at his office and they drove to the meeting with Frank Custode, stopping at Dunkin' Donuts on the way.

Respondent testified that he prepared the reprimand memo (P-3) on August 16 and, on or about August 17 or 18 when Driscoll returned from her days off, discussed it with her in a regular, professional, friendly tone of voice. (T6, 28.) Respondent never raised his voice. He gave her the memo to read and spoke to her about it and was going to destroy it afterward, so there was no confidentiality breach.

On September 8, at the school building, Driscoll seemed upset and wanted to speak with respondent in his office. He told her that "we can't discuss this," but she proceeded to tell him her belief that there had been miscommunication and wanted to speak to respondent's attorney. (T6, 38.) She voluntarily made handwritten notes (P-4) that respondent did not ask her to write. He did not stop her because she was crying and upset. She took a sheet with a note from the pad upon which she had written them, and gave it to respondent to get to his attorney. Respondent sent a note to Babiak.

With regard to communicating with Burton as to whether he was involved with preparation of the letters, respondent testified that he did not speak with her or anyone from the District after October 6, and she had not contacted him. Respondent was unaware that Driscoll had disclaimed responsibility for the letters on October 7, and he was not asked about it by the Board President, Jackie Carruthers.

Respondent does not regard as dishonest or deceitful the "common practice" whereby the person for whom a letter of recommendation is prepared contributes to its content and he, as the person recommending the individual, reviews it for accuracy and signs it.

On re-cross-examination, respondent testified that on July 18, 2011, Driscoll did not directly request of him a salary increase when they discussed options for additional help, though she was interested in one. In any event he was not interested in recommending that the Board split the positions. Respondent absolutely denied that the only reason splitting of the positions was mentioned was to intimidate Driscoll.

Further, respondent maintained a copy of the memorandum to Driscoll regarding file maintenance, despite having told her that he would discard it and his intent to

discard it. He does not recall however telling her that he retained a copy. It was not his practice to retain copies of documents that he said would be discarded, but he had spoken to Babiak about this particular memorandum. He told her that it would not be in her personnel file and it was not, and it was not a lie when he told her that he would dispose of it. Respondent admitted that as superintendent he was ultimately responsible for personnel records at the Lebanon Borough Board of Education.

Summary of Testimony

Factual determinations often turn on credibility. When the testimony of witnesses is in disagreement, it is the obligation and responsibility of the fact-finder to weigh the credibility of the witnesses in order to make factual findings. Credibility, or more specifically, credible testimony, must not only proceed from the mouth of a credible witness, but it must be credible in itself as well. Spagnuolo v. Bonnet, 16 N.J. 546, 554-55 (1954). Credibility is the value that a fact-finder gives to the testimony of a witness. The word contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). The process of evaluating the credibility of witnesses entails: (a) observing demeanor; (b) evaluating the ability to recall specific details; (c) considering the consistency of the testimony under direct and cross-examination; (d) determining the significance of any inconsistent statements or evidence; and (e) otherwise developing a sense of the witness' candor. In assessing credibility, the interests, motives or bias of a witness are relevant, and a fact-finder is expected to base decisions on credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973). Frequently, the trier of fact relies on the innate sense of whether the testimony has the ring of truth.

Driscoll's testimony was crucially flawed by inconsistency and faulty recollection. She was uncertain as to exactly what respondent said about "shift things around." (Count 1).) She was similarly uncertain about their exact exchange concerning the mailbox incident, and was admittedly very stressed at the time (Count 4). The week of October 3, 2011, was quite unclear. She testified, "I was mentally shot . . . . It's very

convoluted in my mind that period of time, because I was just an emotional -- I was very stressed out." "I have a bad recollection of that week." Regarding the events of October 5, 2011, she testified, "I'm not sure what happened. I know that we -- I let him know that at -- or we were -- this is hard for me to remember . . ." She had poor and selective memory of October 6, as the only thing that she could recall was signing a letter that respondent handed her that she did not read.

Further, Driscoll's testimony in that regard is inconsistent with her statement to Burton and Carruthers on or about October 7 that, in addition to the letter to Burton that he forwarded on October 5, he "forwarded the second letter, which was ultimately read by Costa at the Board meeting." (P-12 at 2.) What is more, Driscoll's testimony regarding never having read the second letter prior to testifying at the hearing on August 14, 2012, is inconsistent with her sworn affidavit dated December 13, 2011, stating that a "true and accurate copy of the second letter dated October 5, 2011 is attached hereto as Exhibit C." (R-22.) This is not a minor inconsistency; clearly, both statements cannot be true. As to how she could swear that the second letter, attached to her affidavit as Exhibit C, was a true and accurate copy if she had never read it prior to her testimony, she testified, "I guess I didn't. I guess it's just what I believed it to be."

Driscoll's testimony in this regard also conflicts with that of Costa, who, even if somewhat biased toward respondent, gave credible testimony that Driscoll approached him and asked if he would read a letter to the Board for her because she was unable to attend. She thereafter left the letter in his mailbox and on the following day asked whether he had read it and how it went.

Respondent presented a forthright demeanor. His testimony that Driscoll voluntarily participated in writing and reviewing both letters, with his input, was more credible. The diner receipt dated October 6 corroborates his testimony that Driscoll voluntarily met him there on that date and voluntarily reviewed, discussed and signed the second letter that she then delivered to Costa to read at the Board meeting. Further, it is neither illogical nor unreasonable that one letter addressed confidential matter of the investigation and the other dealt with the more public issue of the renewal of respondent's contract as superintendent.

In a direct and straightforward manner, respondent adamantly denied pressuring Driscoll into helping him with the Board or asking Driscoll to return to work for his benefit or to sign letters. In a similarly credible fashion, he testified that he had no intention of leading the Board to believe that Driscoll wrote the letter on her own. Further, his testimony explaining the circumstances as well as his conduct between July 14 and October 6, 2011, was reasonable and corroborated by other evidence and testimony in the record, and therefore credible.

After assessing the credibility of the witnesses, and based upon the preponderance of the credible evidence in the record, I **FIND as FACT** the following:

1. On July 14, 2011, respondent was informed of the investigation and asked Driscoll, who was nearby, whether she was involved and she replied no; respondent believed her and was unaware of her connection to the investigation.

2. On July 18, 2011, respondent was unaware of Driscoll's connection to the investigation. On that day, he did not display a cold or hostile attitude toward Driscoll. He discussed with her, as he had previously, the need for keeping up with the workload because she was overwhelmed. His discussion with her at that time was in the context of reviewing options for addressing that issue and his statements were neither hostile nor threatening and did not objectively pose any threat to Driscoll or her job security. He took no action against her, retaliatory or otherwise, and there was no adverse impact regarding her position, salary or benefits.

3. On July 19, 2011, respondent's drafting of a maternity leave coverage advertisement was for the sole purpose of getting coverage for, not replacing, Driscoll during her maternity leave absence. At that time, respondent was unaware of Driscoll's connection to the affirmative action investigation. The proposed advertisement appropriately described the position as a twelve-month "maternity leave" position, including benefits, and it did not represent that the substitute would prevent or interfere with Driscoll's return from maternity leave. It

was not intended to harass or intimidate Driscoll, or retaliate against her, and viewed objectively it did not threaten or impact her job security or create a hostile work environment.

4. Respondent discovered that the investigation was based upon Driscoll's report of his comment about gaining weight or being pregnant on or about July 27, 2011, when, in the presence of his attorney, Andrew Babiak, he was interviewed by Frank Custode. At that time, Custode notified respondent of the prohibition against retaliation and that the matter should be kept confidential.

5. Babiak had advised respondent to maintain as much distance as possible from Driscoll and to generally remain in his office. He further advised respondent to do his job in a businesslike fashion.

6. On August 17, 2011, Custode issued his findings and recommendations based upon the investigation, providing a summary to respondent's attorney. The Board could have acted upon the recommendation that the parties meet to discuss and resolve the issues and the future working relationship between respondent and Driscoll, but it chose not to do so and, instead, took over the ongoing investigation.

7. On August 17, 2011, Driscoll was absent from work and respondent noticed a number of materials that were either misplaced or not properly filed. At that time, he prepared a memorandum addressed to Driscoll regarding proper maintenance and security of files and documents. He did not manufacture the memo at a later time to discredit her after he was suspended. He discussed the memo with her on the following day, but did not place it in her personnel file as that was not deemed necessary.

8. On September 8, 2011, respondent spoke to Driscoll about having left a staff member's confidential personnel file out in the open. Driscoll's job responsibility included maintaining a "well organized up-to-date filing system" and "preserving confidentiality." This was not the first occasion on which respondent discussed

with Driscoll the issue of properly maintaining documents and files. Further, respondent did not make any harassing, retaliatory, threatening, or intimidating statement toward Driscoll.

9. Also, on September 8, 2011, Driscoll voluntarily drafted a handwritten note, without pressure or coercion from respondent, indicating that she had reported that she never felt sexually harassed or discriminated against in any way, that she never filed any complaint against him with regard to sexual harassment, retaliation, or intimidation, and that she had informed Pat Leonhardt that she felt that she was being used as a "pawn" to get to respondent. After Driscoll wrote the note, respondent's attitude did not change to become "nicer," rather, has Driscoll herself testified, "he listened."

10. On September 16, 2011, respondent charged Driscoll with mailing NJ ASK test scores to parents. She placed the correspondence, with test scores, in the school mailbox, rather than deliver them to the post office, but the custodian knocked over the mailbox and unwittingly took the mail. Parents complained and respondent was made to issue an alert regarding the mail and apologize. Upon discovering what had happened with the mail, respondent addressed Driscoll because the mail was her responsibility, but he also addressed the custodian, Jerry Haag. Under the circumstances, his comments to the effect "You're killing me" or "It's all your fault. You're ruining my reputation," were unrelated to the affirmative action investigation, and did not constitute harassing, retaliatory, threatening, or intimidating conduct.

11. On October 3, 2011, Driscoll and respondent agreed to meet at the Readington Diner. At that time she offered to do whatever she could because she had "never filed [a] complaint," believed that the whole matter involved "miscommunication," and wanted to sit down with Christie [Burton] and settled this," as reflected by her voluntary handwritten notes made at that time. (R-6.) Respondent indicated that he did not see why she could not return to work at the school building.

12. On October 5, 2011, she voluntarily returned to work. At that time she voluntarily went into respondent's office and worked with him on two letters that she wanted to submit: one that dealt with confidential matters involved in the investigation that she would deliver to Christine Burton's home mailbox; and another that focused on the more public issue of respondent's qualifications and performance as superintendent, to be read at the Board meeting.

13. Both Driscoll and respondent participated in the drafting of the letters. Driscoll left early, for family reasons, and respondent sent her, by email, the draft of the letter to Burton (P-6), which Driscoll then edited. Her editing included inserting "intentionally" to relay that respondent had "never done anything intentionally to harm [her]," (P-6) but the content was primarily hers and reflected her sentiments regarding the matter.

14. The second letter (P-7) was likewise drafted on October 5, but signed by Driscoll on the following day, when she arranged for Richard Costa to read the letter aloud at the Board meeting after deciding not to attend for medical reasons.

15. Respondent did not impose retaliatory pressure upon Driscoll to draft, sign or present either letter.

16. Respondent did not engage in a pattern or practice of harassing, intimidating, or retaliatory conduct toward Driscoll. Further, he did not prevent her from filing any complaint or from participating in the Board's investigation of alleged harassment.

17. Respondent did not present letters to the Board that Driscoll did not author and did not intend to mislead the Board to believing that she authored them alone. The letters express her sentiments, and were reviewed, signed and either delivered or arranged to be delivered by her. Further, respondent did not impose pressure upon her, retaliatory or otherwise, with regard to the letters.

LEGAL ANALYSIS AND CONCLUSION

The New Jersey Legislature has provided standards for dismissal of a school district superintendent under N.J.S.A. 18A:17-20.2. Instead of "career tenure" for superintendents, the statute provides tenure for the duration of the contract between the local board of education and the superintendent, i.e., "[d]uring the term of any employment contract with the board, a superintendent shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming a superintendent or other just cause . . . ." N.J.S.A. 18A:17-20.2.

In the present matter, petitioner alleges that respondent engaged in "conduct unbecoming" a teaching staff member as the basis for his dismissal.[15] Conduct unbecoming a public employee has been described as an "elastic" phrase that includes "any conduct which adversely affects the morale or efficiency" of the public entity or "which has a tendency to destroy public respect for . . . [public] employees and confidence in the operation of . . . [public] services." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted); see Karins v. City of Atl. City, 152 N.J. 532 (1998). Behavior rising to the level of unbecoming conduct need not be predicated upon a violation of any particular rule or regulation and may be based simply upon a violation of the implicit standard of good behavior. City of Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429 (1955); In re Tuch, 159 N.J. Super. 219, 224 (App. Div. 1978). Therefore, the elements of conduct unbecoming a public employee such as a school superintendant include that the employee's position is in the public eye, that the position is subject to a promulgated or implicit standard of good behavior, that the position requires the employee to uphold that which is morally and legally correct, and that the subject conduct demonstrates that the employee is unsuitable for his or her duties as a public servant. Karins, supra, 152 N.J. at 554-55 (1998); see also In re Vitacco, 347 N.J. Super. 337, 344 (App. Div. 2002); Bd. of Educ. of Middletown v. Witmer, A-5128-07T3 at *46-47 (App. Div. Aug. 17, 2009), http://njlaw.rutgers.edu/collections/courts/. Succinctly stated, "the touchstone is fitness to discharge the duties and functions of

[15] The parties contest the rubric for evaluating this case by arguing that the standards applicable to a claim under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42, are useful. As an initial threshold, the present matter includes no claim under LAD or any other anti-discrimination law. Accordingly, the standards for evaluating a discrimination claim are not applicable to this case and thus such issues as the burden-shifting model or the ability of the Board to establish a prima facie claim for retaliation under the LAD are irrelevant.

one's office or position." In re Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974).

It is the obligation of the Board as petitioner to prove the tenure charges by a preponderance of the credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); In re Polk, 90 N.J. 550, 560-61 (1982). Precisely what is needed to satisfy this standard must be decided on a case-by-case basis. The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263, 274-75 (1958). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily depending on the number of witnesses, but the evidence having the greater convincing power. State v. Lewis, 67 N.J. 47, 49 (1975).

Here, the Board has not proved the tenure charges by a preponderance of the credible evidence. Indeed, there does not exist a greater weight of credible evidence that respondent engaged in either retaliation or dishonesty as charged.

Notably, Driscoll never filed a complaint against respondent and she suffered no adverse consequence with regard to her position, salary, or benefits. Respondent was unaware of her connection to the affirmative action investigation until July 26 or 27, 2011. Following the advice of counsel, respondent conducted himself in a business-like fashion at the office and did not direct animosity toward Driscoll. Respondent's interactions with Driscoll regarding the maternity-leave advertisement, maintenance of files, and mailing of test scores, did not constitute harassing, retaliatory, threatening, or intimidating conduct. Further, respondent did not impose retaliatory pressure upon Driscoll to draft, sign, or present either letter. And he did not present letters to the Board that Driscoll did not author, or intend to mislead the Board to believing that she authored them alone.

Therefore, under the specific charges, facts and circumstances of this matter, the Board has presented insufficient credible evidence that respondent did not uphold the "implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann, supra, 258

N.J. Super. at 40 (citation omitted). Accordingly, I **CONCLUDE** that the Board has not proven by a preponderance of credible evidence any of the allegations contained in the sworn statement of tenure charges.

DECISION AND ORDER

Petitioner has not proven by a preponderance of credible evidence that respondent's conduct constitutes conduct unbecoming a teaching staff member. Therefore, it is **ORDERED** that the tenure charges in their entirety be and hereby are **DISMISSED**.

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

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

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

January 2, 2014
DATE

ROBERT BINGHAM II, ALJ

Date Received at Agency: January 2, 2014

Date ~~Mailed~~ to Parties: January 6, 2014
FAXED

/bdt

APPENDIX

WITNESSES

For Petitioner:

Leah Driscoll
Christine Burton
Frank Custode, Esq.
Patricia Leonhardt

For Respondent:

Richard Costa
Andrew Babiak
Dominic Costanzo

EXHIBITS

Joint:

J-1 Statement of Tenure Charges
J-2 Certificate of Determination
J-3 Respondent's Answer to Charges
J-4 Respondent's employment contract

For Petitioner:

P-1A Costanzo's memorandum to Elizabeth Nastus, dated April 21, 2008
P-1B Driscoll letter to Costanzo, dated April 18, 2008
P-2 March 1, 2011, reprimand concerning fire drills (for form only)
P-3 Letter of reprimand, dated August 17, 2011
P-4 Handwritten note, dated September 8, 2011
P-5 Email sent from Costanzo to Driscoll, dated October 5, 2011
P-6 Driscoll letter to Burton, dated October 5, 2011
P-7 Driscoll letter to Burton and Board, dated October 5, 2011
P-8 Impartial Fact-finding Report, dated October 6, 2011

P-9 Custode letter to Driscoll, dated July 20, 2011
P-10 Custode letter to Costanzo, dated July 27, 2011
P-11 Custode Supplemental Report, dated October 6, 2011
P-12 Custode Supplemental Report, dated October 14, 2011
P-13 Superintendent Job Description
P-14 Nondiscrimination/Affirmative Action policy
P-15 Driscoll Evaluation report 2007-2008, dated May 21, 2008
P-16 Driscoll Evaluation report 2008-2009, dated June 1, 2009
P-17 Driscoll Evaluation Report 2009-2010, dated June 1, 2010

For Respondent:

R-1 Letter from Driscoll, dated July 19, 2011
R-3 Letter from Custode to Babiak, dated September 7, 2011
R-6 Driscoll's handwritten notes
R-7 Diner receipt, dated October 3, 2011
R-8 Diner receipt, dated October 6, 2011
R-11 Employment advertisement
R-12 2008 Job Posting
R-19 Custode's Impartial Fact-Finding Report
R-20 Email Babiak to Gagliardi, dated July 26, 2011
R-22 Affidavit of Leah Driscoll with attached exhibits
R-24 Driscoll absence summary, 2010-2011 school year
R-25 Maternity-leave position advertisement
R-26 Job Description for Administrative Assistant
R-27 Costanzo memorandum to Debbie Krupt (sic), dated December 13, 2010
R-28 Email from Leonhardt to Costanzo, dated July 15, 2011
R-29 Email from Babiak to Gagliardi, dated August 3, 2011
R-30A Custode email to Babiak, dated August 24, 2011
R-30B Babiak email to Custode, dated August 23, 2011
R-31 Babiak email to Gagliardi, dated September 26, 2011
R-32 Costanzo's handwritten notes, dated July 27, 2011
R-32 Costanzo's typed notes, dated July 27, 2011
R-33 Costanzo's handwritten notes, dated July 26, 2011

R-33A Costanzo's typed notes, dated July 26, 2011

R-34 Costanzo's handwritten notes, undated

R-34A Costanzo's typed notes, undated

The non-sequential numbering of exhibits reflects the fact that numerous pre-marked exhibits were neither identified nor offered into evidence.

144-14

LOVING CARE AGENCY, INC. AND K.S. and K.A., ON BEHALF OF MINOR CHILD, A.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners sought to compel the respondent Board to allow Loving Care Agency (LCA) to continue to provide the medically necessary clinical nursing services required by A.A. while she attends school in the Trenton school district, pursuant to the Parent Choice Act, *N.J.S.A.* 18A:40-3.3(b). The respondent Board contends that K.S. and K.A. are required to use the home nursing service that the school district is now contracted with to provide services to students during school hours. LCA has agreed to provide the services to A.A. at the same rate the Board has agreed to pay the other agency, regardless of how that rate is calculated. Both parties filed motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the Parent Choice Act, *N.J.S.A.* 18A:40-3.3(b), governs the employment of nursing personnel for medically fragile students, and provides that the parents or legal guardian shall have the option to choose a provider to render clinical nursing services so long as the cost to the school district remains neutral; under the circumstances in this matter, the District's cost for LCA's services would be the same as its contracted rate with the other agency; and the Board's contention that the parents' chosen service provider must bid for the entire district runs counter to the purpose of the Parent Choice Act, which serves to protect parents from having a winning bidder forced upon them. The ALJ granted the petitioners' motion for summary decision, denied the Board's motion for summary decision, and ordered that the parents of AA be allowed to choose LCA as the provider of medically necessary clinical nursing services for their daughter.

Upon a full and independent review of the record, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, for the reasons expressed therein.

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

April 7, 2014

at the same rate respondent agreed to remit to its current contracted service provider for the same services.

Furthermore, the Commissioner agrees with the ALJ's conclusion that the parents' choice must be honored notwithstanding the fact that the district has contracted with a different service provider through the public bidding process outlined in the Public School Contract Law, *N.J.S.A.* 18A:18A-1 to -59. A contrary holding would render the Parent Choice Act nugatory.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons stated therein; the petitioners' motion for summary decision is hereby granted; and the respondent's motion for summary decision is hereby denied. A.A. shall receive required clinical nursing services through Loving Care Agency, Inc., while she attends school in respondent's district, so long as the cost of those services remains the same as, or less than, the cost of those services by respondent's contracted service provider.

IT IS SO ORDERED.[1]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/07/14

Date of Mailing: 4/08/14

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7261-13
AGENCY DKT. NO. 103-5/13

LOVING CARE AGENCY, INC. AND
K.S. AND K.A. ON BEHALF OF
MINOR CHILD, A.A.,
Petitioners,
v.
BOARD OF EDUCATION OF THE
CITY OF TRENTON, MERCER COUNTY,
Respondent.

Christopher J. Dalton, Esq, for petitioners (Buchanan, Ingersoll and Rooney, attorneys)

Rita F. Barone, Esq. for respondent (Purcell, Mulcahy, Hawkins, Flanagan and Lawless, LLC, attorneys)

Record Closed: January 10, 2014 Decided: February 18, 2014

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Petitioners Loving Care Agency (LCA) and parents K.S. and K.A. on behalf of their minor child, A.A., seek an Order to require the respondent Trenton Board of Education (Board) to allow LCA to provide the medically necessary clinical nursing services to A.A. while she attends school in the district pursuant to the Parent Choice Act, N.J.S.A.18A:40-3.3(b).

PROCEDURAL HISTORY

On or about February 7, 2013, petitioners filed a complaint in the Superior Court Chancery Division. On April 29, 2013, the parties entered into a Consent Order to allow the case to be transferred to the New Jersey Department of Education pursuant to R. 1:13-4(a). On May 23, 2013, the Department of Education filed the complaint with the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On October 15, 2013, the parties submitted a Joint Stipulation of Facts. Pursuant to an extension for good cause, on November 15, 2013, the Board filed a motion for summary decision. On December 2, 2013, petitioners cross-moved for summary decision and opposed the Board's motion for summary decision. On December 3, 2013, the Board opposed petitioners' motion for summary decision. I heard oral argument on January 10, 2014.

STIPULATED FACTS

1. Petitioners K.S. and K.A. are the parents and legal guardians of their minor daughter, A.A.[1]
2. A.A. is a medically-fragile minor child for purposes of N.J.S.A. 18A:40-3.3(b).

[1] The parents and minor child are identified simply by their initials to maintain the confidentiality of the child's identity to the extent practicable.

3. A.A. is enrolled as a student within the Trenton Public School District, located in Mercer County, New Jersey.
4. Respondent Board administers the Trenton Public School District.
5. LCA is engaged in the business of providing clinical nursing services to medically-fragile children.
6. LCA provides the services throughout New Jersey and, specifically, within the geographic area under the control and supervision of the Board.
7. At the request of K.S. and K.A., LCA provided A.A. with the necessary services she required while attending classes in the Trenton Public School District during the 2012-2013 school year.
8. On or about July 11, 2012, the Board entered into an agreement with Bayada Home Health Care (Bayada) wherein Bayada agreed to provide the Board with RNs and LPNs to administer services to the students enrolled within the Trenton Public School District.
9. On or about October 15, 2012, subsequent to the July 11, 2012, Agreement between the Board and Bayada, K.S. and K.A. sent correspondence notifying the Board that they wanted LCA to continue to provide the services to A.A. during school hours. (See correspondence dated October 15, 2012, from K.S. and K.A. to the Board, attached hereto as Exhibit A).
10. Following their October 15, 2012, request, the Board advised K.S. and K.A. that they were required to use Bayada to administer the necessary services to A.A. during school hours. (See correspondence from the Board to "Parents/Guardians" dated October 18, 2012, attached hereto as Exhibit B).
11. On or about November 1, 2012, LCA sent correspondence to the Board reiterating K.S. and K.A.'s desire to have LCA continue to provide the services to A.A. during school hours. (See correspondence dated November 1, 2012, attached hereto as Exhibit C).
12. In that November 1, 2012, correspondence, LCA also informed the Board that it was willing to provide the services to A.A. during school hours at the

same rate the Board agreed to remit to Bayada to provide the same services. (Ibid.)

13. Although the Board's October 18, 2012, correspondence explicitly informed K.S. and K.A. that, effective November 1, 2012, A.A. would start receiving her services through Bayada, to date, such a transfer has not yet occurred.

DECISION

Summary Decision Standard

N.J.A.C. 1:1-12-5 governs motions for summary decisions. The provisions of N.J.A.C. 1:1-12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. Pursuant to these rules, a case may be dismissed before it is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12-5(b). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submissions of the issues to the trier of fact." R.4:46-2.

When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth, by affidavit, specific facts showing there is a genuine issue resolvable only by an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). A judge is to scrutinize the competent evidential materials presented, in a light most favorable to the non-moving party, and consider whether a rational fact-finder could resolve the disputed issue in favor of the non-moving party. Id. at 540.

The New Jersey Supreme Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, 142 N.J. at 539.

Legal Analysis

In May 2012, the Legislature enacted the Parent Choice Act, N.J.S.A. 18A:40-3.3(b), which governs the employment of nursing personnel for medically fragile students. A "medically fragile student" is a "school-aged child who suffers from a life-threatening medical condition, and as a result of such condition, requires more individualized and continuous care than is available from a school nurse." N.J.S.A. 18A:40-3.3. The Parent Choice Act provides that:

> [t]he parent or legal guardian of a medically fragile student shall have the option to choose a provider to render clinical nursing services to the student, and the State Board of Education shall allow the provider chosen by the parent or legal guardian to render such services to the student only if the cost to the school district remains neutral.
>
> [N.J.S.A. 18A:40-3.3(b).]

The legislative history of this provision has been codified as N.J.S.A. 18A:40-3.2, which states that

> [m]edically fragile students who require clinical nursing services while attending school should expect and receive the same level of care they receive at home. Maintaining a continuity of care for medically fragile students creates a safer environment at school, fosters learning, and gives parents confidence that their children's medical needs are being met by qualified health care providers . . . [t]herefore, it is in the public interest that, in order to guarantee the health and safety of medically fragile students while attending school, . . . parents should be given the option to choose the provider who will render clinical nursing services to their children while attending school, if the cost remains neutral to the school district.
>
> [N.J.S.A. 18A:40-3.2(b).]

The Board has raised two issues in its motion. First, the Board argues that LCA's offer to match Bayada's hourly rate is not cost-neutral, because the contract with Bayada is capped at $300,000 per year. Therefore, the Board garners a cost benefit by Bayada's servicing as many students as possible. However, LCA has agreed to accept the same rate as Bayada, regardless of how that rate is calculated. Thus, if the $300,000 cap is met, thus reducing the per-student cost, LCA has agreed to accept the reduced rate. Further, the Board has not produced evidence to indicate that the cap is close to being met this year. Because LCA has agreed to accept a pro rata reduction in costs, the parent's choice to use LCA is cost-neutral to the Board.

The second issue raised by the Board is that the Parent Choice Act must be harmonized with the Public School Contract Law, N.J.S.A. 18A:18A-1 to -59. The Board is concerned about maintaining a fair bidding process. Specifically, the Board fears that some providers will not place bids for fear of bidding too low, but then, after a low bid has been selected, the non-bidding provider will urge parents to "choose" them as service provider, and then offer to match the low bid. The Board's position is that if a provider is servicing a child in the district, it should plan to bid competitively for the entire district. However, the Board is imposing a hurdle in the Parent Choice Act that is not expressed in the statute. The statute does not express a precondition that an agency compete in the RFP process. This is an issue that the Board would need to raise with the Legislature, not at the OAL.

The Legislature is presumed to be familiar with its own past enactments and judicial interpretation. In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349, 359 (2010); Coyle v. Bd. of Chosen Freeholders, 170 N.J. 260, 267 (2002). In M.C. o/b/o B.C. v. Trenton Bd. of Educ., EDS 6948-13, Initial Decision (June 10, 2013) <http://njlaw.rutgers.edu/collections/oal/>, the Board entered into a public contract bid with Bayada to provide services at the rate of $49 per hour. However, the mother of a medically fragile student was not satisfied with Bayada's services, and sought to have Newborn Nurses provide care. Newborn Nurses agreed to match the $49 per hour rate. At issue was who has the right to choose a provider under the Parent Choice Act. ALJ Schuster determined that the parents had the right to choose, reasoning that the Legislature could be presumed to have been aware of the Public

School Contract Law when it enacted the Parent Choice Act, and that "the Legislature intended the Public School Contract Law to be superseded by the Parent Choice Act when there would be a conflict between the two." M.C. o/b/o B.C., supra.

The Board's contention that the parents' chosen Service provider must bid for the entire district runs counter to the purpose of the Parent Choice Act. The Act serves to protect parents from having a winning bidder forced upon them, giving them greater control over the day-to-day care of their medically fragile children.

CONCLUSION

For the foregoing reasons, I **CONCLUDE** that petitioners' motion for summary decision is **GRANTED**. The express language of the Parent Choice Act gives the parents the right to choose A.A.'s Service provider so long as it is cost-neutral to the Board. Because LCA has agreed to match the rate the Board would otherwise pay to Bayada under its contract, the parents' choice to utilize LCA is cost-neutral. Additionally, nothing in the statutory language of N.J.S.A. 18A:40-3.3(b) required LCA to place a bid for the entire district. Conversely, the Board's motion for summary decision is **DENIED.**

ORDER

Based on the foregoing, I **ORDER** that the parents of A.A. be allowed to choose LCA as the provider of medically-necessary clinical nursing services to A.A. while she attends school in the Trenton Public School District since LCA has agreed to provide such services at the same fixed hourly rate as that paid to the Board's contracted provider.

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

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

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

February 18, 2014
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: February 18, 2014

Date Mailed to Parties: February 20, 2014

cmo

145-14

BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
RUSSELL MILLER,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioning Board sought a declaratory ruling that respondent, Russell Miller, is ineligible to serve as a member of the Board due to a conflict of interest prohibited by *N.J.S.A.* 18A:12-2. Respondent, who was elected to the Westwood Board of Education in November 2012, is either an owner or employee of a company – Westwood Truck Center – that has provided vehicle maintenance services to the Board since at least 2004. Both parties argued that the dispositive issue in this matter is whether the respondent owns Westwood Truck Center.

The ALJ found that: *N.J.S.A.* 18A:12-2 governs this dispute, as the New Jersey Supreme Court has held that *N.J.S.A.* 18A:12-2 imposes ongoing qualifications for membership on a board of education, and the provisions of the subsequently-enacted School Ethics Act do not supersede *N.J.S.A.* 18A:12-2; regardless of whether respondent is an owner or employee of Westwood Truck Center, an impermissible conflict of interest existed under the regulations; however, the disqualifying conflict of interest was cured, and thereby mooted, when the contract with Westwood Truck Center terminated on June 30, 2013; and after that date, no conflict of interest existed. Accordingly, because the contract has been terminated, the ALJ concluded that the respondent is not required to forfeit his seat on the Board.

The Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision in this matter.

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

April 7, 2014

OAL DKT. NO. EDU 6392-13
AGENCY DKT. NO. 57-3/13

BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
RUSSELL MILLER,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the respondent, Russell Miller, had an impermissible and disqualifying conflict of interest pursuant to *N.J.S.A.* 18A:12-2 when he was sworn in as a member of the Westwood Regional Board of Education (Board). The Commissioner is also in accord with the ALJ's determination that the disqualifying conflict of interest was cured, and thereby mooted, once the Board's contract with Westwood Trucking Center terminated on June 30, 2013. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/07/14
Date of Mailing: 4/08/14

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06392-13
AGENCY DKT. NO. 57-3/13

BOARD OF EDUCATION OF THE WESTWOOD REGIONAL SCHOOL, DISTRICT, BERGEN COUNTY,

Petitioner,

v.

RUSSELL MILLER,

Respondent.

Rodney T. Hara, Esq., for petitioner (Fogerty & Hara, attorneys)

Russell Miller, respondent, pro se

Record Closed: January 8, 2014 Decided: February 21, 2014

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

STATEMENT OF THE CASE[1]

Petitioner, Westwood Regional Board of Education (the Board), requests a declaratory ruling that respondent, Russell Miller (Miller), is ineligible for membership on

[1] The relevant facts in this matter are entirely undisputed, though Miller disputes a number of irrelevant facts. (See Answer.) For the sake of completeness, such irrelevant, but contested, facts are footnoted.

the Board, due to a conflict of interest prohibited by N.J.S.A. 18A:12-2. (Pet. 1.) In November 2012, Miller was elected to the Board. (Id. at 2.) Miller is either an owner or employee of SJI Inc. t/a Westwood Truck Center (Westwood Truck Center). (See ibid.; Mot. to Dismiss.) On February 20, 2004, on behalf of Westwood Truck Center, Miller submitted a bid for a vehicle maintenance contract to the Board.[2] (Pet. 2.) The Board awarded the contract to Westwood Truck Center, which has provided vehicle maintenance services to the Board ever since. (Ibid.) Miller signed all documents related to that contract, on behalf of Westwood Truck Center, and was the designated bidder. (Ibid.) The parties agree that "[a]t all time[s] during the contractual relationship between the Board and Westwood Truck Center, Miller was the sole individual who dealt with the Board on all business matters. Miller signed all business vouchers for payment of services rendered by Westwood Truck Center for the Board." (See ibid.; Answer.) During the 2013 election campaign, Miller presented himself as an "owner and operator of the Westwood Truck Center."[3] (Ibid.)

Before Miller assumed his membership on the Board, the Board secretary, Keith A. Rosado (Rosado), informed Miller that unless Westwood Truck Center rescinded the contract, Miller had an impermissible conflict of interest that precluded his membership on the Board. (Ibid.) Miller responded, "there would be no issue due to the fact I do not own the company." (Answer 2.) Accordingly, the Board requested, and Miller submitted, documentation that purported to establish Miller does not own Westwood Truck Center. (Pet. 4-5.) Subsequently, but before resolving the conflict-of-interest issue, Miller certified that he was eligible for membership on the Board, and was sworn in on January 3, 2013. (Id. at 5.)

In reply, Miller provided additional factual assertions, which underscore the proper resolution of this matter. (Answer 3.) First, he generally asserts that he had the authority to terminate the contract with the Board on behalf of Westwood Truck Center,

[2] Miller alleges that the contractual relationship between the Board and Westwood Truck Center dates back even earlier, to 1997. (Answer 1.) Furthermore, he asserts that he does not recall whether he personally submitted the bid. (Ibid.)

[3] Miller now asserts, "I do not remember specifically stating that I was the owner of the Truck Center last election cycle." (Answer 2.)

but that the Board refused to allow him to cancel the contract. (Ibid.) Specifically, he asserts:

> [P]rior to the reorganization meeting, I was seated in the Board room with [Rosado], [Rodney T. Hara, another board member], and the balance of the seated board. This problem was discussed and at that point, to avoid this situation, I volunteered the termination of the contract. In an email from [Rosado] (included), [Rosado] states: "Due to the fact that Westwood Regional BOE has been doing business with Westwood Truck Center for [sic] since 1997 and that you have been the sole contact of said business it has been an understanding that ownership lied [sic] directly with you." I have been the sole contact since 1997 and that indicates that I am the representative for [Westwood Truck Center]. This also indicates that I was the person who approved the current contract and would be the person who would terminate the contract. [Hara] refused me the opportunity. [Hara] also answered his own question if I was [sic] an interest. [Hara] instructed me that if I claim to have no interest, I cannot surrender the contract. At that point this issue could have been resolved. Either I am the interest [sic] and will surrender the contract, or I have no authority to do so, the reason being I am not an interest [sic]. It is also very disappointing that [Rosado] and [Hara] do not understand the basics of a family business. That concept that I was unable to make a decision on behalf of the company by [Hara] is very insulting. [Hara] has no influence on the company where I am employed.
>
> [Ibid.]

Additionally, Miller asserts, "[m]y offer still stands that the company will offer to surrender the contract with no prejudice. If there is no prohibited act present, when the contract comes out for bid again, the Westwood Truck Center will rebid it." (Ibid.)

Second, Miller generally asserts that any financial gain he might receive from the contract is *de minimis*. (Ibid.) Specifically, he asserts that the Westwood Truck Center financial records reveal that "the amount of revenue from [the Board] is about one and one half of a percent of the operation. This also translates to about one tenth of one percent of [the Board's] operating budget. The possible financial gain, if there was one, is very limited." (Ibid.)

PARTIES' ARGUMENTS

Both Miller and the Board appear to argue that the dispositive issue is whether Miller "owns" Westwood Truck Center. (See Pet.; Answer.) Miller additionally argues that "N.J.S.A. 18A:12-24, prohibited acts[,] is a much more accurate statute in this circumstance. Again, the documents that were provided validate that nobody in my immediate family has any interest in [Westwood Truck Center], removing the possibility of prohibited acts between [Westwood Truck Center] and [the Board]." (Answer 3.) Miller explains that "[e]ven if I had an interest in the company, I had to the minute that I was being sworn in to surrender that interest. As long as I surrender the interest to anybody but my immediate family, there would be no conflict. [N.J.S.A.] 18A:12-24 is explicit." (Ibid.)

TESTIMONY

Keith Rosado

Keith Rosado has been employed by the Westwood Board of Education as the business administrator and Board secretary since January 1, 2007. As Board secretary he maintains records related to the Board and minutes of Board meetings. As administrator he is responsible for the finances of the district and maintains all of the contracts the district has with providers.

Rosado testified that respondent was the lead representative for Westwood Truck, the company that services all the district vehicles, and he believed respondent to be the owner. Westwood Truck submitted a Time and Material Bid for maintenance of vehicles in the district (P-1) which was signed by respondent as the representative for SJI, t/a Westwood Truck Center. Respondent also signed the affidavit of non-collusion as president, and under the list of owners indicated that he owned 100 percent of the company. He also signed the affirmative-action questionnaire as president, and the contract was ultimately awarded to SJI.

There were five years of renewals of the contract for services for the repair and maintenance of district vehicles. (P-2.) All of the purchase orders and signed vouchers for the 2009, 2010, 2011 and 2012 budget years were signed and submitted by respondent. (P-4; P-5; P-6; P-7.) As the school administrator he dealt with respondent only, who was the sole contact person.

In November 2012 there was a school board election at which respondent was a candidate for the Board. Rosado testified that he spoke to respondent about his candidacy and about the conflict, and indicated that he advised respondent that if he were to win election, there would be a conflict of interest, and that he could either keep the contract or keep the seat on the Board. During the election respondent held himself out to the public as the owner of the truck company (P-8), and eventually won election to a seat on the nine-member board. The Board is comprised of five members from Westwood and four from Washington Township, Bergen County.

Rosado testified to an email he received from respondent on November 30, 2012, (P-9) wherein respondent indicates he has "no interest" in SJI. Rosado believed this was something they needed to investigate, as respondent had been listed as owner on all of the paperwork that the district had. Rosado responded to respondent's email (P-10) indicating that he would need more information regarding stockholder equity and breakdown of ownership percentages. Respondent thereafter replied with an email purporting to attach his certificate of incorporation; however, the document was actually captioned at the top as a "corporation status sheet" and was unsigned. It indicated that SJI was incorporated October 29, 1981, and that Robert Miller is the incorporator and owns 100 shares. (P-11.) Rosado testified, however, that respondent had signed the notarized affidavit of non-collusion as president and the affirmative-action questionnaire as owner. Also, the bid documents that respondent submitted all indicated he was 100 percent owner. A series of emails ensued (P-12, P-13, P-14 & P-15) whereby Rosado requested corporate and individual tax returns, which he did not receive. Schedule G of a 2010 tax return was provided and respondent was asked for additional information and more detail. He ultimately provided his 2011 Form 1040 and one page of the corporation tax return from 2010, neither of which was signed and neither of which resolved the ownership issue. By this time, however, respondent had been elected to

the Board as of November 2012. Rosado again asked via email for form E from the corporate return, which he believed would list ownership, and ultimately received a Schedule E with no indication as to what year it was for, although it appeared to be for the 2000–2001 tax year. Nothing else was provided by respondent. (P-16.) Rosado testified that this information did not match the information they had already regarding who was president and owner, which respondent had previously certified to. Indeed, this information contradicted the documents that respondent had submitted in connection with the bidding process.

Rosado testified that an executive session was convened before the Board meeting on January 3, 2013, and the Board felt that respondent should not take the oath at that meeting, but should wait until the second meeting in January. Ownership could be clarified in the interim, and the contract terminated if respondent still owned the company. Rosado testified that respondent was asked to wait to be sworn in; however, respondent did not wish to wait, and as such took the oath of office at the January 3, 2013, reorganization meeting. (P-17.) Nothing was ever received from respondent's father, who respondent claimed was the owner of the company, disavowing the contract. Additional purchase orders and signed vouchers were submitted covering the period of time from February 25, 2013, through August 21, 2013 (P-18), during which period respondent was a sitting member of the Board. The purchase orders and vouchers were submitted by respondent and signed by him and the conflict was never resolved.

Ultimately, on January 24, 2013, a resolution was passed authorizing the township attorney to petition the Commissioner of Education for a declaratory ruling as to the existence of a conflict. (P-19.) This was the meeting the Board wanted respondent to wait for before being sworn in, but respondent declined to do so. The contract with SJI ended on June 30, 2013.

On August 29, 2013, the Board approved an interlocal agreement between the district and the Borough of Westwood for the repair and maintenance of district vehicles, and the Board felt that this resolved the conflict. (P-20.)

Carol Mountain

Carol Mountain has been a trustee of the Westwood Board of Education for ten years and at the 2012 election was elected president of the Board of Education. She was aware of the concerns regarding the conflict that she believes precluded respondent from being a Board member. Mountain testified that she had seen the contracts before and had to approve them, and knew respondent was the owner of SJI. He always represented himself as the owner, and when respondent was on the ballot she knew they would have a conflict.

Mountain testified that during the election respondent held himself out as owner and operator of SJI (P-8), and ultimately the documents they requested of him were untimely and did not answer their questions. She could not understand the delay in resolving this issue, which she articulated to Rosado. Mountain indicated that the Board was extremely conscious of ethical standards and Board policy because they had just been through a difficult and public removal of the superintendent and a huge public outcry. She wanted to be sure that they were complying with all ethical standards and did not want to seat someone with a conflict of interest. She testified that it was unclear to the Board and they wanted to be sure; however, respondent wanted to be seated at the reorganization meeting. The Board unanimously felt he should wait, but ultimately they wanted a ruling from the Commissioner. She testified that the Board discussed the conflict at a closed session and respondent offered to "suspend" the contract and then offered to rescind it, all the while indicating he did not own SJI, and so the Board did not understand how he could then rescind the contract. Mountain indicated that respondent could have addressed the conflict before the meeting later in January and choose not to. He was given the opportunity to provide documents from his father, who he indicated owned the company, so that the contract could be disavowed, but he never did so. She stated that she believes that if Miller's father had been able to disavow the contract and did so, that would have resolved the conflict.

Russell Miller

Russell Miller testified that he made sure he had no interest in the company. He manages and maintains it and handles all municipal contracts. He testified that at the reorganization meeting he offered to terminate the contract. He indicated that he continued to service the district vehicles so that they had coverage, but that he is only a salaried employee and not an owner. Miller stated that he signed all of the other documents as president and owner to "facilitate things," because his father is often away, but indicated he did not do so "with malice." He testified that the labor provided to the district vehicles is at cost, and that they only mark up parts, and, as such, are performing a service to the community. He also testified that they service the ambulances and fire trucks at no charge to the municipality. Miller testified that he knows he should not have signed documents as owner and president. He also agreed that he never provided any documents to the Board to indicate that he had the authority to cancel the contract, and knew there was a question regarding ownership. He agrees that he was given the chance to provide documentation. Miller testified that it was suggested that he defer taking the oath so that the contract could be cancelled, but he did not agreed to that because he "shouldn't have had to." He felt that there was no problem and no conflict, and that is why he voted for the resolution to seek clarification from the Commissioner. Miller agreed that he represented himself to the public as the owner and operator of SJI.

DISCUSSION

I. N.J.S.A. 18A:12-2 governs this dispute, because the New Jersey Supreme Court squarely held that N.J.S.A. 18A:12-2 imposed ongoing qualifications for membership on a board of education, and the provisions of the later-enacted School Ethics Act do not supersede N.J.S.A. 18A:12-2.

The applicable statute provides that "[n]o member of any board of education shall be interested directly or indirectly in any contract with or claim against the board . . . ." N.J.S.A. 18A:12-2. Therefore, "in rather plain language, the statute sets out clear prohibitions against board members having inconsistent claims against the board, interests in contracts with the board, and specific office-holding." Bd. of Educ. of Sea

Isle City v. Kennedy, 196 N.J. 1, 13 (2008). Clearly, "the Legislature intended that no one be permitted to commence their service in office as a local board of education member without swearing that he or she meets all qualifications for office at the time of taking office." Id. at 13–14. Nevertheless, the New Jersey Supreme Court has noted that "a qualification to assume office does not necessarily equate to a required forfeiture of office when a like issue arises during the term of a sitting member." Ibid.

The School Ethics Act (SEA) governs the conduct of sitting board members. See N.J.S.A. 18A:12-22. While the requirements of the SEA and N.J.S.A. 18A:12-2 largely overlap, the SEA appears to be more lenient. Cf. N.J.S.A. 18A:12-24; N.J.S.A. 18A:12-2. For example, while N.J.S.A. 18A:12-2 creates a blanket prohibition on even indirect interests in claims against the board, N.J.S.A. 18A:12-24 provides that "[n]othing shall prohibit any school official, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his, or their, own interests." N.J.S.A. 18A:12-24(j). Similarly, while N.J.S.A. 18A:12-2 appears to create a blanket prohibition on even indirect interests in contracts with the board, N.J.S.A. 18A:12-24(a) provides that "[n]o school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest." The same regulation further prohibits a school official from acting "in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment," or "in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family." N.J.S.A. 18A:12-24(c). Accordingly, the enactment of the SEA suggests that N.J.S.A. 18A:12-2 merely outlines threshold requirements for membership on a board, while the SEA outlines the ongoing obligations of board members. Cf. N.J.S.A. 18A:12-22; N.J.S.A. 18A:12-2. In Sea Isle, the Court addressed this ambiguity with respect to the prohibition on inconsistent claims. Sea Isle, supra, 196 N.J. at 17. After a board member filed a special-education claim against the board on behalf of his son, the board petitioned for a declaratory ruling that such claim created an impermissible conflict of interest in violation of N.J.S.A. 18A:12-2, which required the

board member's removal. The board member argued that by enacting the SEA, the Legislature intended "for board members to be able to represent their personal interests in 'negotiations and proceedings' involving their school boards. However, by treating N.J.S.A. 18A:12-2 as an ongoing and absolute requirement for sitting board members, the Commissioner rendered N.J.S.A. 18A:12-24(j) inapplicable for board members." Id. at 11. The board member urged that "[e]ither the later N.J.S.A. 18A:12-24(j) could be read to have impliedly repealed N.J.S.A. 18A:12-2, or the later-enacted statute could be read *in pari materia* with N.J.S.A. 18A:12-2, in which case N.J.S.A. 18A:12-24(j) would require that his conduct be held not to constitute a disqualifying conflict of interest under N.J.S.A. 18A:12-2." Ibid. First, the Court noted that numerous administrative decisions that addressed N.J.S.A. 18A:12-2

> demonstrate a willingness to engage in a careful examination of a board member's asserted conflicting interest in a claim against a board and, further, to find that not all claims in which a board member has an interest constitute a "substantial conflict" requiring removal from office as the sole remedy.
>
> [Id. at 16.]

The Court noted that "[r]ead broadly, the later-enacted SEA could contradict N.J.S.A. 18A:12-2's interest in prohibiting substantial conflicting claims that pit a board member's interest in a claim against the interests of the board." Ibid. Nevertheless, the Court concluded that "the two statutes are readily capable of being harmonized." Id. at 17. The Court explained that the Legislature's approval of a board member's right "to pursue resolution of some personal issues, interests, or disagreements with a school district through negotiations and even 'proceedings' is not repugnant to the earlier recognition by the Commissioner that not all 'claims' against a board will require disqualification and removal from office under N.J.S.A. 18A:12-2." Ibid. Therefore, the Court characterized "the SEA's exemption as a legislative expansion of that previously recognized, limited case-law exception to the rule against inconsistent claims." Ibid. Accordingly, the Court held that "a board member should not be removed from office merely because he or she has advanced any claim 'in a proceeding' against a school district involving that individual or an immediate family member's interests." Id. at 17–

18. Rather, "[s]ubstantial, disqualifying conflicts of interest should be identified either by type of claim, i.e. specific monetary claims by the member or a family member as in a tort claim, or by type of proceeding." Id. at 18. Finally, the Court concluded that "[u]ltimately, however, the line between acceptable and prohibited activities by board members, in respect of the advancement of personal or a family member's interests in proceedings against a board of education, may be resolved through the prism of a fact-specific inquiry." Ibid. Because that specific claim included a claim for "substantial monetary relief," the Court concluded that removal was appropriate. Id. at 22.

Here, Miller claims that "N.J.S.A. 18A:12-24, prohibited acts[,] is a much more accurate statute in this circumstance. Again, the documents that were provided validate that nobody in my immediate family has any interest in [Westwood Truck Center], removing the possibility of prohibited acts between [Westwood Truck Center] and [the Board]." (Answer 3.) Miller explains that "[e]ven if I had an interest in the company, I had to the minute that I was being sworn in to surrender that interest. As long as I surrender the interest to anybody but my immediate family, there would be no conflict. [N.J.S.A.] 18A:12-24 is explicit." (Ibid.) Miller is apparently referencing N.J.S.A. 18A:12-24(a), as he focuses on the term "immediate family." N.J.S.A. 18A:12-23. Indeed, while Miller fails to cite such, the SEA defines an "interest" as "the ownership or control of more than 10% of the profits, assets, or stock of a business but shall not include the control of assets in a labor union." N.J.S.A. 18A:12-23. However, N.J.S.A. 18A:12-24 provides that "[n]o school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest." N.J.S.A. 18A:12-24(a) (emphasis added). Assuming, arguendo, that Miller divested any ownership interest in Westwood Truck Center, the SEA further prohibits Miller from engaging "in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest." N.J.S.A. 18A:12-24(a). The parties agree that Miller is engaged in the business of Westwood Truck Center, either as an owner or employee. (See Pet.; Answer.) Moreover, the regulations further provide that he may not act "in his official capacity in any matter where he . . . has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment," or

"in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family." N.J.S.A. 18A:12-24(c). Presumably, employment with a vendor qualifies as a "direct or indirect financial involvement" and "creates some benefit to the school official." See ibid. Therefore, even if N.J.S.A. 18A:12-24 controlled this matter, rather than N.J.S.A. 18A:12-2, I **FIND** that Miller's employment with Westwood Truck Center creates a conflict of interest.

II. Miller had an impermissible conflict of interest, because Miller is indisputably either an owner or employee of Westwood Truck Center, and because the specific facts of this case suggest an impermissible conflict of interest whether Miller is a an owner or mere employee.

Moreover, as with claims against a board, the Legislature's apparently more lenient approach in the SEA "is not repugnant to the earlier recognition by the Commissioner that not all [contracts with] a board will require disqualification and removal from office under N.J.S.A. 18A:12-2." Ibid. For example, administrative decisions have concluded that a board member's employer's successful bid on a contract with the board violated N.J.S.A. 18A:12-2. See Oehlke v. Tewksbury Twp. Bd. of Educ., 93 N.J.A.R.2d (EDU) 792, 797. In Oehlke, a board member was employed as a bus driver with a bus company that bid on a contract with the board. Notably, the contract was not awarded until after the board member was elected to his seat. In modifying the Commissioner of Education's (Commissioner's) final decision, the State Board of Education (State Board) concluded that "the prohibition under the statute was not, as the Commissioner conclude[d], respondent's employment with a bus company bidding for contracts with the Board. Rather, it was his employment with the bus company once it was actually under contract with the Board." Ibid. The State Board explained that

> [n]otwithstanding any possible constraints on respondent's conduct as a board member while his employer pursued a transportation contract therewith, he was not subject to potential disqualification from service on the Board under N.J.S.A. 18A:12-2 until such time as [the bus company] and the Board entered into a contractual relationship, in which respondent had a direct interest.

[Ibid.]

Nevertheless, the State Board agreed with the Commissioner that "pursuant to N.J.S.A. 18A:12-2, the conflict in [that] case was of such a substantial, material and pervasive nature as to disqualify [the bus driver] from continued service on the Board." Ibid. Finally, the State Board noted that "it is evident from the express and unambiguous language of N.J.S.A. 18A:12-2 that a board member may not continue in office if he or she has a conflict prohibited thereunder. Id. at 798.

However, the State Board later clarified that Oehlke did not create a per se rule prohibiting board members' employment with contractual vendors, but rather, a fact-sensitive inquiry. Bd. of Educ. of Union v. Andrews, 95 N.J.A.R.2d (EDU) 350, 351. In Andrews, the State Board explained that "[c]ontrary to the Commissioner's assertion, Oehlke does not stand for the proposition that employment as a bus driver with a transportation company under contract with a district board automatically renders such employee ineligible for board membership pursuant to N.J.S.A. 18A:12-2." Ibid. Rather, the State Board explained, "[o]ur decision in Oehlke was expressly predicated upon the particular facts therein following a hearing in the Office of Administrative Law." Ibid. The State Board noted that in Oehlke, the ALJ found that

> the respondent board member therein worked as a school bus driver for the company which was the successful bidder for the board's transportation contract. At the time, the respondent "additionally held the significant position of power as President of the Board. He neither withdrew from his employment nor totally abstained from all participation in deliberations which affected his employer." The ALJ found that respondent had participated in discussions "which no doubt influenced colleague votes, especially as they related to school transportation issues." The ALJ further found that various members of the board's transportation committee asked respondent questions and sought his advice and suggestions concerning route alignments. In addition, the ALJ found that respondent allowed the use of his farm property within the township for the storage of the company's buses.
>
> [Ibid. (citations omitted).]

The State Board emphasized that "our determination disqualifying the respondent [in Oehlke] from board membership was expressly predicated on the particular facts established in that case, including respondent's position and leadership responsibilities on the board and the manner in which he had exercised such responsibilities." Ibid. Accordingly, the State Board remanded the case to the Commissioner "to determine whether Andrews had an inconsistent interest under the particular facts of this case of such a 'substantial, material and pervasive nature' as to disqualify her from membership on the Board." Ibid.[4]

Additionally, the Commissioner has found a disqualifying interest arising from a landlord/tenant contract with a board. Thomas v. Edwards, 93 N.J.A.R.2d (EDU) 369. In Thomas, the owner and operator of a private day-care center, located in a building owned by the board, filed a petition for candidacy for election to that board. Id. at 371. Accordingly, a potentially disqualifying conflict arose from the landlord/tenant contract (lease) between the day-care-center owner and the board. Ibid. The day-care-center owner argued, among other things, that "although the conflict of interest does exist, it is not one that is substantial and material which would preclude her candidacy for election or disqualification as a board member. As a result, it does not have the effect of an automatic disqualification upon the existence of a conflict." Ibid. Specifically, the day-care-center owner conceded that the lease was a commercial contract, but argued that the lease did "not really take the form of the type of commercial contract contemplated by N.J.S.A. 18A:12-2 since the intended focus of that section involves contracts that have been awarded and which bestow special economic advantage on an individual." Ibid. The ALJ stated that he failed "to understand the logic behind that argument. School boards of education are not allowed to lease their premises at a loss." Id. at 372. Rather, he noted that "a leasehold agreement is the type of contract contemplated in N.J.S.A. 18A:18-2(c), which defines contracts as meaning 'contracts or agreements for the performance of work or for the furnishing or hiring of services, materials or supplies as distinguished from contracts of employment.'" Ibid. The day-care-center owner's argument that the lease did "not confer upon her special advantage

[4] The parties settled the matter after the remand was transmitted to the Office of Administrative Law, but prior to an Initial Decision on remand.

begs the question. She maintains an ongoing contract with the BOE to maintain her day care enterprise at the Garfield School. This is precisely the type of activity which is prohibited by a school board member and, as indicated hereinabove, serves as an automatic bar to election to the Board." Ibid. The ALJ further noted that in Oehlke, "the only viable solution was removal from service as a board member so long as the conflict continued. Abstention from transportation-related types of questions as a board member did not satisfy that requirement." Ibid. He noted that as in Oehlke, it was "easy to envision any number of potential issues which could come up for Board consideration which could reasonably impact upon the Landlord Tenant relationship which presently exist[ed] between the Board and Edwards." Ibid. He emphasized that "[b]oards of education need fully functional board members. Under the facts of this case, Edwards's participation would seriously and potentially compromise the Board from exercising that function." Finally, he noted that "the opportunities for the appearance of impropriety due to the conflict are so replete that Edwards's participation on the Board under such circumstances would constitute a disservice to herself as well as to the community at large." Ibid. In affirming the Initial Decision, the Commissioner expressly agreed that the day-care-center-owner's lease created a disqualifying conflict, "as the factors affecting the contract to which she is a party . . . are so inherently widespread and diffuse as to make it difficult, if not impossible, to adequately remove herself by absention [sic] from actual or potential conflict." Ibid.

Most recently, and perhaps most strikingly, the Commissioner has found a disqualifying conflict of interest arising from a contract to pay individualized retirement benefits. Saxton v. Luthman, EDU 898-08, Initial Decision (March 5, 2008), adopted, Comm'r (March 14, 2008), <http://njlaw.rutgers.edu/collections/oal/>. The board argued that the collective bargaining agreement and the individual retirement contract were "binding contracts, such that if the [b]oard failed to pay, pursuant to the terms, then [the potential candidate for board membership] would have the right to sue the [b]oard." The matter could not be cured by the board impermissibly accelerating payments pursuant to the retirement contract, in order to complete performance of the contract prior to the election. Moreover, the only other way the conflict could be cured was if the retiree waived the remaining payments, which the retiree refused to do. The retiree argued that the contract was merely "'an agreement'; and that the conflict is remote, in that the

conflict would not arise unless the Board failed to pay him pursuant to the terms of what he calls 'only an agreement.'" The retiree argued that if the board failed to perform, "he would resign from the Board and then file suit against the Board." The ALJ concluded that the retiree was "not eligible to be a candidate for the [b]oard at the April 2008 election because of an impermissible conflict of interest which deem[ed] him unqualified ab initio and to which cannot be cured prior to the election or prior to the respondent being sworn, if elected."

Here, the parties' mutual confusion over the applicable law and misguided focus on the ownership issue presents a unique factual predicament. (See Pet.; Answer.) Certainly, the contract between Westwood Truck Center and the Board was a commercial contract that presented a disqualifying conflict of interest for Miller, whether he is an owner or merely an employee. See Oehlke, supra, 93 N.J.A.R.2d (EDU) at 797; Andrews, supra, 95 N.J.A.R.2d (EDU) at 351. To the extent that Miller argues that the contract bestowed a *de minimis* financial benefit to him, such argument was rejected in prior case law. Thomas, supra, 93 N.J.A.R.2d (EDU) at 372. Whether Miller is an owner or merely an employee, he has negotiated contracts with the Board on behalf of Westwood Truck Center since at least 2004, or, as he asserts, 1997. (See Pet.; Answer.) Moreover, throughout his Answer and Motion to Dismiss, Miller insisted that he had the authority to rescind the contract. (See Answer; Mot. to Dismiss.) Indeed, attached to his Motion to Dismiss is a candid series of emails between Miller and counsel for the Board, in which Miller writes:

> [t]he Westwood Truck Center has been taking care of the [Board's] equipment from somewhere around 1997. Never has there been an issue with anything that has transpired between the [Board] and [Westwood Truck Center]. Many times we have done favors for the [Board], such as when you need to purchase parts from a vendor not on your list. We have purchased them, and passed on the invoice, without the negotiated fifty percent markup. Every . . . time Dean sends somebody down to see if we just happen to have something laying around, and it is here and we give it to you is very convenient. When the [Board] was "broke" in the early 2000's, we gave the [Board] a truck that was used for about 12 years. We saved the [Board] a ton of money getting rid of hundreds of old computers. Nobody in the area ever bids against us and we are the only shop in the area

> that can handle all the needs of the [Board]. The additional costs in transportation alone to get repairs done would be ill-spent monies. Before you spite me, think about what you are trying to accomplish. The comment at the last board meeting that "I can still get out" was not proper. The [Board] would be at a loss without the service of this shop. If you think that the relationship between [Westwood Truck Center] and the [Board] in any way would change, you need to look in the mirror and see the only place a change would take place.
>
> [Answer.]

Miller's email vividly illustrates his conflict. Whether owner or mere employee, Miller repeatedly refers to Westwood Truck Center with the first person plural pronoun "we." He references repeated "favors" Westwood Truck Center has done for the Board, and seems to insinuate that the Board owes Westwood Truck Center (or Miller, personally) impermissible favors in return. Indeed, the reference to purchasing parts from an unapproved vendor through Westwood Truck Center at least suggests that Miller believes that Westwood Truck Center and the Board have conspired together in unlawful conduct. Miller's assertion that Westwood Truck Center is the only viable bidder for contracts with the Board, and his further assertion that the Board would be materially disadvantaged by Westwood Truck Center's decision not to bid on such contracts, only emphasizes the extremity of the conflict. Finally, the remaining sentences appear to be a thinly veiled threat for the Board to accept his membership, or suffer the loss of a valuable commercial contract.

This disturbing email may illustrate why mere rescission of the contract may not have been an option in this case. See Luthman, supra, EDU 898-08, Initial Decision, <http://njlaw.rutgers.edu/collections/oal/>. Typically, Westwood Truck Center could have rescinded the contract, prior to Miller being sworn, thereby curing any conflict for Miller. See ibid. Indeed, Miller asserts that he offered to rescind the contract. (Answer; Mot. to Dismiss.) However, both parties mistakenly believed that Miller's ownership of Westwood Truck Center was dispositive. (See Pet.; Answer.) Accordingly, counsel for the Board apparently believed that either Miller had the authority to rescind the contract, in which case he had an incurable conflict, or did not have the authority to rescind the contract, in which case he had no conflict, regardless of his employment status. (See

Pet.; Answer.) Rather, I **FIND** that Miller unquestionably had both a conflict of interest and the authority to rescind the contract, curing such conflict. See Luthman, supra, EDU 898-08, Initial Decision, <http://njlaw.rutgers.edu/collections/oal/>. Here, however, the Board may have been materially prejudiced by such rescission, as is so disturbingly illustrated by Miller's email. (See Answer). Nevertheless, Miller certainly had an impermissible conflict of interest, whether he was an owner or merely an employee of Westwood Truck Center. See Oehlke, supra, 93 N.J.A.R.2d (EDU) at 797.

In the Oehlke matter, the State Board concluded:

> [w]e therefore conclude that, although respondent was qualified for service on the Board at the time of his election thereto, he subsequently had an inconsistent interest pursuant to N.J.S.A. 18A:12-2 when Fleming's entered into a contractual relationship with the Board, and that the conflict under the facts in this particular case was of such nature as to disqualify him from continued service as a member of that Board. Accordingly, with the modification indicated herein, we affirm the Commissioner's ultimate determination which required that respondent either cure the conflict by giving up his position as a driver for the bus company under contract with the Board or forfeit his seat on the Board.
>
> [Id. at 798 (emphasis added).]

The within matter presents a converse situation, in that the conflict was mooted by virtue of the contract expiring on June 30, 2013, rather than arising during the course of Miller's term. The same logic articulated in the State Board Decision in Oehlke, however, applies. Specifically, a board member only has a duty to cure a conflict of interest, so long as a current conflict of interest exists. Once the conflict is mooted, the duty to cure is mooted.

CONCLUSION

N.J.S.A. 18A:12-2 governs this dispute, because the New Jersey Supreme Court squarely held that N.J.S.A. 18A:12-2 imposed ongoing qualifications for membership on

a board of education, and the provisions of the later-enacted School Ethics Act do not supersede N.J.S.A. 18A:12-2. Based upon all of the foregoing, I **CONCLUDE** that Miller had an impermissible, disqualifying conflict of interest as of the moment he was sworn in as a Board member, because he was indisputably either an owner or employee of Westwood Truck Center, and because the specific facts of this case suggest that an impermissible conflict of interest existed whether Miller is an owner or merely an employee. I **FURTHER CONCLUDE** that the disqualifying conflict of interest pursuant to N.J.S.A. 18A:12-2 was cured, and thereby mooted, once the contract terminated on June 30, 2013. After that date, no conflict of interest existed, and, as such, I **CONCLUDE** that Miller is not required to forfeit his seat on the Board.

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

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

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

February 21, 2014
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency:

Date Mailed to Parties: FEB 24 2014

dr

2-24-14
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

Keith Rosado

Carol Mountain

For Respondent:

Russell Miller

Exhibits

For Petitioner:

P-1 Bid documents for maintenance of district vehicles submitted by SJI

P-2 Five years of contract renewals between the district and SJI

P-3 No exhibit

P-4 Purchase orders/signed vouchers for 2010–2011 budget year submitted by respondent

P-5 Purchase orders/signed vouchers for 2009–2010 budget year submitted by respondent

P-6 Purchase orders/signed vouchers for 2011–2012 budget year submitted by respondent

P-7 Purchase orders/signed vouchers for 2012–2013 (covering July 2012 through December 2012) budget year submitted by respondent

P-8 Newspaper article wherein respondent refers to himself as owner and operator of the Westwood Truck Center

P-9 Email from Miller to Rosado dated November 30, 2012

P-10 Email from Miller to Rosado dated December 2012

P-11 Email from Miller to Rosado dated December 12, 2012

P-12 Email exchange between Miller and Rosado on December 19, 2012

P-13 Email exchange between Miller and Rosado on December 27, 2012

P-14 Respondents 1040 tax return for the calendar year 2011 with SJI corporate tax return for fiscal year 2010

P-15 Email from Rosado to Miller on December 30, 2012, and email response from Miller on January 3, 2013

P-16 Email from Miller to Rosado on January 3, 2013, attaching undated, unsigned schedule E

P-17 Oath of Office signed by respondent

P-18 Purchase orders/singed vouchers from February 25, 2013, through August 21, 2013

P-19 Extract from minutes of board meeting held January 24, 2013

P-20 Extract from minutes of board meeting held August 29, 2013

P-21 Email exchange between Rosado and counsel for the board and Carol Mountain dated December 28 and December 29, 2012

146-14

E.H., on behalf of minor children, E.H. and J.H.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner filed a *pro se* residency appeal challenging the respondent Board's determination that E.H. and J.H. were not entitled to a free public education in the Township of North Brunswick schools for the period between October 2011 and February 2013. Petitioner asserted that he is domiciled in respondent's school district, but had been evicted from his former apartment in North Brunswick and sublet a one bedroom apartment – also in North Brunswick – where he lived during most of the above period. Petitioner further claimed that his two older sons sometimes spent part of the week sleeping at a friend's home in another town because the one bedroom apartment was too crowded for the family. The respondent Board contended that petitioner did not reside in the school district, and sought tuition reimbursement for the 2011-2012 and 2012-2013 school years.

The ALJ found that: based on the documents submitted by the petitioner and his credible testimony at hearing, E.H. resided within the North Brunswick school district, in a sublet apartment, during much of the period at issue here, and has resided in an apartment on Georges Road in North Brunswick since October 2012. Accordingly, the ALJ concluded that petitioner's children are entitled to a free public education in North Brunswick schools, and that E.H. is not liable for tuition to the North Brunswick school district. The ALJ ordered the within counterclaim for tuition dismissed with prejudice.

Upon review of the record and the Initial Decision, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the Initial Decision was adopted as the final decision in this matter.

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

Issued 4/07/14

OAL DKT. NO. EDU 3234-12
AGENCY DKT. NO. 59-3/12

E.H., on behalf of minor children, E.H. and J.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the petitioner established that his children were entitled to attend school in the North Brunswick School District between October 2011 and February 2013. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/07/14
Date of Mailing: 4/08/14

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03234-12
AGENCY DKT. NO. 59-3/12

E.H., ON BEHALF OF MINOR CHILDREN,
E.H. AND J.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

E.H. o/b/o **E.H.** and **J.H.,** pro se

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley Vignuolo, Hyman Stahl and Clarkin, attorneys)

Record Closed: May 23, 2013 Decided: February 20, 2014

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

Petitioner appeals the residency determination of respondent Board of Education of the Township of North Brunswick, Middlesex County (Board of District) with regard to minor children E.H. and J.H. The matter was transmitted to the Office of Administrative Law on March 9, 2012 and hearing held on December 3, 2012 and May 23, 2013, on which date the record closed. For good cause, extensions of time to file the initial

decision were granted nunc pro tunc until February 20, 2014. N.J.S.A. 52:14B-10(c); N.J.A.C. 1:1-18.8.

ISSUE

Whether the children were eligible to attend the North Brunswick Township School District free of charge, between October 2011 and February 2013, in accordance with N.J.S.A. 18A:38-1(b). If not, what amount of tuition is owed to the District?

SUMMARY OF EVIDENCE

The District presented Greg Maurer, the residency investigator, who investigated the residency of petitioner's children E.H. and J. H. On October 4, 2011, Maurer waited in the Parsons School's parking lot and observed E.H. pick-up one of the children after school. Then, E.H. and his son entered an apartment building on Laurel Place. Shortly thereafter, the father and child left the building, drove off in a red Mustang and parked near Linwood School. (R-1). The next day, Maurer observed the Mustang parked outside the Laurel Place apartment building. Maurer spent the next several days observing the site. (R-1.) On October 11, 2011, Maurer spoke with a resident of the building, who told him that E.H. also lived in the building. On October 18, 2011, Maurer entered E.H.'s apartment and Maurer observed two mattresses on the floor. E.H. informed Maurer that he and his wife had recently moved into the one bedroom apartment with their three children. E.H. also told Maurer that some nights his sons, E.H. and J.H., stay with friends in Franklin Township due to the small and crowded apartment. (R-1.) E.H. could not provide any proof of tenancy, e.g. lease, utility bills. (R-1.) Further investigation revealed that the apartment was leased to A.G. and managed by Midlantic Property Management, Inc. (R-1).

Susan Irons is employed by the District as the Business Administrator and Board Secretary. The District is seeking tuition for E.H. for school year 2011-2012 in the amount of $9,452.04 and for school year 2012-2013 in the amount of $10,000. Irons also provided a detailed account of daily rates. (R-2.) With regard to J.H., the District is

seeking tuition for school year 2011-2012 in the amount of $9,624.04 and for school year 2012-2013 in the amount of $10,000. (R-3.)

E.H. testified that he suffered a "financial set-back" and the family was evicted from their prior apartment on Parson Road in North Brunswick in 2008. Since then, he rented a one bedroom apartment at Laurel Place from a friend, who held the lease. E.H., his wife and the three children sleep on two mattresses, which Maurer had observed on the floor. E.H. acknowledged that several times per week, perhaps three, the older boys, E.H. and J.H. spend the night with a friend in Franklin Township because their apartment was too small. However, the family never separated and lived in the one bedroom apartment on Laurel Place, North Brunswick. At the hearing on May 23, E.H. further testified that in October 2012, the family moved to an apartment on Georges Road, North Brunswick.

LEGAL DISCUSSION AND CONCLUSION

Attendance at public schools shall be free to any person who meets the requirements set forth in N.J.S.A. 18A:38-1. A child who is domiciled within the school district and satisfies other requirements may attend the public schools free of charge. N.J.S.A. 18A:38-1(a). If the board of education denies admission to the child, the resident or parent may contest that determination and has the burden of proof by a preponderance of the evidence to establish that the child meets the requirements for eligibility. If the evidence does not support the claim, the parent shall be assessed tuition for the student prorated to the time of the student's ineligible attendance within the district. N.J.S.A. 18A:38-1(b)(2).

A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). A child's domicile is normally that of his or her parents. Ibid. Indeed, the domicile of a minor child follows that of his parents. See V.R. on behalf of A.R. v. Bd. of Ed. of Hamburg, 2 N.J.A.R. 283, 286.

The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed. 2d 518 (1999). Specifically, a person's domicile "is the place where a person dwells and which is the center of his domestic, social and civil life." Ibid. (citations omitted). Acquiring another residence does not result in a person having multiple domiciles. Id. at 375. Although the person's intent with respect to domicile is very important, there needs to be objective indicia that a particular residence is that person's domicile. Id. at 376. Also important where a person has more than one residence are the following factors: "the physical characteristics of each [place], the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return." Mercadante v. City of Paterson, 111 N.J. Super. 35, 39-40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971).

Here, E.H. was evicted from his former residence and sublet a one bedroom apartment in North Brunswick for purposes of establishing a home for his family; not for the purposes of his children receiving a free public education in North Brunswick. While E.H.'s two older sons might spend a portion of the week sleeping at a friend's home located in another town, petitioner credibly testified the arrangement was made because of the crowded living situation in the one bedroom apartment on Laurel Place. I am also mindful that respondent submitted documents revealing that E.H. was a subtenant at Laurel Place and the landlord had served A.G. (the lessee) a notice to cease the overcrowding property, dated December 21, 2011. However, the record does not reveal how that situation was resolved. Nevertheless, I am persuaded by the evidence presented by petitioner.

Therefore, I **FIND** that E.H. resides in North Brunswick as do his children E.H. and J.H.

Based on the whole of the record, I **CONCLUDE** that E.H. satisfied the residency requirements pursuant to N.J.A.C. 18A:38-1(b)1. Therefore, I **CONCLUDE** that E.H. is not liable for tuition to the District.

ORDER

I **ORDER** that the District's claim for payment of tuition is hereby **DISMISSED WITH PREJUDICE**.

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

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

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

February 20, 2014
DATE

Mumtaz Bari-Brown
MUMTAZ BARI-BROWN, ALJ

Date Received at Agency:

February 20 2014
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed to Parties: FEB 24 2014

dr

APPENDIX

Witnesses

Presented by Petitioner:

E.H.

Presented by Respondent:

Greg Maurer

Susan Irons

Exhibits

Presented by Petitioner:

P-1 Affidavit

P-2 Sworn Statement by E.F.D.

Presented by Respondent:

R-1 Residency Report

R-2 Annual Tuition for E.H.

R-3 Annual Tuition for J.H.

R-4 Certification of Carl Gensib

147-14

OAL DKT. NO. EDU 01761-14
AGENCY DKT. NO. 29-2/14

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

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

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This case shall proceed to a plenary hearing at the OAL to determine the underlying claim on the merits.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/07/14

Date of Mailing: 4/08/14

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF
OAL DKT. NO. EDU 01761-14
AGENCY DKT. NO. 29-2/14

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

Louis R. Lessig, Esq., appearing for petitioner (Brown & Connery, attorneys)

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

BEFORE **ELIA A. PELIOS, ALJ**:

STATEMENT OF THE CASE

Petitioner seeks an order on emergent relief compelling respondent to undergo a psychological evaluation with petitioner's chosen psychologist.

PROCEDURAL HISTORY

On February 7, 2014, petitioners' petition of appeal was filed with the Office of Controversies and Disputes of the New Jersey Department of Education, along with a request for emergency relief seeking an order compelling respondent to undergo the sought-after psychological evaluation. On February 11, 2014, the emergent matter was filed along with the due process request with the Office of Administrative Law. The emergent relief request was scheduled for oral argument, which was held on February 20, 2014.

FACTUAL DISCUSSION

Claudine Hayes (respondent) is a tenured teacher of the handicapped employed by the Camden City School District (petitioner). On December 11, 2013 an incident occurred, which resulted in respondent being transported during the school day away from the school by EMT. Subsequent to the incident, petitioner directed respondent to undergo a mental health fitness for duty evaluation with its chosen psychologist. Respondent did not appeal the directive and on January 9, 2014 respondent reported to the office of petitioner's chosen psychologist, Dr. Jennifer Kelly. While at Dr. Kelly's office, respondent was presented with three forms to sign, including a release of medical records. Respondent refused to sign the forms. After discussions between the parties' respective counsel failed to resolve the matter, on January 17, 2014, respondent communicated her preference that the evaluation be conducted by the psychologist of her choosing, Dr. Steven Barnett. The district rejected the choice of Dr. Barnett on January 28, 2014, and reiterated its position that petitioner must be examined by Dr. Kelly and that respondent must sign the requested release, regardless of who conducted the examination. Petitioner offered to enter into an agreement whereby it waived its ability to see any records provided to Dr. Kelly and only receive the final report. Respondent rejected this offer.

LEGAL ANALYSIS AND CONCLUSION

The standards which must be met by the moving party in an application for emergent relief in a matter concerning a special needs child are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

N.J.S.A. 18A:16-2(b) provides in pertinent part that, "[t]he Board may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the Board, an employee shows evidence of deviation from normal physical or mental health." N.J.S.A. 18A:16-3 states:

> Any such examination may be made by a physician or institution designated by the Board, in which case the cost thereof. . . shall be borne by the Board or, at the option of the employee, they may be made by a physician or institution of his own choosing, approved by the board, in which case said examination shall be made at the employee's expense.

The parties do not dispute that the district can require that the psychological examination be conducted, and that one must now occur.

Petitioner argues that petitioner and its students will suffer irreparable harm if emergent relief is not granted in that delay in providing children with an adequate education constitutes irreparable harm. Petitioner further argues that respondent has been on leave since December 11, 2013 which has required the services of a substitute, and that her students are harmed every day that they do not have a permanent teacher. Respondent argues that deprivation of education cannot be proven by broad allegations and general statements, and that the district is required to ensure that students receive adequate education from qualified substitute whenever a teacher is forced to miss time. Respondent further argues that petitioner could end any perceived harm to the students by allowing petitioner to see the evaluator of her choice and that petitioner is therefore creating and perpetuating the perceived harm alleged. Petitioner counters that given the anticipated cooperation of the respondent, petitioner has not engaged the services of a long term substitute teacher and prohibited by regulation from keeping a non-long-term substitute in place beyond a specified number of days.

There are many instances in which a district may be faced with extended absence by a teacher. Whether it is for reasons of illness, discipline, created at the direction of the district or the request of the teacher, extended absences can and do occur, and districts are expected to continue to provide for the appropriate educational needs of the students. There is no controlling authority which stands for the proposition that extended absence by a teacher on its face constitutes irreparable harm. Presumably, the underlying nature of or reason for the absence itself, absent some very fact-sensitive and specific showing, cannot be said to create the harm to the students or exacerbate it to the point of irreparability. While both parties have laid out a litany of alleged facts which cover approximately two years prior to the decision to seek the psychological evaluation, and while petitioner seeks to view the potential for harm through the cumulative prism of that entire background, we are dealing with the decision, not contested by either party, on December 13, 2013 to seek the evaluation. Any analysis of impact or harm for purposes of emergent relief will be viewed from that point forward. If petitioner is of the belief that harm is exacerbated or created by the number of substitute teachers respondent's students have experienced, it is free to

engage a long term substitute and mitigate any such harm. In the meantime, I **CONCLUDE** that petitioner has failed to demonstrate that either it, or its students, will suffer irreparable harm if emergent relief is not granted.

As to the second and third prongs, petitioner argues that the law is well settled and that petitioner will likely succeed on the merits because petitioner is required by law to undergo a mental health fitness for duty evaluation with the district's chosen psychologist. Respondent argues that the law is settled that respondent may have the evaluation performed by a psychologist of her choosing, and therefore petitioner is unlikely to succeed on the merits.

Petitioner argues that respondent acted unreasonably in agreeing to be evaluated by the district's chosen psychologist and then "backing out" of that evaluation before invoking her option to choose her evaluator. Petitioner cites Bd. Of Educ. Of the City of Pleasantville v. Chambers, 95 N.J.A.R.2d 291, 1995 (Dept. of Education) as supporting its position, stating that in that case respondent refused to provide the district's evaluator with access to medical records before ever meeting with the doctor, while noting that in the present matter respondent did not so refuse until after she met with the doctor and then chose to invoke her right to choose an evaluator.

Respondent argues that she was not notified that she would have to provide access to her records until she met with the district's doctor, and cites the same case as standing for the proposition that approval of her choice of psychologist may not be unreasonably withheld. Respondent further notes that the State Board of Education subsequently rejected the Commissioner of Education's ruling in *Pleasantville* that upon rejecting the employee's choice of psychologist the Board could then require that its choice of psychologist be used. 96 N.J.A.R.2d 447, 1996.

The parties essentially are citing two decisions in the same case, one reversing the other, as supporting their respective positions. Both decisions may be considered

persuasive but neither decision is precedential. Clearly the statute offers the option for respondent to choose her evaluator, and it is equally clear that the same statute empowers the district to approve or disapprove of the respondent's choice. It is not clear, however that upon rejection of the respondent's choice the petitioner may compel that its doctor would be utilized. This could lead to a potentially absurd reality which frustrates the intent of giving respondent the option to begin with if all petitioner needs to do is say no. Viewed through the prism of the current emergent relief application, the legal question is at best unsettled.

Petitioner also seeks to compel respondent to sign a release of medical records provided by its chosen psychologist. Respondent argues that that N.J.A.C. 6A:32-6.3, which addresses psychiatric evaluations required by a district pursuant to N.J.S.A. 18A:16-2 and 16-3, provides that a respondent may refuse to release such records. Specifically, respondent invokes N.J.A.C. 6A:32-6.3(d)(3) which provides that "The employee may, without reprisal, refuse to waive his or her right to protect the confidentiality of medical information, in accordance with P.L. 104-191, Health Insurance Portability and Accountability Act of 1996."

The arguments and case law put forth by the parties show that the law is not settled on this matter, and as such petitioner cannot claim a likelihood of success on the merits. Additionally, the State Board in *Pleasantville* indicated that this decision is subsequent to agreement among the parties as to the identity of the evaluator. While the district is entitled to have some comfort that the evaluation and the methods utilized are thorough and valid, the respondent is also entitled to the rights provided by the administrative code. While the protections may not be, as petitioner argues, absolute, such determination is likely extremely fact sensitive and requires some degree of testimony by medical professionals as to what records, if any, are required to be provided. Given that the petitioner has not demonstrated a likelihood of success on the merits as to requiring that its doctor of choice be utilized, the question of records is not ripe to this emergent relief request. If it were, however, it is likely determination of that issue would require further fact finding provided by plenary hearing or expert testimony.

Accordingly, I **CONCLUDE** that petitioner has failed to demonstrate that the legal right underlying its claim is settled or that it has a likelihood of succeeding on the merits of the underlying claim.

As to the fourth and final prong, each party argues that they will suffer greater harm if they do not prevail on the question of emergent relief. Petitioner argues that students continue to be harmed by the absence of a permanent teacher, and that the district is forced to continue to pay two individuals for one job while respondent is receiving her full salary and benefits while not working and that the administrative leave designation is non-punitive. Respondent argues that the district could get the sought after evaluation by using a psychologist of respondent's choosing, thereby obtaining exactly what it seeks even though losing on emergent relief. Meanwhile, respondent argues that if she loses she is forced to sign a release which discloses personal medical information to a psychologist who clearly works for her employer or face the loss of her job if she refuses to comply.

Considering the forgoing, it is apparent that if emergent relief is denied, petitioner still will get the psychological evaluation it seeks. The same cannot be said for respondent, who may give up rights and arguments she may ultimately prevail upon at plenary hearing. Accordingly, I **CONCLUDE** that the balance of equities argument favors respondent, and that petitioner has **FAILED** to satisfy this prong.

Consequently, the petitioners' request for emergency relief is **DENIED**.

ORDER

For the foregoing reasons, I **CONCLUDE** that petitioners are not entitled to the requested emergent relief and that the Petitioners' request for emergency relief is **DENIED**. The matter will now be scheduled for plenary hearing on the underlying due process petition.

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

February 26, 2014
DATE

ELIA A. PELIOS, ALJ

EAP/mel

148-14

BOARD OF TRUSTEES OF THE VINELAND PUBLIC CHARTER SCHOOL AND ANN MURPHY-GARCIA,

PETITIONERS,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE

RESPONDENT.

COMMISSIONER OF EDUCATION
DECISION

SYNOPSIS

Petitioners challenged the findings and conclusions reached by the Department's Office of Fiscal Accountability and Compliance (OFAC) subsequent to a request from the Office of Educational Data (OED) that OFAC investigate the work hours recorded for Ann Murphy-Garcia, the Executive Director of Vineland Public Charter School (VPCS). In February 2011, OED had recorded that Murphy-Garcia was working the equivalent of 2.7 full-time positions in two public school districts and three charter schools. OFAC's investigation determined that Murphy-Garcia was not, in fact, working more than one full-time position, but also concluded that Murphy-Garcia had "orchestrated what appeared to be a hastily developed and ill-conceived plan intended to provide misinformation to the OFAC investigators." Based upon this conclusion, the matter was referred to the State Board of Examiners and the Division of Criminal Justice. The Board of Examiners subsequently initiated a separate case alleging that Murphy-Garcia's conduct was inappropriate and provided cause for the revocation of her certificates. Petitioners in this case have asserted that OFAC's findings are not supported by competent evidence. The State Board of Examiners' action seeking to revoke her New Jersey certificates is in abeyance while the instant controversy is adjudicated.

The ALJ found, *inter alia,* that: the initial investigation into whether Murphy-Garcia was working in more than one full-time position was resolved favorably for the petitioners, as the evidence credibly and overwhelmingly confirmed that her employment agreement was part-time; since the evidence confirmed that Murphy-Garcia was always treated and paid as part-time, the written contracts in the school files needed to be corrected to reflect the true nature of her employment; Murphy-Garcia worked with staff and the VPCS Board to correct her erroneous contracts and forward the corrected ones to the OFAC. The ALJ concluded that OFAC's finding that Murphy-Garcia thwarted its investigation is wrong as a matter of fact and law; it was undisputed by all witnesses that Murphy-Garcia and her staff were attempting to "right a wrong" in regard to her employment contracts; and there was no attempt to confuse or thwart OFAC's investigation. Accordingly, the ALJ recommended that the OFAC's August 2011 fact finding report be rejected.

Upon review, the Assistant Commissioner – to whom this matter was delegated pursuant to *N.J.S.A.* 18A:4-34 – rejected the specific conclusions found in the OFAC's report, *i.e.*, that Murphy-Garcia acted without the VPCS Board's knowledge and tried to thwart OFAC's investigation. However, the Assistant Commissioner cautioned VPCS to improve its business practices and administrative oversight to ensure that its contracts are properly memorialized and that all of its records are secured and accessible. Further, the Assistant Commissioner expressed concern that Murphy-Garcia may have contracted with more employers than she can properly serve. Petitioners' appeal was granted subject to the above, and copies of this decision were forwarded to the State Board of Examiners and the Division of Criminal Justice.

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

Issued 4/04/12

OAL DKT. NO. EDU 9938-12
AGENCY DKT. NO. 176-6/12

BOARD OF TRUSTEES OF THE VINELAND PUBLIC CHARTER SCHOOL AND ANN MURPHY-GARCIA,	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE:	:	
RESPONDENT.	:	

The petitioners in this controversy challenge the findings and conclusions of the report of an investigation conducted by the Office of Fiscal Accountability and Compliance (OFAC) of the New Jersey Department of Education. The report found that petitioner Murphy-Garcia had attempted to thwart OFAC's investigation into her hours of employment, and referred the matter to the New Jersey State Board of Examiners (Board of Examiners) and the Division of Criminal Justice. Based upon OFAC's findings, the Board of Examiners concluded that Murphy-Garcia's certificates should be revoked.[1] Both OFAC's report and the Board of Examiners' determination were appealed. The instant proceeding consists exclusively of the appeal of the OFAC report.

After a six-day hearing in the Office of Administrative Law (OAL), during which two representatives of the New Jersey Department of Education (the Department) and four

[1] The Board of Examiners commenced an action to revoke Murphy-Garcia's certificates, which is still pending – but in abeyance – at the OAL under docket number EDE 1237-12. It relied on OFAC's findings and did not do its own investigation. The record does not indicate whether any action has been taken by the Division of Criminal Justice.

witnesses affiliated with petitioners testified, and over forty exhibits were entered into evidence, the Administrative Law Judge (ALJ) assigned to the case determined that the findings and conclusions of the OFAC report were not supported by the record, and thus recommended that the Commissioner reject the OFAC report. Upon review of the record, Initial Decision of the OAL (Initial Decision), OFAC's exceptions and petitioners' replies thereto, the Commissioner[2] concurs that the facts do not sufficiently support OFAC's conclusion that Murphy-Garcia single-handedly – *i.e.,* without the knowledge of the Board of Trustees of the Vineland Public Charter School (VPCS) – took action to misinform OFAC and thwart its investigation.

As set forth in the Initial Decision, in February of 2011, the Office of Educational Data (OED) of the New Jersey State Department of Education recorded that Murphy-Garcia had been working the equivalent of 2.7 full-time positions in 1) the Winslow Township and Voorhees Township public school districts and 2) in three charter schools: VPCS,[3] Charter-Tech High School for the Performing Arts, and Environment Community Opportunity Charter School.[4] The OED asked OFAC to investigate.

Thomas Martin of OFAC was assigned the case. To ascertain Murphy-Garcia's hours of employment, Martin interviewed administrators from the schools at which she was employed and requested documents from her various employers, including copies of her 2009-10 and 2010-11 employment contracts for her job at the VPCS. The VPCS's business administrator, Jonathan Houdart, forwarded copies of contracts which had been given to him by

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[2] This matter has been delegated to the undersigned Assistant Commissioner, pursuant to *N.J.S.A.* 18A:4-34.

[3] Murphy-Garcia is a founding member of VPCS.

[4] The record includes a copy of a letter dated July 25, 2010, from several individuals to Deborah Yanez, who was the President of the Winslow Township Board of Education, complaining about the high salary drawn by Murphy-Garcia and questioning how she could be putting in the hours to warrant that salary while also serving four other schools or school districts. *See,* twentieth document attached to the interrogatory answers of Gary Stanker, in the Department's Exhibit P-38. The letter was copied to Governor Christie and two media organizations.

VPCS secretary Colleen Colclough. The copy of the contract for the 2009-10 school year consisted of one page, and the copy of the contract for the 2010-11 school year was three pages long. The contract for the 2010-11 school year indicated that Murphy-Garcia was a full time employee. When Martin compared that contract with Murphy-Garcia's contract with the Winslow Township Board of Education, which also listed her as a full-time employee, Martin set up interviews with VPCS employees to ascertain Murphy-Garcia's actual hours.

Soon after Houdart's transmission of the contract copies, petitioners learned that an error had been made. As Colclough ultimately testified, when she was originally asked to pull Murphy-Garcia's employment contracts, she took them out of a file marked "voided." 5T12.[5] Since she was not able to find copies of Murphy-Garcia's contracts anywhere else, she thought they must have been misfiled in the "voided" folder. 5T13-14. When Colclough had given Houdart the contract copies, she had not told him that she had retrieved the copies from the "voided" file, 5T22, and he sent them off without reviewing them. 3T159.

After the mistake was caught, on March 11, 2011, Colclough sent Martin an email, which carried a letter signed by Houdart. The letter advised that Houdart was transmitting corrected contracts for the 2009-10 and 2010-11 school years. In the corrected 2010-11 contract, Murphy-Garcia's employment was designated as part-time. Martin was suspicious of the replacement contracts.[6]

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[5] 1T = Hearing Transcript dated January 22, 2013; 2T = Hearing Transcript dated January 31, 2013; 3T = Hearing Transcript dated March 14, 2013; 4T = Hearing Transcript dated March 21, 2013; 5T = Hearing Transcript dated May 24, 2013; 6T = Hearing Transcript dated August 7, 2013.

[6] The ALJ asked Colleen Schulz-Eskow, of the Department's Charter School Office, whether replacement contracts had ever been submitted by other charter schools, and she testified in the affirmative. 6T71. She further stated that charter school Boards of Trustees have the prerogative to change contracts without the Department of Education's approval. 6T73. If the change is detrimental to the school's financial position, that is revealed when the Department does its annual audit of budgets submitted on March 31 of each year. 6T74.

The record also reveals that in March 2011, Gary Stanker, president of the VPCS Board of Trustees, and the other Board members learned of the issue with Garcia's employment contracts. It is undisputed that 1) Murphy-Garcia undertook to reconstruct her original contracts; 2) on March 9 or 10, 2011, Stanker knowingly signed the reconstructed contracts (OFAC's Exhibits P-9 and P-12) for submission to OFAC; and 3) Murphy-Garcia drafted the March 11, 2011 letter, which was signed by Houdart (OFAC Exhibit P-7) and attached to Colclough's March 11, 2011 email to Martin (OFAC Exhibit P-6), transmitting the reconstructed contracts.

Stanker testified that he executed the contracts after the Board members had conferred with each other informally. 4T59-60. Everyone on the board had understood that, since neither Murphy-Garcia nor the VPCS staff could find the original operative contracts for Murphy-Garcia, she was attempting to produce corrected contracts. 4T200-01. The Board was also aware of the fact that Stanker would sign P-9 and P-12. 4T85. No one felt that it was necessary to have a board meeting, because even if the contracts erroneously sent to Martin had contained incorrect provisions, everyone knew that Murphy-Garcia had always worked part-time. 4T54; 4T59. Further, the Board had consulted with its attorney, Hope Blackburn, who had advised that since no changes were being made to the original terms of Murphy-Garcia's contracts, there was no need for a formal Board resolution authorizing the reconstruction and submission of the contracts. 4T55.

Stanker further recalled that at a March 27, 2011 public Board meeting, about two weeks after Murphy-Garcia's reconstructed contracts had been sent to OFAC, Murphy-Garcia reported her actions to the Board. She advised that she had reconstructed the contracts, had gotten them signed by Stanker and the present and former VPCS business administrators, and

had seen to it that they were forwarded to Thomas Martin at OFAC. 4T162. An excerpt from the minutes of the March 27, 2011 Board meeting, which made reference to Murphy-Garcia's report to the Board, was entered into evidence as VPCS Exhibit R-7.

However, according to Stanker, the submission of the reconstructed contracts did not resolve OFAC's inquiry. Further requests for information were made by Martin, and the Board decided to get a second opinion from different legal counsel about how the Board might handle the problem. 4T201. It was stipulated that the second opinion came from Joan Josephson, Esq. 4T85. During a June 19, 2011 Board meeting, Josephson counseled the Board that it would be prudent for them to formally ratify the March 2011 actions of Murphy-Garcia, Stanker, *et al.* by way of a resolution. 4T163-65. The Board did so; its act was memorialized in the minutes for the June 19, 2011 Board meeting. 4T164; P-35.

The record contains other indications that Murphy-Garcia was not attempting to hide from OFAC an improper simultaneous employment in two full-time jobs. According to Martin's final report (OFAC Exhibit P-36), in June 2011 attorney Blackburn had told him that it was always intended that Murphy-Garcia be a part-time employee. (Exhibit P-36 at 8) To support her assertion, Blackburn emailed Martin a copy of the template she had provided to VPCS in June 2009 to serve as the basis of Murphy-Garcia's contract. (Exhibit P-36 at 9) Also, when Martin interviewed VPCS Principal Yvonne Cribbs, Stanker, and two other VPCS board members,[7] they all told him that Murphy-Garcia had always worked part-time at VPCS. (Exhibit P-36 at 7 and 10) And Randy Ostrow, the business administrator who worked for VPCS in the first half of 2009, testified that the original 2009-10 contract for Garcia, which was lost, was similar to P-33 (a template of P-9, the corrected contract sent to Martin on

[7] Stanker further testified that he had communicated to Martin at two separate meetings that Garcia was always part-time. 4T149-50.

March 11, 2011) as opposed to the one-page document erroneously sent to Martin on March 3, 2011 (OFAC Exhibit P-4). 3T261-64. Ostrow corroborated that Murphy-Garcia's contract had been drafted by Hope Blackburn, and that it had contemplated part-time employment. 3T264.[8]

Nonetheless, on an unspecified date in August 2011, OFAC issued a report accusing Murphy-Garcia of orchestrating a "hastily developed and ill-conceived plan intended to provide misinformation to the OFAC investigators and thwart the OFAC investigation." (Exhibit P-36 at 11) The report further found that Murphy-Garcia, "of her own accord and without the knowledge or consent of the VPCS Board, undertook the following:

> Modified her original employment contracts....
>
> Sought out and received witnessing signatures from both a current subordinate and a former subordinate on incomplete signature pages of those modified contracts via late night emails.
>
> Authored a document to the OFAC that indicated the replacement contracts developed by her were, in fact, the original employment contracts.
>
> (Exhibit P-36 at 11. [Emphasis added.])

In the OFAC report, great weight was placed on a sentence in the March 10, 2011 letter (OFAC's Exhibit P-7) transmitting the corrected contracts to him. That sentence stated: "We have attached the contracts for Dr. Garcia that were in our minute books and also I have certified an excerpt for your records." The '"certified excerpts," entered into evidence as OFAC Exhibits P-10 and P-13, are portions of the VPCS Board's June 14, 2009 and May 2, 2010 meeting minutes in which approval of Murphy-Garcia's contracts for the 2009-10 and 2010-11

[8] Ostrow testified that she did not mind signing Murphy-Garcia's corrected 2009-10 contract (by signing a signature page, OFAC Exhibit P-15, which Murphy-Garcia had scanned and emailed to her) because she knew that there had been such a contract for Murphy-Garcia in 2009. 3T265-66; 3T274. When she signed the corrected contract she was no longer working at VPCS and Murphy-Garcia had no influence over her. 3T271. She signed the emailed signature page (P-15) in 2011 to replace the 2009-10 contract, which could not be found. 3T273-74.

school year are memorialized.[9] Martin's interpretation of the above-quoted sentence appears to be that Murphy-Garcia was purporting to send him the exact physical contracts authorized by the VPCS Board at its June 2009 and May 2010 meetings. The Commissioner is not persuaded that the above referenced language necessitates such an interpretation.

Considering the foregoing, the Commissioner agrees with the ALJ's finding that:

> ...the VPCS Board was fully aware and authorized the action taken by Garcia to correct her employment contracts, consistent with the advice of legal counsel. Garcia collaborated with the Board and school administrators to effectuate the correction plan; albeit in an informal or piecemeal way. The overarching intent was to recreate the lost contracts with the same terms and conditions that existed at the time they were originally approved by the Board.
>
> (Initial Decision at 11)

Thus, as stated above, the Commissioner must reject the conclusions of the OFAC report, which attribute to Murphy-Garcia an intent to mislead Martin and thwart the OFAC investigation into her hours.[10]

The Commissioner notes that the bulk of OFAC's exceptions to the Initial Decision pertain to Murphy-Garcia's and Houdart's invocation of the Fifth Amendment to the Constitution. The Commissioner has reviewed the exceptions, but rejects them. First, the Commissioner declines to draw a negative inference relating to Houdart's decision to terminate his testimony. While the possibility that his statements about his transmittal of incorrect contracts might subject him to criminal sanctions seems remote, it nonetheless existed by virtue of OFAC's transmittal of its report to the Division of Criminal Justice. The Commissioner is further unpersuaded that a negative inference flowing from Houdart's actions can be imposed

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[9] While the approvals disclose the salary to be received by Murphy-Garcia, they do not mention her hours.

[10] Since the OFAC report did not expressly allege impropriety by the VPCS Board, the Commissioner does not find it necessary to comment on the ALJ's analysis of the Board's actions *vis-à-vis* the Open Public Meetings Act, *N.J.S.A.* 10:4-15 *et seq.* *See,* OFAC's Exception VI to the Initial Decision.

upon Murphy-Garcia. Most importantly, however, is that Houdart's testimony would add little to this controversy. It is undisputed that Murphy-Garcia gave Houdart reconstituted contracts to transmit to Martin, and that Stanker testified that the Board knew of Murphy-Garcia's actions. Houdart is not in a position to divine what the Board did or did not know.

For similar reasons, the Commissioner is not inclined to draw a negative inference from Murphy-Garcia's invocation of her Fifth Amendment right not to testify against herself. OFAC does not argue that Murphy-Garcia did not have that right, but rather argues that it was abrogated by her responses to discovery. The Commissioner is, however, reluctant to withhold from Murphy-Garcia a constitutional right in a controversy where her testimony is unnecessary to a resolution. Murphy-Garcia does not deny reconstituting the contracts and asking Board President Stanker and the former and present VPCS business administrators to execute the signature pages of same. The chief issue is whether she acted clandestinely, or with the knowledge of the VPCS Board. Stanker testified multiple times that the Board knew that Murphy-Garcia was trying to reconstruct the lost contracts and send them to Martin. Murphy-Garcia is in no position to rebut Stanker's representation about what he and the Board knew.

Notwithstanding that the Commissioner finds the OFAC report's conclusions about Murphy-Garcia to be unsupported, the Commissioner finds much of concern in the OFAC report. It is clear that the investigation was a very frustrating exercise for Martin. Multiple copies of contracts for Murphy-Garcia were given to OFAC and the Charter School Office of the Department of Education. The copies conflicted in every respect – from format and content to dates and signatures – and Martin's interviewees did not offer much clarity. While the Commissioner finds that the reconstructed contracts submitted to Martin on March 11, 2011, were valid representations of Murphy-Garcia's relationship with VPCS, he is dismayed at the

disorganization evident in VPCS's administration, especially as regards record-keeping, and the casual manner with which the Board oversaw the administration.

The record does not include any direct evidence that Murphy-Garcia reconstituted the VPCS contracts to hide financial irregularities. Indeed, Stanker testified that Murphy-Garcia, who was a founder of VPCS, donated back to VPCS all of her 2009-10 salary and half of her 2010-11 salary. 4T167 However, the Commissioner is concerned about the collective number of hours of Murphy-Garcia's employment.

Colleen Schulz-Eskow, of the Department's Charter School Office, testified that it was common for business administrators – but not lead personnel – to work at multiple charter schools. 6T52-53. Since she was aware that – at the time VPCS was starting up – Murphy-Garcia was doing business administrator work at other schools or districts, Schulz-Eskow questioned Murphy-Garcia about whether her time and commitment to VPCS would be sufficient to adequately oversee the school. 6T44-47. Ultimately, when the DOE approved VPCS, they were not worried about Murphy-Garcia being at the school on a part time basis. 6T55.

It is not clear to the Commissioner, however, whether Schulz-Eskow was aware of how many schools employed Murphy-Garcia. If she was, it appears that she did not share the concerns of her Department of Education colleague, Martin, about the implications of Murphy-Garcia's multiple employment. However, as a matter of common sense, the Commissioner must register misgivings about Murphy-Garcia's – or anyone else's – ability to actively devote to each of five employers the respective number of hours of work which were promised them. It is likely that such a concern motivated OFAC's continuation of its investigation into Murphy-Garcia's employment.

In sum, after a full review of this case, the Commissioner rejects the specific conclusions about Murphy-Garcia on page 11 of OFAC's report. However, the Commissioner cautions petitioner VPCS to improve its business practices and administrative oversight and to ensure that its contracts are properly memorialized and that all of its records are secure and accessible. The Commissioner also reiterates his concern that petitioner Murphy-Garcia may have contracted with more employers than she can properly serve.

Accordingly, the petition seeking rejection of the August 2011 OFAC report is granted, subject to the Commissioner's cautions contained herein. Copies of this decision will be forwarded to the New Jersey State Board of Examiners and the Division of Criminal Justice.

IT IS SO ORDERED.[11]



ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 4/04/14

Date of Mailing: 4/08/14

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9938-12
AGENCY DKT. NO. 176-6/12

BOARD OF TRUSTEES OF THE VINELAND PUBLIC CHARTER SCHOOL AND DR. ANN MURPHY-GARCIA,
Petitioners,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABLITY AND COMPLAINCE,
Respondent.

Joseph Betley, Esq., for petitioners Board of Trustees of Vineland Public Charter School and Ann Murphy-Garcia (Capehart & Scatchard, attorneys)

Beth N. Shore, Deputy Attorney General, for respondent New Jersey Department of Education, Office of Fiscal Accountability and Compliance (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: November 21, 2013 Decided: January 2, 2014

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF CASE

Petitioner, Vineland Public Charter School (VPCS) Board of Trustees (Trustees) challenges the findings and conclusions reached by Department of Education's Office of

Fiscal Accountability and Compliance (OFAC). In February 2011, the New Jersey Department of Education, Office of Educational Data ("OED") recorded that petitioner Dr. Ann Murphy-Garcia ("Garcia") was working the equivalent of 2.7 full-time positions in one public school district and three charter schools (P-1). Based on this information, the OED requested OFAC investigate whether Garcia did, in fact, hold two (2) full-time positions among the five (5) schools where she was employed. The OFAC concluded that Garcia was in fact, not working 2.7 full-time positions (P-36).

The OFAC concluded however that Garcia "orchestrated what appeared to be a hastily developed and ill-conceived plan intended to provide misinformation to the OFAC investigators and thwarted the OFAC investigation" (P-36). Based upon this conclusion the matter was referred to the State Board of Examiners and the Division of Criminal Justice (P-36). These findings by the OFAC are docketed as EDU 9938-12.

In a separate case docketed as EDE 1237-12, the State Board of Examiners alleges that Garcia's conduct was inappropriate and provides cause for the revocation of her certificates.

The VPCS asserts that the finding in the investigation report of the OFAC is not supported by competent evidence. Garcia also appeals the State Board of Examiner's action seeking to revoke her Teacher of Bookkeeping and Accounting, Teacher of Data Processing, Teacher of General Business, School Business Administrator, Assistant Superintendent for Business and School Administrator certificates.

PROCEDURAL HISTORY

The petitioner requested a hearing and the matter was filed at the Office of Administrative Law (OAL) on July 24, 2012, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. The prehearing order dated October 12, 2012, provides that the VPCS challenge to the OFAC findings and conclusions will proceed first since any further action is entirely predicated upon the findings therein (EDU 9938-12). The State Board of Examiner's action does not contain any independent findings but merely recites the OFAC findings. The Board of Examiners is

seeking to suspend or revoke Garcia's certificates. This appeal was tabled pending the outcome of the challenge to the validity of the OFAC findings (EDE 1237-12). The matters were not consolidated.

Hearings were held in EDU 9938-12 on January 22 and 31, 2013, March 14 and 21, 2013, May 24, 2013, and August 7, 2013. The parties agreed to submit written closings after receipt of the hearing transcripts. The last submission was received on November 21, 2013.

SUMMARY OF THE REVELANT EVIDENCE AND TESTIMONY

VPCS is located in Vineland, New Jersey. The VPCS Board President is Gary Stanker (T. 3/21/13, p. 9). Randy Ostrow was the former School Business Administrator/Board Secretary who worked for the VPCS Board from approximately March to July 2009, during the VPCS start-up period (T. 3/14/13, p. 221-2). Ostrow was replaced by Jonathan Houdart, who began working at the VPCS as the School Business Administrator/Board Secretary on or about August 2009 until January 2012 (T. 3/14/13, p. 150). Donna Colclough was the Receptionist/Secretary/Administrative Assistant at VPCS from 2009 through the end of 2011, and she handled many of the day-to-day administrative duties (T. 5/24/13, p. 9-10).

Garcia is the Executive Director of the VPCS. She holds various educational degrees and certifications (P-36). Garcia did not need to hold any certificate issued by the New Jersey Board of Examiners to act in her capacity as the Executive Director of the VPCS (T. 8/7/13, p. 56-7).

Garcia was the Business Administrator/Board Secretary for the Winslow School District during the relevant period of this matter. Her employment at the Winslow School District was a full-time position. Garcia's position as Executive Director at VPCS was a part-time position. In addition, Garcia was employed in a part-time position in the Voorhees School District as the Treasurer, the Charter-Tech High Charter School as the Business Administrator, and the Environment Community Opportunity Charter School as the Business Administrator. During the approval process for the VPCS, the Office of

Charter Schools was aware of Garcia's multiple positions and knew that she was not going to be at the school on a day-to-day, full-time basis (T. 8/7/13, p. 49-50, 55-6).

Thomas Martin ("Martin"), Manager of the Investigations Unit of the OFAC received the OED's request from his supervisor, Robert Cicchino ("Cicchino"), Director of OFAC (P-1; T 1/22/13, P-26). Martin worked as Manager of the Investigations Unit since August 2008 (T 1/22/13, p. 25). Martin was employed with the New Jersey State Police for thirty (30) years, prior to being employed with the OFAC (T 1/22/13, p. 25). Martin is responsible for the day-to-day administration and personnel administration of the Investigation Unit. He also receives the complaints that come into the Unit, assigns each complaint to an investigator for handling; works on investigations with investigators; and reviews and disseminates final investigative reports (T 1/22/13, p. 25).

On February 28, 2011, OFAC received a request from the Division of Field Services to investigate an allegation that Garcia held four employment positions that totaled 2.7 full-time equivalent hours ("FTE") (P-1). The OFAC initiated an investigation of Garcia because she had "an unusually high number" of full-time hours (T. 1/22/13, p. 26-7). The issue regarding Garcia's employment came from the Department of Educational Data seeking clarification of her FTE based on the hours she was performing, according to Martin.

Martin requested Garcia's employment contracts with the VPCS for school years 2009-2010 and 2010-2011 (P-2; T. 3/14/13, p. 153). On March 3, 2011, Mr. Houdart forwarded an e-mail to Martin, which was originally sent to Mr. Houdart from VPCS's Administrative Assistant, Donna Colclough, attaching the requested contracts (P-3). Mr. Houdart did not review the attachments when he forwarded Ms. Colclough's e-mail to Martin (T. 3/14/13, p. 159). The wrong or voided contracts were initially sent to Martin.

Martin was unable to determine whether Garcia was a full- or part-time employee because the contract was silent as to her employment status. (T 1/22/13, p. 31). Upon reviewing Garcia's contract for the 2010-2011 school year (P-5), however, Martin observed that paragraph 2 of the contract stated she was a full-time employee, and

paragraph 8 of the contract set forth full-time hours—8:00 a.m. to 4:00 p.m., Monday through Friday (T 1/22/13, p. 32). Because Garcia's 2010-2011 employment contract for Winslow also specified that she was a full-time employee, Martin decided to investigate the matter further (T 1/22/13, p. 33). He set up interviews with employees of the VPCS to determine whether Garcia was actually working full-time at VPCS (T 1/22/13, p. 33).

On March 11, 2011, Martin received an e-mail from Donna Colclough ("Colclough"), VPCS's administrative assistant, attaching: a letter signed by Houdart; the contracts Houdart had previously sent to Martin marked "void" and stricken through with a line; and another set of revised contracts for Garcia for the 2009-2010 and 2010-2011 school year (T 1/22/13, p. 33-34; P-6; P-7; P-8; P-9; P-10). Martin speculated that parts of this letter were untrue and that the revised contracts were a ruse to throw off his investigation.

Martin compared Garcia's original and corrected contracts for the 2010-2011 school year (T 1/22/13, p. 44-47). Although the original 2010-2011 contract indicated that Garcia was full-time, the corrected contracts for 2010-2011 indicated she was employed on a "part-time basis" (T 1/22/13, p. 44; P-12 at ¶1). Martin also reviewed the excerpt of the May 2, 2010, VPCS Board of Trustees meeting minutes that Houdart had certified (T 1/22/13, p. 45). This excerpt indicated the Board's acceptance of Garcia's contract for the 2010-2011 school year (P-13). The minutes did not specify whether Garcia's contract was for full- or part-time employment (P-13). The minutes also did not specify that the contract being approved was a new or modified contract based on a prior voided contract (T 1/22/13, p. 45; P-13).

Colclough testified how the wrong contracts for Garcia were sent to the OFAC on March 3, 2011. Colclough explained that she obtained the documents (P-4, P-5) from a pendaflex file marked "voided" in Mr. Houdart's office (T. 5/24/13, p. 12). Colclough thought Garcia's contracts were misfiled in the "voided" file and she could not find Garcia's contracts anywhere else (T. 5/24/13, p. 13-4). She did not tell Houdart that the contracts came from this voided file. Id. Since Mr. Houdart did not review and/or

authenticate the documents that were provided to him by Colclough, the incorrect contracts were forwarded to Martin (T. 3/14/13, p. 159).

The March 11, 2011, e-mail from Colclough to Martin was explored in detail during direct and on cross-examination. Colclough e-mailed Martin (P-6) corrected contracts reflecting the original and true intent of the VPCS Board regarding Garcia's part-time employment terms. The cover letter was signed by Mr. Houdart (P-7; P-20). The March 10, 2011, letter was authored by Garcia, signed by Mr. Houdart and the substance of the letter was true (T. 3/14/13, p. 175-6; T. 3/14/13, p. 120-21; T. 3/21/13, p. 138).

Under cross-examination Martin's conclusion that the VPCS engaged in a ruse to thwart his investigation, was itself undermined:

> Petitioners' Counsel: First line is, "During the week of February 28, 2010 [sic], I emailed two contracts for Dr. Garcia to your email address." That was a fact, correct?
>
> Martin: Yes.
>
> Petitioners' Counsel: That was not a misrepresentation?
>
> Martin: No. T. 1/31/13, p. 120.
>
> Petitioners' Counsel: [D]o you have knowledge whether or not [the second sentence is true], "These contracts were forwarded to me by Donna [Colclough], our administrative assistant."
>
> Martin: I believe they were . . . I can infer that this representation is true.
>
> Petitioners' Counsel: T. 1/31/13, p. 121.
>
> Petitioners' Counsel: [Mr. Houdart] then says, "The contracts that were forwarded were from a file of voided contracts." Is there any basis to believe that that statement was false?
>
> Martin: No. T. 1/31/13, p. 123.

> Petitioners' Counsel: [Mr. Houdart] then said, "I have now marked all those contracts 'void' so there should be no further confusion." What [Mr. Houdart] is telling you that he was the one who marked the contract "void," correct?
>
> Martin: Yes.
>
> Petitioners' Counsel: And again you have no basis to believe that that particular statement if [sic] false, do you?
>
> Martin: No. T. 1/31/13, p. 124.
>
> Petitioners' Counsel: [Mr. Houdart] then says, "We have attached the contract for Dr. Garcia that were in our minute books and also I have certified an excerpt from [sic] your records." Now you told us during your direct that you never bothered to look at the minute books, right?
>
> Martin: I got copies of the minutes. I did not look at the minute books. No.
>
> Petitioners' Counsel: So you have no way of knowing whether that particular statement is true or not, because you never looked at the minute books right?
>
> Martin: I believed it to be untrue, because I believe those contracts didn't exist at the time the minute books portrayed them to exist.
>
> Petitioners' Counsel: But you never looked at the minute books.
>
> Martin: No, I did not. T. 1/31/13, p. 125-6.
>
> Petitioners' Counsel: [Mr. Houdart] then says, "I have certified an excerpt for your records." You have no basis to suggest that that's an untrue statement either, do you?
>
> Martin: No. T. 1/31/13, p. 126.

In March 2011, the VPCS Board President, Gary Stanker, became aware that there was a potential problem regarding Garcia's employment contracts. He received a phone call from Garcia's husband (who was also a Board member) reporting that Garcia was rumored to be employed full-time in two positions (T. 3/21/13, p. 150). Mr. Stanker was also informed that Garcia's husband called the other Board members and shared

with them what he had learned (T. 3/21/13, p. 153). Thereafter, VPCS and Garcia discovered that the March 3, 2011, e-mail attached the wrong contracts for the Executive Director (T. 3/21/13, p. 50-2). The incorrect one-page contract sent to the OFAC for 2009-2010 (P-4) did not mention full- or part time status. The incorrect three-page contract for 2010-2011 (P-5) stated that Garcia was a full-time employee. The VPCS Board and Garcia knew that she was part-time and it was always the intent of the parties for her position to be part-time (T. 3/21/13, p. 50).

The VPCS staff could not locate the correct contracts, and nor could Garcia. They sought the advice of the VPCS Board Solicitor, Hope Blackburn, Esq. (T. 3/21/13, p. 50-2, 55, 84-5). Blackburn advised the Board members and administrators that the Board could correct the contracts, without convening a new meeting (Id.). The Board had already approved the terms of Garcia's employment for school years 2009-2010 and 2010-2011 (T. 3/21/13, p. 55, 154; T. 3/21/13, p. 59-60). The Board members had informal discussions amongst themselves about the course of action recommended by Blackburn, but the Board did not convene an official meeting under the Sunshine Law to discuss the corrective actions being taken by Garcia (T. 3/21/13, p. 57-61). The issues were discussed by all involved in a "piecemeal" fashion (T. 3/21/13, p. 60). The Board was aware that Board President Stanker would sign the corrected contracts as reflected by this colloquy:

> Q. How was the Board made aware that you were signing these contracts?
>
> Mr. Stanker: We discussed how we were going to handle it and we were told that all we had to do is make up a contract that has the right provisions in it for her part-time employment and we can sign them and that's all we needed to do. So we did it. T. 3/21/13, p. 85.
>
> Q. . . . On that point you - - you testified that there was a second solicitor who was brought in to give you a second opinion.
>
> Mr. Stanker: Right. Correct.

Based on the advice of counsel, the Board members worked together with its administrators to correct Garcia's contracts to reflect the intent of the Board that she was always a part-time employee (T. 3/21/13, p. 98-100, 154). Garcia coordinated with Stanker in March 2011 to sign the corrected employment contracts because she was trying to correct a mistake (T. 3/21/13, p. 151-4).

On March 27, 2011, Garcia provided a summary of the status of the OFAC investigation during the Board meeting (T. 3/21/13, p. 158, 162, R-7). She told the Board that she had Mr. Houdart and Ms. Ostrow sign the corrected contracts and that Mr. Stanker signed them as well (T. 3/21/13, p. 162; R-7). There was no formal Board action or approval at that meeting (T. 3/21/13, p. 163; R-7).

Martin did review the excerpt of the June 14, 2009, VPCS Board of Trustees' meeting minutes that Houdart had certified. (T 1/22/13-42; P-10). This excerpt indicated the Board's acceptance of Garcia's contract for the 2009-2010 school year (T 1/22/13, p. 42; P-10). The excerpt of the minutes did not specify whether Garcia's contract was for full- or part-time employment (T 1/22/13, p. 43; P-10). The excerpt of the minutes did not indicate that another contract for Garcia for the same year had been voided. (T 1/22/13, p. 43; P-10). At a later point in the investigation, Martin reviewed the full minutes from the June 14, 2009 Board meeting. Nothing in the full minutes indicated whether Garcia's contract was for full- or part-time employment or whether another contract for Garcia for that year had been voided (T 1/22/13, p. 132; P-34).

By April 20, 2011, Martin interviewed three or four employees from the VPCS who indicated to him that Garcia's position was always part-time (T. 1/31/13, p. 129-30). Similarly, on April 20, 2011, Martin spoke to Blackburn, attorney for the Board, who had stated that Garcia was always part-time. Id. By this time Martin was sufficiently convinced that Garcia was a part-time employee of the VPCS.

On June 29, 2011, VPCS Solicitor Blackburn e-mailed Martin the template (P-33) of the agreement from 2009 that she prepared as the attorney for the VPCS Board regarding Garcia's employment contract with a word document number of 419545 (P-32). Martin admitted that Blackburn prepared a contract in June 2009 for Garcia for the

position of Executive Director which says Garcia is **part-time** (T. 1/31/13, p. 117). Martin also admitted that the contract e-mailed to him by Mr. Houdart on March 11, 2011, (P-9, P-23) has the exact word document number (419545) setting forth Garcia's contract terms for the 2009-2010 and 2010-2011 school years (T. 1/31/13, p. 118-9, 126). Martin did not dispute that in June 2009, the Board's attorney prepared the contract for Garcia for the 2009-2010 school year (T. 3/14/13, p. 143).

By June 2011, the Board sought a second legal opinion from another attorney, Joan Josephson, Esq. (T. 3/21/13, p. 57, 85-6). Josephson provided a different legal opinion than Blackburn and recommended at the June 19, 2011, that the Board formally approve the corrected contracts at its June 19, 2011, meeting (T. 3/21/13, p. 163-5; P-35).

Mr. Stanker testified that he knew of Garcia's actions and she was not doing anything without the Board's knowledge (T. 3/21/13, p. 200). The other members of the Board knew and understood Garcia's attempts to correct the void/mistaken documents that were initially sent to OFAC. Mr. Stanker stated:

> Nobody was out in the dark as far as the Board members were concerned. Everybody knew what was going on. We all talk to one another and we were told like I said before by our Board solicitor at that time to just change the contract. We didn't need to do it at a meeting . . . Board member kept discussing that . . .Then when we were told with the second lawyer . . . the best thing you can do is do it at a Board meeting, re-adopt it, get it over with. (T. 3/21/13, p. 201-2).

Consistent with Ms. Josephson's legal advice, the Board formally approved Garcia's corrected contracts at the June 19, 2011, Board meeting (P-35). Indeed, the Board's formal motion made clear that:

> The position of Executive Director has always been a part-time position. The **contracts that were executed in March 2011 are consistent with the terms and conditions of employment that the Executive Director has always followed. The prior contracts that describe the**

> **Executive Director as a full-time employee were done in error and have never been followed**. (P-35).
>
> [Emphasis added]

In August 2011, the OFAC issued its Report of the investigation regarding Garcia's employment positions (P-36). The OFAC accepted that Garcia's position at VPCS was developed and intended to be a part-time position. The OFAC nevertheless concluded that Garcia "orchestrated what appeared to be a hastily developed and ill-conceived plan intended to provide misinformation to the OFAC investigators and thwart the OFAC investigation" (P-36).

CONCLUSIONS

The OFAC charges that Garcia "orchestrated a hastily developed and ill-conceived plan" intended to provide "misinformation" and "thwart" the OFAC investigation by:

> (1) modified her original employment contracts;
>
> (2) sought out and received witnessing signatures from the former and current school business administrator on these modified contracts via late night emails; and
>
> (3) authored a document to OFAC that indicated the replacement contracts developed by her were, in fact, the original employment contracts.

I **CONCLUDE** that the VPCS Board was fully aware and authorized the action taken by Garcia to correct her employment contracts, consistent with the advice of legal counsel. Garcia collaborated with the Board and school administrators to effectuate the correction plan; albeit in an informal or piecemeal way. The overarching intent was to recreate the lost contracts with the same terms and conditions that existed at the time they were originally approved by the Board.

The OFAC initial investigation questioned whether Garcia was working in more than one full-time position. This question was resolved favorably for Garcia midway through the OFAC investigation. All board members, administrators, former board members or employees, and legal counsel confirmed that Garcia was always part-time with VPCS.

Nevertheless, the OFAC charged Garcia with undermining and thwarting its investigation, because she aided in sending corrected contracts to the OFAC during the course of the investigation. I **CONCLUDE** the OFAC investigation was not undermined or thwarted by Garcia when she aided in sending corrected employment contracts to the OFAC. There was no misleading modification of any contractual term by Garcia that was inconsistent with her actual employment relationship. Indeed, Martin performed an exhaustive investigation and independently concluded that Garcia was never employed, or intended to be employed, as a full-time employee with the VPCS. This conclusion was reached by Martin after interviewing current and former employees and checking with the Board Solicitor. Witness statements received by Martin were corroborated by contract templates prepared by outside counsel, covering the period under investigation. Without any doubt, Garcia was at all times, intended to be a part-time employee with the VPCS. The investigation should have ended here. But the sloppy record keeping by the VPCS raised questions as the accuracy and authenticity of the documents provided during the OFAC investigation. Therefore Martin pursued matters further with his focus solely upon Garcia. But the documents were supplied by many individuals, not just Garcia.

Garcia did not submit anything directly to the OFAC, made no admissions to the OFAC, and provided nothing that was false to the OFAC. Moreover, Garcia never made any statements or admissions to the OFAC investigator. Consequently, the OFAC Investigation Report contains no competent evidence regarding Garcia's motives or intentions concerning her corrected contracts. It only espouses inferences and supposition which are not the same as facts.

Indeed, the OFAC investigation put the VPCS on notice that many of its document retention procedures, particularly for contracts, was in need of substantial

improvement. Staff contracts were misplaced or lost and/or the wrong contracts were executed and kept on file as authentic ones. As the investigation moved forward, so did the VPCS move ahead regarding its responsibility to correct Garcia's employment contracts. Corrected contracts were prepared, signed and submitted to Martin by the VPCS business administrator, not Garcia. And the terms of the contracts for Garcia were already approved by the VPCS Board during the contract years 2009-2010 and 2010-2011 (P-10; P-13). Indeed, the VPCS Board had already voted on Garcia's contract and the corrections were merely being implemented, without any further vote as suggested by the Board solicitor. The business administrator was therefore authorized to forward the corrected agreements to Martin. I **CONCLUDE** that substantively, Garcia's employment with the VPCS was always part-time (See, P-35). Martin came to the same conclusion, after an extensive investigation (T. 1/22/13, p. 134-136). Martin was questioned as follows:

> The Court: But, you're telling me from your investigation she was part-time, the contracts in place said she was full-time and once OFAC got involved, that is you, she realized there was a mistake in her contracts and she was trying to clean them up to be factually accurate with her job title and duties.
>
> Martin: That would be part of the characterization, yes sir.
>
> T. 1/22/13, p.136.

While it appeared that Garcia was employed full-time, the evidence credibly and overwhelming established that substantively her employment agreement was part-time. Indeed the evidence confirmed that Garcia was always treated and paid as part-time and that her written contracts needed to be corrected. Therefore, the OFAC's assertion that Garcia "modified her original contracts," is without merit. Her "original" employment terms were that she was hired as a part-time employee. Her written contracts were wrong. Therefore, Garcia worked with her staff and the Board to correct her erroneous contracts and forward the corrected ones to the OFAC.

The VPCS and Garcia were responsible for correcting erroneous written contracts and replacing them with corrected ones. The Open Public Meetings Act (OPMA) found at N.J.S.A. 10:4-15a provides public boards with extensive flexibility to

take corrective action when it makes errors. In Gandolfi v. Town of Hammonton, 367 N.J. Super. 527, 539-540, (App. Div. 2004) the Appellate Division explained:

> In any event, N.J.S.A. 10:4-15a provides that [a]ny *action* taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ[s]. . . ." (Emphasis added). Here, no "action" was taken by the Board during the November 1, 2000 closed session. The transcript of the session makes clear that although a settlement proposal was discussed, it was never voted upon. In fact, there was no quorum of available and eligible Board members to take such action.
>
> N.J.S.A. 10:4-15a provides further that when action taken by a public body does not conform to the provisions of the act, **it "may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act. . . ." This remedial section of the act "contemplate[s] maximum flexibility in rectifying governmental action which falls short of the standards of openness prescribed for the conduct of official business."** Polillo v. Dean, 74 N.J. 562, 579, 379 *A.2d* 211 (1977). "While the purpose of the act is to secure public access to the meetings of public bodies, N.J.S.A. 10:4-15 'provide[s] a means to balance the rights of an informed citizenry against the need of government to function effectively.'" Council of NJ State College Locals v. Trenton State College Board of Trustees, 284 N.J. Super. 108, 115, 663 A.2d 664 (Law Div.1995) (quoting Aronowitz v. Planning Board, 257 N.J. Super. 347, 358-59, 608 A.2d 451 (Law Div.1992)).
>
> Here, subsequent to the November 1, 2000 closed session, the Board and its attorney held executive sessions on two occasions to discuss the entry of a consent order for the purposes of settling the matter. At the public portion of the hearing held on November 15, 2000, a resolution was adopted authorizing the Board's attorney to "pursue" the consent order for the purpose of settling the SMA action. Thereafter, public hearings were held on SMA's by-right subdivision, which was the centerpiece of the settlement proposal. **In our view, even if any "action" was taken during the November 1, 2000 meeting, the subsequent de novo actions taken during the public hearings cured any technical violation of the OPMA.**
>
> (Emphasis added)

I **CONCLUDE** the OFAC's fact finding and conclusions reached in its report, holding that Garcia thwarted its investigation, is wrong as a matter of fact and law. The facts presented at the de novo OAL hearing, as developed through the adversarial process, persuasively and credibly established that Garcia was correcting errors in her employment contracts which helped the OFAC understand what her actual contractual terms were. The adversary system "is a procedural system involving active and unhindered parties contesting with each other to put forth a case before and independent decision maker." Black's Law Dictionary (9th ed. 2009, at page 63). This process includes challenging the proofs offered by the opposing sides by direct and cross-examination of witnesses as recollection, competence, bias, believability, vantage point, logic, and other similar techniques designed to cull out the truth. It is vital to contested case.

Here Garcia had implicit and apparent authority to make these corrections to her contract under the OPMA since the VPCS Board had already voted to hire her as a part-time employee in 2009. In fact, Garcia was required to correct her written contracts and fix them so they conform to the terms under which she was hired. The fact that Garcia, together with the VPCS Board and staff all made corrections to these contracts during the OFAC investigation, does not make Garcia guilty of obstructing or misleading an ongoing investigation.

Conversely, if Garcia failed to correct the erroneous contracts initially provided to the OAFC, she would be guilty of thwarting the investigation. When a (public) employee takes action to cure an error, and is thereafter charged with wrongdoing for taking corrective action, such a charge is repugnant to public policy. This type of charge chills public employees from doing what is right and creates the perception that correcting mistakes will come with substantial charges and penalties.

I also **CONCLUDE** that Garcia did not falsely or improperly attest to the signature of Randy Ostrow (Ostrow). Ostrow's 2009-2010 employment does not contain her signature (P-17). Garcia was a witness to the document's execution by the Board president. The inference suggested by the OFAC is that Garcia must have improperly

attested to Ostrow's signature (P-17). Garcia's counsel sufficiently rebutted any inference that she witnessed Ostrow's signature. **I CONCLUDE** that OFAC failed to establish this claim beyond mere speculation.

The signature page for Ostrow's contract is arranged as follows:

President /s/ Gary Stanker
Attest /s/ Dr. Garcia
Issue date July 1, 2009

Employee /s/ Randy Ostrow
Date 7/1/10

(P-17)

The contract layout and the evidence indicate that Garcia only attested to the signature of Board President Stanker and not to Ostrow's signature (P-17). The testimony revealed that the OFAC investigator was simply speculating that Garcia witnessed Ostrow signature:

> Petitioners' Counsel: Now how do you know that that particular attestation of Dr. Garcia had nothing to do with Randy Ostrow's signature and everything to do with president Gary Stanker's signature?
>
> Martin: I do not know that.
>
> Petitioners' Counsel: "...[I]t certainly can suggest that Dr. Garcia was witnessing Gary Stanker's signature, couldn't it?"
>
> Martin: It could. T. 1/31/13, p. 168-9.

School law has very specific procedures, rules and regulations regarding employment contracts. Unless otherwise specified in the Charter School Program Act or its implementing regulations, or unless otherwise exempted by the Commissioner of Education, "[a] charter school shall operate in accordance with its charter and the provisions of law and regulation which govern other public schools." N.J.S.A. 18A:36A-11(a).

On or before April 30 of each year, every board of education must notify its non-tenured staff whether they will be reappointed or terminated. The non-tenured staff member must notify the board of education by June 1, that they are going to accept employment with the board for the succeeding year. N.J.S.A. 18A:27-3.1. Likewise, school business administrators such as Ostrow are hired and fired under a similar process. N.J.S.A. 18A:17-14.1.

Employment contracts are distributed to the employees; the employee signs the contract and returns it to the Board for approval. There is no evidence that Ostrow's fabricated signature occurred at the Board meeting or at any other time when Garcia could have witnessed the agreement. The layout of the contract plainly indicates that Garcia was only witnessing Stanker's signature as Board President. Employees can return their executed contract to the Board in the mail or in person. Thereafter, the employee contract must be voted on and approved at a Board meeting, with or without the employee being present. When it is finally approved by the Board, it is signed by the president and witnessed. Thus, there is no evidence that Garcia intended her signature to be anymore than an authentication of Board President Stanker's signature. I **CONCLUDE** based upon the record herein, that the OFAC assertion that Garcia falsely or improperly witnessed Ostrow's signature is mere speculation. Indeed, Martin was not aware of school law or the process of how contracts are disseminated to employees and returned for approval and execution by the Board.

Finally, the OFAC urges that an adverse interest be drawn against Garcia because she did not testify. Garcia did not testify because Martin referred his final OFAC Report to the Division of Criminal Justice. Garcia exercised her Fifth Amendment right not to testify, based upon the referral.

The Fifth Amendment establishes the privilege against self-incrimination in providing that "no person shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. Amend V. The privilege against self-incrimination applies to both civil and criminal matters. See Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (stating that the witness can refuse to testify in a civil proceeding if their testimony can incriminate them in a future criminal matter). It is well settled that the

privilege against self-incrimination may be lost if it is not invoked. See Garner v. United States, 424 U.S. 648, 653 (1976); Rogers v. United States, 340 U.S. 367, 371 (1951). Furthermore, the privilege may be "lost by not asserting it in a timely fashion." Maness v. Meyers, 419 U.S. 449, 466 (1975) [dictum]. Waiver is only one of several manners in which this privilege may be lost. Garner, supra, 424 U.S. at 654.

The consequences of Dr Garcia's assertion of her Fifth Amendment right is found in State Department of Law & Public Safety v. Merlino, 216 N.J. Super. 579, 587 (App. Div. 1987), certif. granted, 107 N.J. 657, aff'd, 109 N.J. 134 (1988). It states:

> It is well settled that in administrative and civil proceedings, it is permissible for the trier of fact to draw adverse inferences from a party's plea of the Fifth Amendment. **But the inference may be drawn only if there is other evidence [competent and credible] supporting an adverse finding; it must not alone constitute the evidence of guilt**.
>
> [Emphasis added; Citations omitted.]

I have declined to draw an adverse inference based upon the overwhelming weight of evidence in favor of Garcia's actions. It was undisputed by all witnesses that Garcia and her staff were attempting to "right-a-wrong", in regard to the contracts at issue. They were not attempting to obfuscate, confuse or thwart an investigation. Consequently, there is no reason to draw an adverse inference.

ORDER

I **ORDER** that the fact-finding report by the OFAC be rejected as it is not supported by sufficient and competent evidence to support the findings made therein.

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

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

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

1-2-14
DATE

W. TODD MILLER, ALJ

Date Received at Agency: January 2. 2014

Date Mailed to Parties: January 2. 2014

MH/ds

WITNESSES

For Dr. Garcia (Petitioner):

None

For the OFAC (Respondent):

Thomas Martin
Jonathon Houdart
Randy Ostrow
Gary Stanker
Donna Colclough
Colleen Eskow

EXHIBITS

For Dr. Garcia (Petitioner):

R-1 Letter from Robert Cicchino, Director of Office of Fiscal Accountability and Compliance, September 12, 2011
R-2 Letter Robert Cicchino, Office of Fiscal Accountability and Compliance, August 10, 2011
R-3 Newsletter – Millville Public Charter Schools, dated March 11, 2001
R-4 Handwritten notes
R-5 Interview with Randy Ostrow March 18, 2011
R-6 Data from Department of Education regarding Dr. Ann Garcia's full-time employment
R-7 Minutes, Vineland Public Charter School, March 27, 2011

For the OFAC (Respondent):

P[1]-1 E-mail from Robert Cicchino, February 28, 2011

[1] The exhibits for the OFAC case under EDU 9938-12 are marked as "P" even though the OFAC is the respondent. This happened because they were premarked before the case started. The Board of Examiners has a companion case under docket number EDE 1237-12 wherein it is the petitioner while the OFAC is the respondent in EDU 9938-12. It was anticipated by the OFAC and the Examiners that both cases would be presented together even though they were not consolidated. Indeed the prehearing order indicates that the Examiners case was being tabled and the OFAC case would proceed first. As a consequence the OFAC exhibits are marked a "P" exhibits.

P-2 E-mail from Thomas Martin, March 1, 2011

P-3 E-mail from Jonathan Houdart, March 3, 2011

P-4 Employment Contract – Randy Ostrow, July 1, 2009

P-5 Employment Contract – Dr. Ann Garcia, July 1, 2010 to July 30, 2011

P-6 E-mail from Vineland Public Charter School, March 11, 2011

P-7 Letter from Jonathan S. Houdart dated March 10, 2011

P-8 Voided Contract – Randy Ostrow, July 1, 2009

P-9 Employment Contract - Dr. Ann Garcia, July 1, 2009 to June 30, 2010

P-10 Vineland Public Charter School Minutes, June 14, 2009

P-11 Voided Contract for Dr. Ann Garcia for July 1, 2010 to June 20, 2011

P-12 Contract for Dr. Ann Garcia July 1, 2010 to June 30, 2011

P-13 Vineland Public Charter School Minutes from May 2, 2010

P-14 E-mail from Randy Ostrow, March 18, 2011

P-15 Signature page of Contract (unsigned) for Dr. Ann Garcia

P-16 Business Signature Card – TD Bank – Vineland Public Charter School

P-17 Employment Contract – Randy Ostrow, July 1, 2009 to June 30, 2010

P-18 Signature exemplar for Randy Ostrow

P-19 E-mail from Jonathan Houdart, May 25, 2011

P-20 Letter from Jonathan Houdart dated March 10, 2011

P-21 Computer properties for Jonathan Houdart's letter dated March 10, 2011

P-22 E-mail from Jonathan Houdart dated May 32, 2011

P-23 Employment Contract – Dr. Ann Garcia, July 10, 2010 to June 20, 2011P-

P-24 Computer properties for Contract of Dr. Ann Garcia-Murphy

P-25 Vineland Public Charter School Minutes from June 14, 2011

P-26 Computer properties for the Minutes, March 9, 2011

P-27 Vineland Public Charter School Minutes from May 2, 2010

P-28 Computer properties for Minutes from March 9, 2011

P-29 E-mail from Jonathan Houdart dated June 24, 2011

P-30 Employment Contract template for Vineland Public Charter School

P-31 Computer properties for Contract template June 24, 2011

P-32 E-mail Hope Blackburn dated June 29, 2011

P-33 Template for Employment Contract for Dr. Ann Garcia

P-34 Vineland Public Charter School Minutes for the period June 14, 2009 through June 27, 2010

P-35 Vineland Public Charter School Minutes, June 19, 2011

P-36 Report of Examination prepared by Investigator Thomas Martin, August 2011

P-37 Letter from Robert J. Cicchino, Director, Office of Fiscal Accountability and Compliance, August 9, 2011

P-38 Responses to discovery on behalf of Dr. Ann Garcia

P-39 Department of Education, Office of Fiscal Accountability and Compliance Interrogatories

P-40 Omitted

P-41 Employment Contract – Randy Ostrow, July 1, 2009

P-42 Employment Contract – Yvonne Cribbs, July 1, 2009

150-14

ÓAL DKT. NO. EDU 1796-14
AGENCY DKT. NO. 32-2/14

AUGUST DALEO, GINA M. FRASCA, and MATTHEW G. MALESKI,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
JOHN BELLONE, VICE PRESIDENT, BOARD OF EDUCATION OF THE TOWNSHIP OF LITTLE EGG HARBOR, OCEAN COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

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

Accordingly, the recommended Order of the OAL denying petitioners' application for emergent relief is adopted for the reasons expressed therein. This case shall proceed to a plenary hearing at the OAL to determine the underlying claim on the merits.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/10/14

Date of Mailing: 4/11/14

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



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 1796-14

AGENCY DKT. NO. 32-2/14

AUGUST DALEO, GINA M. FRASCA,
AND MATTHEW G. MALESKI,
Petitioners,
v.
JOHN BELLONE, VICE PRESIDENT,
BOARD OF EDUCATION OF THE
TOWNSHIP OF LITTLE EGG HARBOR,
OCEAN COUNTY,
Respondent.

August Daleo, petitioner, pro se

Gina M. Frasca, petitioner, pro se

Matthew G. Maleski, petitioner, pro se

Michael P. Madden, Esq., for John Bellone, respondent (Madden & Madden, attorneys)

Andrew Babiak, Esq., for Frank Kasyan, intervener

Record Closed: February 24, 2014 Decided: February 25, 2014

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

By request for an emergent relief hearing received by the New Jersey Department of Education, petitioners August Daleo (Daleo), Gina M. Frasca (Frasca), and Matthew Maleski (Maleski), (collectively "petitioners"), who are members of the Little Egg Harbor Township Board of Education ("Board" or "District"), request emergent relief seeking a determination that a failed motion for non-renewal of the employment contract of Dr. Frank Kasyan (Kasyan), the superintendent of the District, be overturned, and that the motion be declared as approved or carried. The matter was filed at the Office of Administrative Law on February 14, 2014. The Commissioner of the Department of Education requested that an administrative law judge be assigned to conduct a hearing in this matter. I was assigned to conduct the hearing, and the matter for emergent relief was heard on February 24, 2014. At the commencement of the hearing, this tribunal granted Kasyan's motion to intervene as a party due to his interest in the outcome of the matter. The record closed at the conclusion of the hearing.

FACTUAL DISCUSSION

For purposes of deciding this application for emergent relief, the following is a summary of the relevant facts not in dispute as derived from the contents of the petition and from the arguments of petitioners and counsel adduced at the hearing. Petitioners, as members of the Board, seek emergent relief as a result of a Board vote respecting the renewal of the contract of respondent Kasyan. On January 7, 2014, the Board, which has seven members, held a reorganization meeting. On January 27, 2014, the Board held a regular meeting, but the agenda for the meeting did not include the subject of Kasyan's contract, which was set to expire on June 30, 2014. Under N.J.S.A. 18A:17-20.1, and the terms of Kasyan's contract, he would have had to have been notified of the non-renewal of his contract no later than January 30, 2014.

At the January 27, 2014, meeting, Daleo made a motion to issue a letter of non-renewal to Kasyan, and Frasca seconded the motion. Three of the seven Board members could not vote on the motion because of conflicts of interest: the husband of the Board president, Lorraine Perrino (Perrino), works as a custodian for the school district; the wife of Board member Carmine Cimino (Cimino) also works as a custodian for the school district; and, the daughter of Board member Martha Palan (Palan) also works for the school district. The remaining non-conflicted Board members were Daleo, Frasca, Maleski, and respondent John Bellone (Bellone).

Before roll call to vote on the motion, the Board attorney, Terry Brady (Brady), stated that, in his opinion, four "yes" votes would be necessary to carry the motion. Thus, all four of the non-conflicted members would have to vote in the affirmative for the motion to carry. Daleo and Frasca disagreed, instead arguing that only a majority of a quorum, or three out of four members, would need to vote in the affirmative in order for the motion to pass. When asked, Brady could not cite any legal authority for his opinion. As a result, Brady directed the Board secretary to call the roll in order to vote on the motion.

However, before the roll was called, Bellone left the meeting and did not return. Since Bellone's absence resulted in a lack of a quorum of non-conflicted members, Brady directed the Board to invoke the doctrine of necessity.[1] This allowed the conflicted members of the Board to vote on the motion to non-renew Kasyan's contract. The vote resulted in three "yes" votes (Daleo, Frasca, and Maleski) and three "no" votes (Cimino, Perrone, and Palan). Bellone remained absent from the meeting and did not vote. As a result of the split vote, the motion did not carry.

As a result of the actions that took place at the January 27, 2014, Board meeting, petitioners in their petition seek the following relief:

[1] The doctrine of necessity "allows an official to participate in public business notwithstanding an otherwise disqualifying conflict." Allen v. Toms River Reg'l Bd. of Educ., 233 N.J. Super. 642, 644 (Law Div. 1989).

> We ask you to please consider Mr. Bellone's decision to walk out of the meeting after the motion and the second was on the table as an abstention to the vote; therefore negating the 'doctrine of necessity' and the three votes from the conflicted board members. Therefore, the motion to send the superintendent a letter on non-renewal would carry.

LEGAL DISCUSSION

As a preliminary matter, there are procedural concerns with petitioners' petition and motion for emergent relief. First, petitioners named only Bellone as a respondent. Petitioners failed to name the Board, as a body, as a party in this matter. The Board is arguably an indispensable party in this matter since petitioners herein seek relief that would affect the Board's business, and the failure to name the Board as a party could be grounds for dismissal in accordance with N.J.A.C. 6A:3-1.3. Second, Bellone questions whether this matter is moot because Kasyan's contract automatically renewed, by statute and by contract, on January 30, 2014, when the Board failed to issue him a letter of non-renewal, and since that date has passed, petitioners cannot obtain effective relief. This may also be grounds for dismissal.

Although the petition could arguably be dismissed on procedural grounds, petitioners' motion for emergent relief fails on substantive grounds. According to N.J.A.C. 6A:3-1.6,

> [a] motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The burden of proving each of these factors rests with the party seeking emergent relief. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citation omitted). "Each of these factors must be clearly and convincingly demonstrated" by the moving party. Waste Mgmt of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008). Here, petitioners have failed to carry their burden, and the petitioners cannot make the requisite showing.

Petitioners will suffer irreparable harm

According to petitioners, "[t]his newly hired board should have the opportunity to fully discuss [Kasyan's] contract and potential rehire and perform their due diligence so that the district is not bound financially to this superintendent's current contract for another five years." Petitioners argue that since the new Board did not have the opportunity to discuss Kasyan's contract between January 7, 2014, when the Board reorganized, and January 30, 2014, when Kasyan's contract automatically renewed, petitioners will suffer irreparable harm if the requested relief is not granted because they will be deprived of the ability to perform their duties as members of the Board, which is tasked with selecting the superintendent of the school district. Petitioners also have concerns that Bellone's actions have impacted the Board's future, including a financial impact to the District and to the community. According to petitioners, if the Board had voted to issue a letter of non-renewal at the January 27, 2014, meeting, the Board would have had time to subsequently consider whether to offer Kasyan a new contract or to appoint a new superintendent at the expiration of Kasyan's term on June 30, 2014.

Respondent Bellone argues that petitioners have provided no facts to suggest that the District's future and/or finances will be adversely impacted by the renewal of Kasyan's contract. In addition, petitioners' argument regarding irreparable harm cannot succeed because the contemplated harm is at best, speculative.

I agree that petitioners have shown that they will suffer irreparable harm if they are not given the opportunity to perform their duties as Board members and consider the propriety of renewing Kasyan's contract. Bellone's actions in walking out of the meeting deprived these petitioners the ability to, at the very least, have a vote taken by

the necessary quorum of four non-conflicted Board members in attendance at the meeting. His absence left three non-conflicted members, and no voting quorum. Had Bellone not left the meeting, his presumptive "no" or "abstain" vote would have maintained the quorum, and the motion could have been considered carried by a three vote majority, assuming four "yes" votes were not required as advised by attorney Brady. In that case, the Board would have had time to subsequently consider whether to offer Kasyan a new contract or to appoint a new superintendent at the expiration of Kasyan's term on June 30, 2014. Bellone's actions effectively did deprive petitioners of the ability to perform their duties as members of the Board, which is tasked with selecting the superintendent of the school district.

The legal right underlying petitioners' claim is not settled

The legal right underlying petitioners' claim is not settled because there is a question whether the Board needed a majority of the full board, and not just a majority of the non-conflicted members of the Board, to vote in the affirmative in order to issue the letter of non-renewal. According to Frasca, "[my] understanding is that there is current debate in the courts regarding this very issue." N.J.S.A. 18A:17-20.1, which governs the reappointment of superintendents, is silent on this issue and petitioners have offered no case law that is dispositive of this issue. Thus, petitioners have failed to show that the law is settled with respect to whether the Board could have voted to non-renew Kasyan's contract without four affirmative votes from non-conflicted members.

Petitioners have also failed to show that the legal right underlying their claim is settled with respect to considering Bellone's action in leaving the meeting as an abstention. Petitioners have pointed to no case law, statute, or regulation that supports the conclusion that a board member who leaves a board meeting before roll is called in order to vote on a matter, and whose absence results in the lack of a quorum to vote on the matter, is deemed to have abstained from the vote. Even if the fact that Bellone left the meeting before a vote could be taken on the issue of Kasyan's contract did not affect the quorum such that the non-conflicted members of the Board could have voted on the motion to non-renew Kasyan's contract, and even if Bellone's vote is counted as

an abstention, petitioners have failed to show that a majority vote of the quorum, or three affirmative votes, is enough to carry a motion to non-renew the contract of a superintendent. Thus, petitioners have failed to show that the legal right underlying their claim is settled.

Petitioners have not shown a likelihood of prevailing on the merits of the underlying claim

Based on the aforementioned analysis regarding petitioners' claim being unsettled, the same conclusion must be reached regarding petitioners' likelihood of prevailing on the merits of the underlying claim. A decision cannot be made based solely on what is currently before this tribunal for the purpose of deciding the application for emergent relief. To state at this point that petitioners' should prevail, without any legal authority, and without having a full and complete record of evidence upon which to base such a decision, would be arbitrary and unreasonable. Thus, based upon all of the above, the petitioners have failed to establish a likelihood of prevailing on the merits of the underlying claim.

Petitioners will suffer greater harm than Bellone, but not Kasyan

Finally, petitioners will suffer greater harm than Bellone if the requested relief is not granted. However, Kasyan, who has intervened in this matter, may lose his job if the requested relief is granted. And, whether he ultimately loses his job or not, his employment record would reflect that he was issued a letter of non-renewal if the requested relief is granted. Thus, on balance, greater harm will occur to Kasyan if emergent relief is granted, than to petitioners if emergent relief is not granted.

As a result of the analysis of the emergent relief required four prong test and determinative factors, petitioners have been able to satisfy only one of the prongs, that is, that petitioners will suffer irreparable harm. To succeed on a request for emergent relief, petitioners must meet all four prongs. I **CONCLUDE** that petitioners have been unable to meet their burden of proof that emergency relief should be granted herein.

ORDER

For the reasons set forth above, upon consideration of the petitioners' request under the previously enumerated emergent relief standards, I **ORDER** that the petitioners have failed to prove that they meet all the standards for emergent relief, and I **DENY** the petitioners' Motion and **DISMISS** the application for emergent relief against Board member Bellone.

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

Edward J Delanoy Jr

February 25, 2014
DATE

EDWARD J. DELANOY, JR., ALJ

EJD/cb

151-14

TROY JACKSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner alleged that his removal from the position of vice–principal in respondent's school district was a violation of the tenure statute. Petitioner had been appointed to the position of "acting" vice-principal in August 2010, and subsequently to the position of vice-principal in January 2012. He did not acquire the provisional administrative certificate required for the position of vice-principal until May 2012. In June 2013, petitioner was reassigned to a teaching position during a district reduction in force (RIF). Petitioner contends that he is tenured as a vice-principal. The respondent asserted that petitioner had not acquired tenure in the position of vice-principal in the district. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary judgment; under the tenure statute, *N.J.S.A.* 18A:28-5, a teaching staff member must hold the standard certificate and serve the required number of years to attain tenure; the petitioner herein worked for less than one year under a provisional certificate as part of his required residency, and had not yet completed the requirements for the standard certificate; therefore, petitioner had not been granted tenure as a vice-principal because he did not hold the standard administrative certificate required for that position. Accordingly, the ALJ determined that the respondent district is entitled to summary judgment as a matter of law, and ordered the petition dismissed.

Upon comprehensive review, the Commissioner concurred with the ALJ's finding that petitioner has not earned tenure as a vice-principal in respondent's district. The Commissioner clarified that tenure can be achieved through service under a provisional certificate, but only if the candidate satisfies all requirements for the standard certificate prior to termination from the position for which tenure is sought. Petitioner in this case had not yet completed the required two-year State-approved residency program when the district implemented a RIF and reassigned him to a teaching position. Accordingly, petitioner did not earn tenure as a vice-principal in the Camden school district. Summary decision was granted in favor of the respondent, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

April 10, 2014

OAL DKT. NO. EDU 14058-13
AGENCY DKT. NO. 191-8/13

TROY JACKSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is petitioner's claim that his removal from the position of vice-principal was a violation of the tenure statute. Upon review of the record and Initial Decision of the Office of Administrative Law (OAL),[1] the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner had not earned tenure as a vice-principal in respondent's district. He was consequently not entitled to remain in the position of vice-principal after a district reduction in force (RIF) precipitated his reassignment to a teaching position.

It is undisputed that although petitioner was appointed as an "acting" vice-principal in August 2010, and subsequently as a vice-principal in January 2012, he did not acquire the provisional administrative certificate required for the position of vice-principal until May 2012. In June 2013, thirteen months after petitioner obtained the provisional certificate, he was reassigned to a teaching position.

[1] Neither party filed exceptions to the Initial Decision.

In *Anson v. Bridgeton Bd. of Educ.*, 1972 *S.L.D.* 638, the State Board of Education determined that tenure can be achieved through service under a provisional certificate only so long as the teacher satisfies specific conditional requirements of the provisional certificate.[2] Subsequent cases have held that, while service under provisional or emergency certificates may be counted toward the total amount of service required for tenure in a district, this is only the case where an employee obtains a permanent certificate in the same field prior to the termination of his or her employment. *Breitwieser v. State-Operated School Dist. of Jersey City*, 286 *N.J. Super.* 633, 644-45 (App. Div. 1996); *Raymond Ruiz v. Board of Education of the Borough of Fort Lee, Bergen County*, Commissioner Decision No. 109-12R, decided March 26, 2012.

To serve in the position of vice-principal in New Jersey, an employee must earn an administrative certificate with a principal endorsement. *N.J.A.C.* 6A:9-12.3(b). *N.J.A.C.* 6A:9-12.5(e) sets out the requirements for that credential. A candidate must first obtain a provisional certificate, which petitioner did. *N.J.A.C.* 6A:9-12.5(e)(1). Then a candidate must "[c]omplete a two-year State-approved residency program while employed under provisional principal certification in a school or district." *N.J.A.C.* 6A:9-12.5(e)(2). [Emphasis added.]

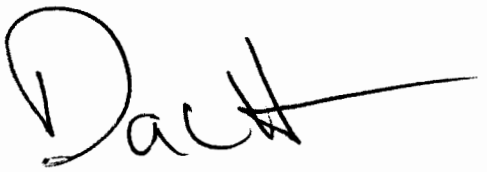
Petitioner had not satisfied the latter requirement when the RIF occurred and he was reassigned to a teaching position. His service as a vice-principal in the district under the proper certificate for his position had not lasted the requisite two years for tenure upon promotion pursuant to *N.J.S.A.* 18A:28-6, and he had not satisfied all requirements for a standard

[2] That holding is in keeping with *N.J.A.C.* 6A:9-6.1, which instructs that a standard certificate – the only permanent certificate – is issued only to candidates who have met *all requirements* for state certification.

certificate prior to his termination from the vice-principal position. Thus, petitioner did not earn tenure as a vice-principal in respondent's district.

Accordingly, summary disposition is granted in favor of respondent and the petition is dismissed.

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/10/14

Date of Mailing: 4/10/14

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14058-13
AGENCY DKT. NO. 191-8/13

TROY JACKSON,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF CAMDEN,
Respondent.

Robert M. Schwartz, Esq, for petitioner

Eric D. Milavsky, Esq. for respondent (Brown and Connery, attorneys)

Record Closed: January 7, 2014 Decided: February 21, 2014

BEFORE **LISA JAMES-BEAVERS**, ALJ:

STATEMENT OF THE CASE

Petitioner Troy Jackson alleges that he was entitled to retain the position of vice principal from which respondent State-Operated School District of Camden (District) removed him.

PROCEDURAL HISTORY

Petitioner filed a petition with the Department of Education Bureau of Controversies and Disputes on August 22, 2013. The District filed an answer on September 30, 2013. The Bureau transmitted the case to the Office of Administrative Law (OAL) as a contested case where it was filed on October 2, 2013. On October 8, 2013, the District filed a motion for summary decision seeking judgment as a matter of law and dismissal of the petition. On December 6, 2013, after the file was assigned to me, I sent correspondence to petitioner's counsel giving him fifteen days to file a reply brief. Because the deadline was just before the holiday, I waited for a response until January 7, 2014. I now render a decision granting the motion for summary decision.

STATEMENT OF FACTS

Troy Jackson is a tenured staff member of the Camden School District, having begun as a technology coordinator, a position requiring an instructional certificate, in 2001. In August of 2010, Jackson was appointed to be an "acting" vice principal and became a vice principal in January of 2012. In May of 2012, Jackson obtained a provisional certificate for the administrative certification required for the position of vice principal. He then began his required, two-year residency under the certificate. Before he could complete the residency, in June of 2013 Jackson was reassigned to a teaching position by the district following a reduction in force.

DISCUSSION

Summary Decision Standard

N.J.A.C. 1:1-12-5 governs motions for summary decisions. The provisions of N.J.A.C. 1:1-12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. Pursuant to these rules, a case may be dismissed before it is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged

and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12-5(b). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submissions of the issues to the trier of fact." R. 4:46-2.

When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth, by affidavit, specific facts showing there is a genuine issue resolvable only by an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary judgment. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). A judge is to scrutinize the competent evidential materials presented, in a light most favorable to the non-moving party, and consider whether a rational fact-finder could resolve the disputed issue in favor of the non-moving party. Id. at 540.

The New Jersey Supreme Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, 142 N.J. at 539. As no material facts are in dispute in the present case, summary decision is appropriate.

Legal Analysis

Respondent seeks summary decision on the grounds that a tenured teacher, who has served as acting vice principal and then vice principal for at least three years, but who has only completed a year of his provisional certificate, has not acquired tenure in the position of vice principal. The tenure statute provides that tenure status is acquired when a teaching staff member holds a position, "which require[s] them to hold appropriate certificates issued by the board of examiners," that the certificates be "proper" and "in full force and effect" when in this position, and that the teaching staff member serve the required number of years. N.J.S.A. 18A:28-5.

The certificates required are issued in categories, which are distinguished by the kind of work performed, and types, which refer to the holder's attainment of the requirements of the certificate. The categories of certificate are the instructional, administrative, and educational services certificates, within which endorsements for particular skills, i.e., classroom subjects, are issued. See N.J.A.C. 6A:8, 6A:12, 6A:13. The types of certificates are standard, provisional, and emergency. The standard certificate is issued to persons who have met all requirements for State certification. N.J.A.C. 6A:9-6.1. The provisional certificate is typically a temporary certificate, issued to those who have met the requirements for initial employment as part of a state-approved district training program or residency leading to standard certification. N.J.A.C. 6A:9-6.2. The emergency certificate is issued only within the educational services category of certificates, and is issued to fill positions left open due to unforeseen or extenuating circumstances. N.J.A.C. 6A:9-6.3.

The case law interprets N.J.S.A. 18A:28-5 as placing two conditions on the attainment of tenure with regards to category and type of certificate. First, a teaching staff member must serve the required time only in positions for which their category of certificate is proper. Regardless of whether the certificate begins as provisional or emergency and becomes a standard certificate, so long as time is accrued within the same proper category of certificate, all of that time may be used to satisfy the tenure requirements. Breitwieser v. State-Operated Sch. Dist. of City of Jersey City, Hudson Cnty., 286 N.J. Super. 633, 644 (App. Div. 1996) ("service under an emergency certificate may be counted towards the service needed for tenure only when that service is followed by the teacher ultimately obtaining a permanent certificate in the same field as the emergency certificate"). For instance, in Breitwieser, a teacher had served in an elementary school position under a standard certificate in the category of elementary school teaching for only a few weeks less than the required number of years to attain tenure. Id. at 635-636. The teacher argued that time she spent under an emergency certificate in educational services should be "tacked on" to her time in order to attain tenure. Id. at 640. The court found, however, that because the emergency certificate was in a different category from the teacher's standard certificate,

the time served under the emergency certificate could not be counted toward the satisfaction of the tenure requirement. Id. at 644.

Second, and more importantly for this case, when a teaching staff member eventually claims tenure after the required amount of time, he or she must hold a standard certificate. Id. at 640 ("[A] teacher must hold a standard certificate when seeking tenure..."); see Ruiz v. Bd. of Ed. of the Boro. of Fort Lee, No. A-4443-11 (App. Div. July 8, 2013) <http://njlaw.rutgers.edu/collections/courts/> (lacking a standard certificate allowed a teacher with four years of experience under a provisional certificate to be denied tenure's protections against dismissal).

Petitioner cannot be granted tenure as vice principal because he has not attained the standard certificate. Petitioner has worked only under a provisional certificate for less than a year as part of his required residency and has not yet completed the requirements for the standard certificate. In each case in which a teaching staff member has attained tenure despite serving time under different types of certificates, he has been able to properly claim tenure because he finally possessed a standard certificate. Without the standard certificate, petitioner cannot claim tenure. Petitioner did not have his provisional certificate for serving as a vice principal long enough to acquire the standard certificate, which is the certificate required in order to properly claim tenure.

CONCLUSION

For the foregoing reasons, I **CONCLUDE** that there is no genuine issue as to any material fact challenged and that the District is entitled to prevail as a matter of law. Thus, the State-Operated School District of Camden's motion for summary decision is **GRANTED**.

ORDER

Based on the foregoing, I **ORDER** that petition of Troy Jackson be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 21, 2014
DATE

LISA JAMES-BEAVERS, ALJ

Date Received at Agency: February 21, 2014

Date Mailed to Parties: 2/24/14

cmo

#153-14

153-14

P.E.R.C. NO. 2014-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND
COMMISSIONER OF EDUCATION

In the Matter of

JAMES A. BRIDGE,

Petitioner/Charging Party
-and-

OAL Docket No. EDU 14001-13
Agency Dkt. No. 215-9/13
PERC Dkt. Nos. CI-2013-59
CI-2013-60
CI-2013-61

NORTH WARREN REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent/Respondent

Appearances:

For the Petitioner/Charging Party, James A. Bridge, Pro Se.

For the Respondent/Respondent, Fogarty & Hara, attorneys (Stephen R. Fogarty, of counsel)

DECISION

On June 14, 2013, James A. Bridge filed three unfair practice charges with the Public Employment Relations Commission (PERC) against the North Warren Regional School District Board of Education (Board). All of the unfair practice charges filed against the Board allege violations of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a)(1)[1/] The first

1/ This provision prohibits public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the (continued...)

charge, CI-2013-59, alleges the Board violated the Act when the Superintendent issued a verbal and written warning to Bridge regarding a union-related flier he distributed to North Warren Regional Education Association (Association) members. The second charge, CI-2013-60, alleges the Board violated the Act when the Principal informed Bridge that he was being investigated for violating the Affirmative Action (AA) policy. The allegations for the investigation were that Bridge showed Association members an e-mail authored by the Association Vice-President, and rival for the Association presidency, that contained an anti-Semitic reference to the Superintendent. The third charge, CI-25013-61, alleged the Board violated the Act when it processed an AA complaint against Bridge relating to his Association activities. A fourth charge, CI-2013-62, was filed against the Association.[2/]

On August 26, 2013, Bridge filed a petition with the Commissioner of Education asserting similar allegations set forth in his unfair practice charges and an appeal of the withholding of his salary increment by the Board. Bridge filed another petition with the Commissioner related to the AA Office findings.

1/ (...continued)
rights guaranteed to them by this act."

2/ The Director of Unfair Practices refused to issue a Complaint on the charge against the Association as it related to internal Association matters. D.U.P No. 2014-13, 40 NJPER __ (¶__ 2014).

This petition was consolidated with the first and transferred to the Office of Administrative Law on November 18, 2013.

On January 30, 2014, the PERC Director of Unfair Practices consolidated the unfair practice charges against the Board and issued a Complaint.

On January 13, 2014, the Board filed a motion with the Administrative Law Judge to consolidate the PERC and Commissioner of Education matters and for a predominant interest determination. On January 23, 2014, Bridge filed an answer opposing the motion.

On March 20, 2014, Administrative Law Judge Irene Jones issued an Order for Consolidation and Determination for Predominant Interest finding the matters should be consolidated and that PERC has the predominant interest.

Having independently evaluated the record, the Chair of the Public Employment Relations Commission, acting pursuant to authority delegated to her by the full Commission and the Commissioner of Education issue the following:

JOINT ORDER

The matters should be consolidated before PERC Hearing Examiner Wendy L. Young designated as a Special Administrative Law Judge pursuant to N.J.S.A. 52:14F-6(b). The Public Employment Relations Commission has the predominant interest. The Hearing Examiner will first offer recommended findings of

fact and conclusions of law to both the Public Employment Relations Commission and the Commissioner of Education, disposing of all issues in controversy through a single initial decision under N.J.A.C. 1:1-18.3 and consistent with N.J.A.C. 1:1-17.8(a). Upon transmittal of the initial decision to both agencies, the underlying record will be forwarded to the Public Employment Relations Commission to resolve the unfair practice issues within its jurisdiction. PERC's decision and the complete record will then be sent to the Commissioner of Education who will decide any remaining education law issues.

If necessary, the matter will then be returned to PERC for any specialized relief necessitated by the Commissioner of Education's decision.

DECISION RENDERED BY THE COMMISSIONER OF EDUCATION ON April 9, 2014

David C. Hespe
Acting Commissioner
Trenton, New Jersey

DECISION RENDERED BY THE CHAIR OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION ON April 8, 2014

P. Kelly Hatfield
Chair
Trenton, New Jersey



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
ON MOTION FOR CONSOLIDATION AND DETERMINATION OF PREDOMINANT INTEREST

JAMES BRIDGE,
Petitioner,
v.
NORTH WARREN REGIONAL SCHOOL DISTRICT, BOARD OF EDUCATION,
Respondent.

OAL DKT. NO. EDU 14001-13
AGENCY DKT. NO. 215-9/13

JAMES BRIDGE,
Petitioner,
v.
NORTH WARREN REGIONAL SCHOOL DISTRICT,
Respondent.

OAL DKT. NO. EDU 16637-13
AGENCY DKT. NO. 257-10/13

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On or about June 14, 2013, petitioner James A. Bridge (Bridge), a tenured teacher for the respondent, North Warren Regional School District (Board), filed unfair labor practice charges with the Public Employment Relations Commission (PERC) against the respondent. The charges stemmed from an investigation conducted by the

District's Affirmative Action Officer (AAO) into the complaints that alleged Bridge had engaged in inappropriate conduct for disseminating an e-mail that contained a racial epithet directed at the District's Superintendent and that he creating a hostile work environment for his colleagues. The AAO found Bridge guilty of the two charges and recommended that the Board withhold Bridge's employment and adjustment increment for the 2013-2014 school year. Further, the AAO recommended that Bridge be required to attend a Board-approved workshop for sensitivity to discrimination in the workplace. Finally, the AAO recommended that a copy of the findings be maintained in Bridge's employment file.[1]

In the unfair labor charge Bridge alleged that the Board had impinged on his right to engage in political speech within the North Warren Regional Education Association in violation of N.J.S.A. 34:13A-5.4(a)(1). The second charge contained a second violation of N.J.S.A. 34:13A-5.4(a)(1) by the Board for interfering with his right to engage in political speech based on an incident that occurred on May 8, 2013. A third charge filed on that same day alleged that on May 24, 2013, the Board violated N.J.S.A. 34:13A-5.4(a)(1) by interfering with his right to engage in political activity/speech. A fourth charge was filed alleging violation of N.J.S.A. 34:13A-5.4(a) from incidents that also occurred on May 24, 2013. The PERC accepted the complaints and they were assigned charge numbers: CI-2013-059, CI2013-060, CI-2013-061, and CI-2013-062, and were consolidated by PERC. All charges, save, CI-2013-062, were filed against the Board.[2] On August 14, 2013, the Board filed an Answer to the charges.

On August 26, 2013, Bridge filed a petition with the Commissioner of Education seeking to appeal the same actions that he alleged in his unfair labor charges. Bridge also appealed the recommendation that his salary and employment increments be withheld.[3]

---

[1] Bridge did not file an appeal with the District from these filings.
[2] The fourth charge was filed against the North Warren Regional Education Association.
[3] Notably, Bridge not file an appeal at the District level. Thus, there was no hearing after the findings were issued by the AAO. Respondent also submitted a letter from Bridge's attorney appealing his increment withholding through the grievance procedure in the Collective Bargaining Agreement.

On September 27, 2013, the Board moved to dismiss the petitions, which were filed with the Commissioner under agency docket number 215-9/13. However, the Commissioner transmitted the matter to the OAL for hearing as a contested case on October 1, 2013, without deciding the Motion to Dismiss. The matter was assigned OAL docket number EDU 14001-13 and assigned to the undersigned. A prehearing conference was scheduled for November 13, 2013, but was adjourned.

On October 15, 2013, Bridge filed yet another petition with the Commissioner, which again appealed the findings of the AAO. This petition requested consolidation with his August 26 petition. The petition was accepted by the Commissioner and assigned agency docket number 257-10/13. On November 13, 2013, the Board moved to dismiss the second petition. Like the first petition, the Motion to Dismiss was not decided and it too was transmitted to the OAL on November 18, 2013, and assigned OAL docket number EDU 16637-13.

On or about January 13, 2014, the Board filed a Motion seeking to consolidate OAL docket numbers EDU 14001-13 and EDU 16637-13 with PERC docket numbers CI-2013-059, CI-2013-060, and CI-2013-061. It also requested a predominant interest determination order. On January 23, 2014, petitioner filed an Answer in opposition to the motion to consolidate and the predominant interest determination.

DISCUSSION

A party or the judge may move to consolidate a case that has been transmitted to the OAL with any other contested case involving common questions of fact or law between identical parties or between any party to the filed case and any other person, entity or agency. N.J.A.C. 1:1-17.1. The following shall be considered:

1. The identity of parties in each of the matters;
2. The nature of all the questions of fact and law respectively involved;
3. To the extent that common questions of fact and law are involved, the saving in time, expense, duplication and inconsistency which will be realized from hearing the matters together and whether such issues can be

thoroughly, competently, and fully tried and adjudicated with and as a constituent part of all other issues in the two cases;
4. To the extent that dissimilar questions of fact or law are present, the danger of confusion, delay or undue prejudice to any party;
5. The advisability generally of disposing of all aspects of the controversy in a single proceeding; and
6. Other matters appropriate to a prompt and fair resolution of the issues, including whether a case still pending in an agency is contested or is ripe to be declared contested.

[N.J.A.C. 1:1-17.3.]

In this matter, I **FIND** that the Motion for Consolidation meets the criteria for consolidation. In this regard, I **CONCLUDE** that the charges and the petitions raise the same issues and arose out of the same issues and out of the same facts. As noted by the Board, the PERC Commission has already consolidated all four charges filed by Bridge, concluding that they are appropriate for consolidation.

Further, the petitioner requested that his petitions filed with the Department of Education be consolidated. I **FIND** that the petitions arise out of the same facts that were alleged in charges filed with the PERC. They, too, involve identical parties and questions of fact and law as those filed with PERC. Consolidation saves time and expense and avoids duplication and inconsistent determinations. Thus, I **CONCLUDE** that the within matters should be **CONSOLIDATED**.

The only remaining issue is which agency has the predominant interest pursuant to N.J.A.C. 1:1-17.5. According to the regulation, the ALJ shall determine which agency, if any, has the predominant interest in the conduct and outcome of the matter by applying the following factors:

1. Whether more than one agency asserting jurisdiction over a common issue has jurisdiction over the issue, and if more than one agency has jurisdiction, whether the jurisdiction is mandatory for one of the agencies;
2. Whether the common issue before the two agencies is, for either agency, the sole, major or dominant issue in dispute and whether its determination would either serve

to moot the remaining questions or to affect substantially their resolution;
3. Whether the allegations involve issues and interests which extend beyond the immediate parties and are of particular concern to one or the other agency;
4. Whether the claims, if ultimately vindicated, would require specialized or particularized remedial relief available in one agency, but not the other;
5. Whether the common issue is clearly severable from the balance of the controversy and thus will permit non-duplicative factual and legal determinations by each agency.

[N.J.A.C. 1:1-17.5.]

I **FIND** that the instant controversy arose out of disciplinary penalties imposed by the District against the petitioner. The District concluded that petitioner had engaged in inappropriate conduct and had created a hostile work environment. Thus, it proposed to withhold his salary and employment increments. In direct response to this action, petitioner filed four (4) charges with the PERC alleging that the District's actions infringed on his right to engage in free speech and interfered with his right to engage in political activity.

I **FIND** that while concurrent jurisdiction exists over the increment withholding, exclusive jurisdiction lies with PERC over petitioner's claims of infringement of his free speech and his allegations of unfair labor practices. I further **FIND** it is PERC who is vested with exclusive power to prohibit public employers from interfering with a public employee's right to exercise their rights under N.J.S.A. 34:13A-5.4. Since petitioner alleges that the District has engaged in and interfered with his rights under N.J.S.A. 34:13A-5.4, I **FIND** that the issue of unlawful/unfair labor practices is paramount, thus I **CONCLUDE** that PERC has the predominant interest in this matter. Moreover, this tribunal has no jurisdiction on petitioner's claim that the District violated and infringed on his right to engage in political activity and free speech.

ORDER

For the foregoing reasons, I **ORDER** that this matter lies with the PERC, who has the predominant interest over claims of interference with the petitioner's right to engage in political activity/political speech and his allegations of unfair labor practices and the denial of his salary increment. The PERC also has jurisdiction over the denial of his salary increments pursuant to N.J.S.A. 34:13S-27(d)—as this issue arises predominantly from the Board's imposition of disciplinary actions.

This order may be adopted, modified or rejected by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** and **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law are authorized to make a final decision in this matter. **THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** and **THE COMMISSIONER OF THE DEPARTMENT OF EDUCATION** are encouraged to consult and coordinate with each other before issuing a final order. If the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** and **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** do not adopt, modify or reject this order within forty-five days and unless such time limit is otherwise extended, this recommended order shall be deemed adopted by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** and **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**. If the agency heads determine that **THE PUBLIC EMPLOYMENT RELATIONS COMMISSION** has the predominant interest, and that agency wishes to have the case heard by its personnel, it should so state in the final order.

Irene Jones

March 20, 2016

DATE

IRENE JONES, ALJ

sej

154-14

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND BOARD OF EDUCATION OF THE BOROUGH OF WHARTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioning Board challenged the determination of the New Jersey Department of Education, Office of School Funding (NJDOE) that Boonton is the district with financial responsibility for the educational services provided to Z.M. – a special education student placed in a residential facility by the Department of Children and Families – during the 2011-2012 school year, pursuant to the State Facilities Education Act, *N.J.S.A.* 18A:7B-1 *et seq.* Petitioner also asserted that the Wharton Board of Education was responsible for Z.M.'s educational costs because Z.M. and his mother had resided in Wharton prior to September 2010. Additionally, petitioner argued that the State Facilities Education Act is unconstitutional as applied to Boonton because the NJDOE and wealthier school districts have greater resources to finance Z.M.'s education; accordingly, the instant matter raises an "as applied" constitutional challenge rather than a "facial" constitutional challenge.

The ALJ found, *inter alia*, that: petitioner has withdrawn its challenge as to which local district is required to pay for Z.M.'s tuition under *N.J.S.A.* 18A:7B-12; therefore, only petitioner's constitutional challenge needed to be addressed; the Appellate Division, rather than the OAL, is the appropriate forum to decide the constitutionality of *N.J.S.A.* 18A:7B-2(a) as there are no material facts in dispute; because petitioner raises a purely legal, facial challenge to the statute, the Commissioner of Education does not have jurisdiction. The ALJ concluded that because the petitioner withdrew its challenge regarding which local district is responsible for Z.M.'s tuition, this appeal is moot.

Upon an independent review of the record, the Commissioner adopted the Initial Decision as the final decision in this matter and dismissed the petition as moot.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 4/10/14

OAL DKT. NO. EDU 12227-12
AGENCY DKT. NO. 222-8/12

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND BOARD OF EDUCATION OF THE BOROUGH OF WHARTON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge that the Commissioner lacks jurisdiction to rule on petitioner's facial challenge to the constitutionality of *N.J.S.A.* 18A:7B-2(a), and that the remaining issues raised in the Petition of Appeal have been rendered moot. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/10/14
Date of Mailing: 4/14/14

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 12227-12

AGENCY DKT. NO. 222-8/12

BOARD OF EDUCATION OF THE TOWN OF BOONTON, MORRIS COUNTY,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION AND BOARD OF EDUCATION OF THE BOROUGH OF WHARTON, MORRIS COUNTY,

Respondents.

Jonathan F. Cohen, Esq., for petitioner (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Angela L. Velez, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey)

Record Closed: January 9, 2014 Decided: February 24, 2014

BEFORE **IMRE KARASZEGI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Z.M. is a student eligible for special education services who had been placed in a residential facility by the Department of Children and Families (DCF). Petitioner, the Boonton Board of Education (Boonton), challenges the determination of the New Jersey Department of Education, Office of School Funding (NJDOE), that Boonton is the district with fiscal responsibility for Z.M.'s educational services during the 2011-2012 school year, pursuant to the State Facilities Education Act, N.J.S.A. 18A:7B-1 et seq. Boonton also maintained that the Wharton Board of Education (Wharton) was responsible for Z.M.'s educational costs because Z.M. and his mother, K.M, had resided in Wharton prior to September 2010. On April 13, 2013, Boonton filed a Voluntary Dismissal with Prejudice as to respondent, Wharton, with the Office of Administrative Law (OAL).

Petitioner also argues that the instant matter raises an "as applied" constitutional challenge, rather than a "facial" constitutional challenge, noting that the State Facilities Education Act is unconstitutional as applied to Boonton because the NJDOE, and wealthier school districts, have greater resources to finance Z.M.'s education.

Boonton filed its appeal before the Commissioner of Education on August 6, 2012. NJDOE filed its answer on August 27, 2012. On September 6, 2012, the matter was transmitted to the OAL for hearing pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On June 11, 2013, Boonton filed an Order affirming that the OAL has the authority to determine whether the State Facilities Education Act is unconstitutional as applied in this case. On August 6, 2013, NJDOE filed a letter brief in opposition to Boonton's assertion that N.J.S.A. 18A:7B-1 et seq. is unconstitutional as applied in this case and in support of NJDOE's cross-motion for summary decision. Boonton filed its reply brief on August 23, 2013. By letter dated November 21, 2013, and reiterated by telephone conference of the parties on December 9, 2013, Boonton advised that it had "withdrawn its challenge as to the legal mechanisms under N.J.S.A. 18A:7B-12, regarding a hearing, as to which local district would be required under that statute to pay for this tuition for Z.M." With no factual issue in dispute as to the fiscal responsibility for Z.M.'s educational services during the 2011-2012 school year, only the constitutional challenge needs to be addressed.

FACTUAL DISCUSSION

Generally, "in administrative proceedings, petitioners can attack the constitutionality of rules as applied, but may not mount facial attacks." 37 New Jersey Practice, Administrative Law and Practice, § 3.8 at 107 (Steven L. LeFelt, Anthony Miragliotta & Patricia Prunty) (rev. 2d ed. 2000). Facial challenges cannot be resolved in administrative hearings, because "[p]ure legal questions are exclusively reserved for the courts. Accordingly, an agency has no power to determine the constitutionality of a statute on its face." Id. at 108. Rather, "[t]he proper procedure was to raise these claims before the Appellate Division upon appeal from an adverse decision of the [agency]." Christian Bros. Inst. v. N. New Jersey Interscholastic League, 86 N.J. 409, 415-416 (1981); see also Wendling v. New Jersey Racing Comm'n, 279 N.J. Super. 477, 485 (App. Div. 1995). Nevertheless, when confronted with a facial constitutional challenge, the agency may "either express its opinion on the constitutionality question or simply note its lack of jurisdiction to determine the matter." 37 New Jersey Practice, Administrative Law and Practice, § 3.8 at 109 (Steven L. LeFelt, Anthony Miragliotta & Patricia Prunty) (rev. 2d ed. 2000).

Of course, whether a constitutional challenge is facial or "as applied" may be difficult to determine. See Jones v. Dep't of Cmty. Affairs, Div. of Codes and Standards, Bureau of Rooming and Boarding Hous. Standards, 395 N.J. Super. 632, 635-36 (App. Div. 2007). The Appellate Division warned that

> [w]hether the constitutional issues are framed as facial challenges to statutes or regulations, or asserted deprivations of the claimant's rights in the manner in which such provisions have been applied, or arguments that due process violations have occurred in the enforcement of those provisions, the factual background of the matter must be developed either through stipulated facts or in a litigation process.
>
> [Ibid.]

However, "[i]f any issues of facial unconstitutionality exist that turn out to be independent of the facts in the case and survive the contested case process, they can be addressed on judicial review." Id. at 636. In other words, to determine whether a challenge is purely legal, and therefore facial, a record must be developed at the administrative level to establish that no factual disputes render the challenge "as-applied." See Ibid.

However, "[a]s applied" has a meaning different from a mere claim that a regulation has worked a unique, unwarranted hardship on certain individuals; if that were the criteria, virtually all constitutional claims by petitioners would be as applied. Giordano v. New Jersey Pinelands Comm'n, 96 N.J.A.R.2d (EPC) 25, 27. For example, in Giordano, property owners contested the decision of the Pinelands Commission that applicable regulations precluded development on the subject property, and the property did not qualify for a waiver. Id. at 26. ALJ Reback noted that "petitioners [did] not dispute the property's failure to meet the minimum depth to seasonal high water level, nor [did] they dispute their failure to meet all of the criteria to qualify for a waiver." Id. at 27. Therefore, because the petitioner was "challenging the validity of the rule itself rather than the way in which it is being applied against her, this [was] a facial constitutional challenge and cannot be heard in the OAL. The proper forum for petitioner to assert such a claim [was] the Appellate Division." Ibid.

Here, Boonton argues that this is an "as applied" challenge to N.J.S.A. 18A:7B-12(b). However, Boonton does not specify any relevant contested facts that render the application of this statute unconstitutional as applied to Boonton. See Ibid. Whether a constitutional challenge is facial or "as applied" cannot be determined by the parties' characterization of the challenge, but only by consideration of whether the matter presents questions of fact, or purely legal issues. See Jones, supra, 395 N.J. Super. at 635-36.

The relevant statute provides that

> [t]he district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or

> out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.
>
> [N.J.S.A. 18A:7B-12(b).]

In turn, the implementing regulation provides that "[t]he 'present district of residence' of a child in a residential State facility . . . referred to in the first paragraph of N.J.S.A. 18A:7B-12(b) means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16." N.J.A.C. 6A:23A-19.2(a)(1).

Boonton argues that the interplay between this statute, N.J.S.A. 18A:7B-2(a),[1] and N.J.S.A. 18A:7F-33 renders this statute unconstitutional as applied to Boonton. Specifically, Boonton argues

> [p]ursuant to N.J.S.A. 18A:7F-33, State Aid is provided to districts based upon student rolls, including those students in a State facility, as of October 15 of the preceding year. For students in State facilities, the aid is then deducted for the student's education costs in accordance with [N.J.S.A. 18A:7B-2(a).] In this case, it is undisputed that Z.M.'s mother, ("K.M."), was not living in Boonton on October 15, 2010. Thus the District is requested to reimburse the State for the cost of a resident child's tuition when the District did not receive funding pursuant to N.J.S.A. 18A:7F-33 by which to pay it.

First, N.J.S.A. 18A:7F-33 does not specify that State aid is calculated from the previous year's report, but merely requires that the board of education secretary must file a report by October 20 of each school year "containing all data necessary to effectuate the aid provisions of P.L. 2007, c. 260 (C.18A:7F-43 et al.), which shall include but not be limited to . . . the number of pupils in State facilities . . . on the last school day prior to October 16." N.J.S.A. 18A:7F-33. In turn, N.J.S.A. 18A:7F-43 to -63, the School Funding Reform Act of 2008, is silent as to when State aid is calculated and released. Furthermore, N.J.S.A. 18A:7B-2(a) provides that

[1] Boonton cites N.J.S.A. 18A:7B-2(c), though clearly refers to N.J.S.A. 18A:7B-2(a). (Emphasis added.)

> [f]or each State-placed child who is resident in a district and in a State facility on the last school day prior to October 16 of the prebudget year, and for each district-placed child who is resident in a district and in a State facility on the last school day prior to October 16 of the budget year, the Commissioner of Education shall deduct from the State aid payable to that district an amount equal to the approved per pupil cost . . . .

Moreover, at least one administrative decision suggests that these two provisions actually refer to October 15 of the same school year. See Bd. of Educ. of Piscataway v. New Jersey Dep't of Educ., Office of Sch. Funding, EDU 05063-10, Initial Decision, (October 4, 2010), adopted, Comm'r (November 8, 2010), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, A-1916-10 (App. Div. April 19, 2012), <http://njlaw.rutgers.edu/collections/courts/>. In Piscataway, a district argued that if a parent of a child placed in a State institution moves subsequent to October 15, the district the parent moves to should bear the financial responsibility for the child's placement. See Piscataway, supra, Initial Decision at *9. ALJ Bass explained the district's argument was

> inconsistent with the statutory scheme for awarding State aid, which is based on a once-annual report of student enrollment data. No other approach would be practical or workable, as, indeed, in every district there are children who leave and those who enter during a given school year. As it must, N.J.S.A. 18A:7F-33 fixes a point in time upon which to assess enrollments, and that point in time is the last school day prior to October 16. Consistent with that approach, N.J.A.C. 6A:23A-19.2 fixes the same point in time, the last school day prior to October 16, for making a residency determination from which a grant of State aid will flow.
>
> [Ibid. (emphasis added).]

Therefore, at least one decision interprets these two provisions to refer to October 15 of the same year. See Ibid.

Second, assuming, *arguendo*, that N.J.S.A. 18A:7F-33 awards State aid calculated from the previous year's report, but deducts State aid calculated from the current year's report, Boonton will still receive funds to account for Z.M. K.M.

incontrovertibly lived in Boonton on October 15, 2011. Therefore, Boonton would still receive State aid to account for Z.M., at worst, one year after State aid is deducted to account for Z.M. Indeed, the statute contemplates a more dire potential outcome for districts, and provides that

> [i]f, for any district, the amount to be deducted pursuant to subsection a. of this section is greater than State aid payable to the district, the district shall pay to the Department of Education the difference between the amount to be deducted and the State aid payable to the district.
>
> [N.J.S.A. 18A:7B-2(b).]

Third, regardless of the interplay between N.J.S.A. 18A:7F-33 and N.J.S.A. 18A:7B-12, such interplay applies identically to all districts. If Boonton faces a hardship because State aid will be deducted from the 2011-2012 school year, and will not be recouped until the 2012-2013 school year, all districts face the same hardship. See N.J.S.A. 18A:7F-33 and N.J.S.A. 18A:7B-12. Because Boonton is "challenging the validity of the rule itself rather than the way in which it is being applied against [Boonton], this is a facial constitutional challenge and cannot be heard in the OAL." Giordano, supra, 96 N.J.A.R.2d at 27. The other argument Boonton raises similarly challenge the validity of the statutory scheme itself. Boonton argues that it "is subject to a 2% tax levy cap by the State, while its per student budget for the 2011-12 school year was vastly reduced by well more than half of the State Aid [Boonton] had been receiving in prior years." However, all school districts are subject to the 2% tax levy cap. N.J.S.A. 18A:7F-38. Moreover, Boonton does not explain why it received less State aid for the 2011-2012 school year than past years, but presumably, such changes reflect changes in statewide funding, or changes in Boonton's need for such funding. Boonton does not argue that such reduced State aid is a unique circumstance not faced by other districts. Similarly, Boonton argues that the deduction for Z.M.'s placement "equates to one, if not two teachers' salaries in [Boonton] . . . " and such funds "could be utilized for educational programs, school repairs, and a variety of other worthwhile expenditures to improve the education for in-district students." However, the same is true of every deduction for a student placed in a State facility, and the district of residence that is financially responsible for that placement. Finally, Boonton asserts that "the inequities

herein are especially significant in light of the fact that Z.M. did not reside in [Boonton], and was not educated by [Boonton], directly prior to his incarceration." However, N.J.S.A. 18A:7B-2(a) does not consider whether the student actually attended the district of residence, for Boonton or any other district. Thus, to the extent Boonton raises a constitutional challenge, the challenge is purely legal, and does not depend on any fact finding to establish that this statute is uniquely unconstitutional as applied to Boonton. Giordano, supra, 96 N.J.A.R.2d at 27. As such, Boonton may appeal an adverse decision by the Commissioner and raise a facial challenge to N.J.S.A. 18A:7B-2(a) before the Appellate Division. See Jones, supra, 395 N.J. Super. at 635-36. However, I **CONCLUDE** that as the parties do not dispute any material facts, the Appellate Division, rather than the OAL, is the appropriate forum to decide the constitutionality of N.J.S.A. 18A:7B-2(a).

In summary therefore, I **CONCLUDE** that the Commissioner of Education does not have jurisdiction to determine Boonton's constitutional challenge, because Boonton raises a purely legal, facial challenge to a statute, which does not require any fact finding to determine. The Commissioner does have jurisdiction to determine the district of residence of a student placed in a State facility by another State agency, because that determination is addressed by the school laws. Because Boonton has withdrawn its challenge as to the legal mechanism under N.J.S.A. 18A:7B-12 regarding which local district would be responsible to pay for the tuition of Z.M., the issue raised by Boonton in this appeal has been rendered moot.

ORDER

Based on the foregoing, it is **ORDERED** that Boonton's appeal is **DISMISSED**.

It is further **ORDERED** that the Commissioner of Education does not have jurisdiction to rule on Boonton's purely legal, facial claim that N.J.S.A. 18A:7B-12 is unconstitutional.

In light of the above, it is no longer necessary to decide respondent's cross-motion for summary decision.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Feb. 24, 2014
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 2/24/14

Date Mailed to Parties: FEB 25 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

id

156-14

OAL DKT. NO. EDU 9657-10
AGENCY DKT. NO. 299-8/10

WILFREDO ROMERO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/15/14

Date of Mailing: 4/15/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09657-10
AGENCY DKT. NO. 299-8/10

WILFREDO ROMERO,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: March 17, 2014 Decided: March 19, 2014

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 2, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated December 23, 2013.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

4. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 19, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 3-21-14

Mailed to Parties: MAR 21 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

WILFREDO ROMERO , Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 09657-2010N Agency Ref. No. 299-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Wilfredo Romero ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Wilfred Romero v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. EDU 09657-2010N, Agency Dkt. No. 299-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $38,869.83, for the period from September 1, 2010 through October 3, 2011. This

amount has already been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through October 3, 2011. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 and July and August, 2011 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 or September, 2011 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through October 3, 2011 was $28,200.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $38,869.83.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through October 3, 2011. Thus, the Final Gross Amount of back salary due to petitioner is $38,869.83. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Wilfredo Romero."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 and 2011-2012 school years. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to October 3, 2011. In addition, Petitioner will receive full seniority for the period September 1, 2010 through October 3, 2011. This period shall also be treated as active employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 and 2011-2012 school years, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 and 2011-2012 school years. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 and 2011-2012 school years. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR PETITIONER

Date: 01-08-14

Wilfredo Romero

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 3/4/2014

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education has discussed a resolution of the Office of Administrative Law matters listed below; and,

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement on file with the Board Secretary, provided that it is fully signed by all parties.

Susy Basilici	Agency Docket No. 639-11/10	OAL Docket No. EDU 13416-2010
Beth Ann Clayton	Agency Docket No. 324-11/11	OAL Docket No. EDU 12774-2012
Milena Maya	Agency Docket No. 338-08/10	OAL Docket No. EDU 10165-2010
Wilfredo Romero	Agency Docket No. 299-08/10	OAL Docket No. EDU 9657-2010
Debra Stallone	Agency Docket No. 331-08/10	OAL Docket No. EDU 10009-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD DECEMBER 23, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-83

157-14

G.H. AND E.H., on behalf of minor child, K.H.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The petitioners challenged the determination of the respondent Board that their son, K.H., engaged in behavior that fell under the school district's policy against harassment, intimidation and bullying (HIB). This case stems from incidents which arose during the week of October 1, 2012, wherein K.H. – an eighth grader at the time – was among a group of boys who chanted "kool-aid" to tease and taunt an African-American classmate when he walked by in the school hallways and in the locker room. K.H. received a one-day, in-school suspension and counseling as discipline for violating the Board's policy prohibiting HIB. Petitioners asked that their son's "conviction under *N.J.S.A.* 18A:37-13.2 and the District's policies be reversed and vacated". The Board contended that its actions were at all times compliant with applicable statutes and regulations governing student conduct, and a reasonable and appropriate exercise of its authority.

The ALJ found, *inter alia*, that: pursuant to New Jersey's Anti-Bullying Law, *N.J.S.A.* 18A:37-14, K.H.'s actions in October 2012 constituted HIB as that term is defined by law; K.H.'s use of the word "kool-aid" was directed at a fellow student because of his race, thereby insulting and demeaning him; petitioners' argument that K.H.'s conduct was a single incident and thus cannot rise to HIB was unpersuasive, as it ignored the factual record and the explicit statutory definition of HIB; the actions of school personnel and the Board were consistent with the letter and spirit of *N.J.S.A.* 18A:37-14 and *N.J.A.C.* 6A:16-7.9; and the petitioners have failed to prove that the Board's actions were arbitrary, capricious, or unreasonable. Accordingly, the ALJ recommended dismissal of the petition.

Upon review, the Commissioner concurred with the ALJ that the petitioners failed to sustain their burden to show that the Board's actions regarding K.H.'s conduct in October 2012 were arbitrary, capricious or unreasonable. Accordingly, the Commissioner adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 4/15/14

OAL DKT. NO. EDU 13204-13
AGENCY DKT. NO. 206-9/13

G.H. AND E.H., on behalf of minor child, K.H.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.[1]

Upon review, the Commissioner concurs with the Administrative Law Judge that the Board's decision to impose a one-day suspension on K.H. for violating *N.J.S.A.* 18A:37-14 and the Board's Harassment, Intimidation and Bullying policy was not arbitrary, capricious or unreasonable. Accordingly, the recommended decision of the ALJ is adopted as the final decision for the reasons expressed therein.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/10/14
Date of Mailing: 4/15/14

[1] The petitioners requested an extension of time to file exceptions; however, exceptions were never subsequently filed.

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13204-13
AGENCY REF. NO. 206-9/13

G.H. AND E.H. ON BEHALF OF K.H.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN LAKES, BERGEN COUNTY,
Respondent.

Charles Shaw, Esq., for petitioners

Stephen R. Fogarty, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: January 31, 2014 Decided: February 24, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, residents of Franklin Lakes, challenge the determination of the Franklin Lakes Board of Education (the Board) that their eighth-grade son, K.H., engaged in behavior statutorily defined as harassment, intimidation and bullying (HIB). In their prayer for relief, petitioners ask that their son's "conviction under N.J.S.A. 18A:37-13.2 and the District's policies be reversed and vacated." The Board replies

that its actions were at all times compliant with applicable statutes and regulations governing student conduct and was a reasonable and appropriate exercise of its authority.

The petition of appeal was filed with the Commissioner of Education (the Commissioner) on September 3, 2013. An answer was filed on September 10, 2013, and the matter transmitted to the Office of Administrative Law (OAL) on September 11, 2013. A plenary hearing was conducted on December 10 and 11, 2013. Post-hearing submissions were filed on January 24, 2014, and January 31, 2014, at which time the record closed.

FACTUAL DISCUSSION AND FINDINGS OF FACTS

On July 19, 2011, the Board adopted a formal policy prohibiting HIB on school premises and at school functions. The policy states:

> The board of education believes that a safe and civil environment in school is necessary for students to learn and achieve high academic standards . . . . Harassment, intimidation or bullying, like other disruptive or violent behaviors, is conduct that disrupts both a student's ability to learn and a school's ability to educate its students in a safe environment . . . . The board prohibits acts of harassment, intimidation, or bullying against any student. School responses to harassment, intimidation and bullying shall be aligned with the board-approved code of student conduct which establishes standards, policies and procedures for positive student development and student behavioral expectations on school grounds, including on a school bus or at school sponsored functions . . . .
>
> [J-1(A).]

A student handbook reiterates the district's lack of tolerance for bullying. (R-1.) The issue of bullying and harassment is discussed at student assemblies and is reinforced by faculty and staff throughout the school year.

The events pertinent to this dispute arose during the week of October 1, 2012, when K.H. was a student at Franklin Avenue Middle School and enrolled in Cory Banta's seventh-grade physical education class. Banta is an eight-year veteran of the Franklin Lakes School District, who had dismissed her seventh-period class on October 5, 2012, when a student who had remained behind in the boys' locker room, C.H., reported that he had been "five starred" by a classmate, A.S. Banta was unfamiliar with this term, and C.H. explained that it meant hitting someone hard with an open hand, so that it left a mark. He lifted his shirt and showed Banta the imprint of a hand on his back.

Banta knew that no school counselors or administrators were in the building, so she sent C.H. to his next class. She was surprised by C.H.'s story, because A.S. was an eager class participant; a quiet and compliant boy; and this sort of behavior seemed out of character for him. Banta confronted A.S., who immediately burst into tears. A.S. advised her that C.H., K.H., and K.C., had been saying "kool-aid" to him for several days. A.S. is Black, and he perceived that this phrase was directed at him because of his race. He had asked his classmates to stop and he let them know he felt offended; but they persisted. A.S. hit C.H. in frustration. Banta replied that she wished he had let her know sooner, so that she could have intervened on his behalf. She checked whether any school counselors or administrators had become available, but none had; accordingly, she sent A.S. to class after admonishing him that disputes are not best resolved through physical violence. Banta in turn sent an email to Principal Joseph Keiser, Vice Principal Eva Prunk, and Anti-Bullying Specialist Kaitlin Brennan, in which she summarized the events that afternoon.[1]

Monday, October 8, 2012, was a school holiday. On October 9, 2012, after consulting with building administration, Brennan opened an investigation. She interviewed A.S., the three boys alleged to have bullied him, nine additional student

[1] Banta related that sometime prior to October 5, 2012, K.C. asked her if it was alright to use the word "kool-aid." The question came out of context, and according to Banta, K.C. was a student who typically engaged in chitchat in an effort to delay leaving for his next class. She quickly told him that use of that expression was alright so that he would continue to his next class. This exchange was offered as proof that the conduct of K.H. and his classmates had been sanctioned by his teacher. But Banta persuasively urged that K.C. knew that what he and his friends were doing was wrong and were using her to validate their poor behavior.

witnesses, and Banta. While Brennan did ask each interviewee to identify any other students who might have knowledge of the events, the nine student witnesses were largely selected at random based upon a review of the class roster. Indeed only A.S. and one other student identified additional witnesses by name; most of the interviewees informed Brennan that anyone in the locker room that day would have knowledge of the relevant events. Each student was interviewed by Brennan alone and in her office.[2] Brennan explained that she supplied no factual prompts to the students; rather, she simply stated that she had heard there had been an incident in gym class, and asked the students if they had any information to share with her. If a student offered that others were teasing or bullying A.S., Brennan would ask who was doing so, but would not suggest any particular students by name. She started her investigation by talking with A.S. Brennan noted that she would typically begin an HIB investigation in this way so that she could best understand the alleged victim's concerns, and make those concerns her focal point.

Brennan related that A.S. was visibly upset when she spoke with him; was reserved and quiet; and readily admitted that he had hit C.H. Brennan found him credible, and indeed, his story was consistent with that earlier shared with Banta. A.S. reiterated that K.H., K.C., and C.H. were saying "kool-aid" to him, and had started doing so during the week of October 1, 2012. He reiterated that he had asked them to stop. Two other young men who had joined in teasing him, D.G. and H.G., respected A.S.'s request; but the other students persisted. A.S. "five-starred" C.H. after he again said "kool-aid" to him in the locker room on October 5, 2012. A.S. identified two classmates who could corroborate his concerns—P.B. and E.L. Brennan memorialized his statement on an investigation form. (J-1(C)(4).)

From there, Brennan conducted nine witness interviews. Every student she spoke to confirmed that A.S.'s classmates were repeating the words "kool-aid." Seven of the students were aware that this was upsetting to A.S., although quite a few did not understand why. Two students heard the words being used, but saw no one that was upset by it. One student, D.G., admitted to engaging in the controverted behavior

[2] A.S. and C.H. were later again interviewed by Prunk; Brennan was present but only as an observer.

himself, and confirmed that he stopped upon being advised by A.S. that it was offensive. D.G. confirmed that other students continued to taunt A.S.; but he declined to identify these classmates. Two students shared that their classmates were teasing A.S. by chanting "kool-aid" and "fried chicken." V.E. did not understand the meaning behind these phrases, so he asked K.H., who explained, "That's what Black people eat and drink." (J-1(C)(15).) An additional interviewee, E.L. likewise confirmed that these words were being said to A.S. because of his race, and because these foods are "stereotypical" for Black people.

A review of the investigation forms completed by Brennan reveals that M.E. specifically named K.H. as one of the students who was taunting A.S. He is the sole interviewee to have done so. But M.E. was selected at random, and like all the interviewees, he was not prompted to identify K.H. as one of the students taunting A.S. M.E. shared that he heard K.H. and two other boys saying "kool-aid" loudly in the locker room. He was among those confused as to the meaning of "kool-aid," but was aware that his classmates were upsetting A.S. M.E. noted that A.S. sometimes ignored his tormentors, and other times "defended himself" by asking them to stop. (J-1(C)(13).) M.E.'s comments to Brennan were hearsay, but were nonetheless admissible in an administrative proceeding.

However, in accordance with the "residuum rule," a factual finding cannot be based on hearsay alone. Weston v. State, 60 N.J. 36 (1972). As the Weston court stated:

> Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it.
>
> [Id. at 51.]

The Uniform Administrative Procedure Rules are in accord, and require that "some legally competent evidence must exist to support each ultimate finding of fact to an

extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b). Corroboration of M.E.'s hearsay statements to Brennan came from A.S. himself.

A.S. was competent to testify, albeit only thirteen-years old. Our courts have held that "[w]itness disqualification is the exception to the general rule of witness competency." Germann v. Matriss, 55 N.J. 193 (1970); see also State v. Butler, 27 N.J. 560, 602 (1958) (citing State v. Mohr, 99 N.J.L. 124, 127 (E. & A. 1923)). The determination as to whether a particular witness is competent lies within the discretion of the judge. State v. R.W., 104 N.J. 14, 19 (1986). N.J.R.E. 601 likewise provides for the general presumption of competency to testify, unless the proposed witness is incapable of expression concerning the matter so as to be understood by the judge and jury either directly or through interpretation; or is incapable of understanding the duty of a witness to tell the truth. See State v. Scherzer, 301 N.J. Super. 363, 463-64 (App. Div. 1997). I discussed the responsibility to tell the truth with A.S. and was convinced that he was mature enough to understand his obligations as a witness in a legal proceeding.

A.S.'s demeanor was much as Banta and Brennan had described him, quiet and so soft spoken that I had to repeatedly coax him to speak up. When asked if he and K.H. were friends A.S. replied with adolescent naiveté that he was unsure, they talked a bit in seventh grade, but not so much anymore. He seemed to derive no particular joy from testifying against K.H., and he told his story in a shy but firm and consistent manner. As a result, he was utterly believable, and I heard nothing that would evidence a motivation for him to lie. Indeed, the record revealed that A.S. was punished with the imposition of a detention for striking C.H. He did not challenge that penalty, and indeed, his mother, Dr. S., testified that she had advised her son that he deserved his detention because regardless of what is said to you, "you do not raise a hand."

According to A.S., K.H. was one of five boys who, during the week of October 1, 2012, began to chant "kool-aid" when he would walk by in the school hallways and in the locker room. A.S. was adamant that these comments were racially motivated; he noted emphatically that they only chanted this phrase for his benefit. Upon informing

two of the boys that this offended him they asked why, urging that "kool-aid" was only a beverage. A.S. replied, "Then why do you only say it to me?" He testified that K.H., K.C., and C.H. all were taunting him in the locker room on October 5, 2012. A.S. forthrightly admitted that he finally felt pushed too far and hit C.H. According to A.S., K.H. and C.H. were both in the locker room when he "five starred" C.H.; C.H. left and alerted Banta about the incident; and A.S. confirmed that he was then called into Banta's office.

K.H. also testified at the hearing. He likewise presented as a youngster of sufficient maturity to testify competently. K.H. is a personable and intelligent fourteen-year-old young man, who by all accounts has no prior record of misbehavior in school. But his testimony was a bit rehearsed and emotionless. K.H. was present during A.S.'s testimony and that of Dr. S. and I was able to further observe his reaction. K.H. remained emotionless.

K.H. admitted saying "kool-aid" in the locker room, although he denied saying it on October 5, 2012. But K.H. testified that he said the word softly to himself, and not within earshot of A.S. He urged that he never directed the word at A.S., but rather, had repeated it as a joke in regard to a television program, Family Guy. In that program, the "Kool-Aid Man" bursts through a wall and says "oh yeah." K.H. and his group of friends find this amusing. Several other students interviewed by Brennan confirmed that this is a scene in the Family Guy program that some of the students enjoy, and a few even reported that they wished to be the "Kool-Aid Man" for Halloween. But K.H. readily conceded that "kool-aid" also could have a different and derogatory meaning, and clearly knew that this expression also alluded to a racial stereotype.

K.H.'s testimony lacked credibility. Our courts have held that "credibility findings . . . are often influenced by matters such as observations of the character and demeanor of witnesses . . . that are not transmitted by the record." State v. Lourito, 157 N.J. 463, 474 (1998). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). K.H.'s assertion that he softly stated "kool-aid" into his locker as a reference to

Family Guy simply made no sense. He would have done so only to elicit a reaction from friends who shared the inside joke. If A.S. could not hear him, his friends likely would not have either. But in any event, the record amply confirms that K.H. did not say these words softly, or as he put it "not loudly enough for anyone to hear"; indeed, both A.S. and M.E. heard him. K.H. denied that he knew A.S. was offended, and he moreover denied that A.S. had requested that the teasing stop. Both assertions fell flat. Indeed both M.E. and D.G. had informed Brennan that A.S. asked his tormentors to stop chanting "kool-aid."[3] I **FIND** that K.H. was one of a group of boys who chanted "kool-aid" to tease A.S. because of his race.

In an investigation summary report dated October 16, 2012, Brennan concluded that K.H.'s actions constituted HIB as defined by law. She recommended a one-day in-school suspension and counseling as the appropriate disciplinary response. In a letter dated October 25, 2012, Superintendent of Schools Frank Romano confirmed that the results of the investigation had been reported to the Board at its executive session meeting. (J-1(E).) Romano approved the discipline to be imposed and advised K.H.'s parents that they had a right to request a hearing before the Board. Petitioners appeared before the Board on May 28, 2012. Brennan reviewed the results of her investigation. K.H. chose not to testify on his own behalf. The Board concluded that he made the offending remark within earshot of A.S. and that K.H. knew that the remark was racially derogatory. The discipline imposed was upheld, as was the finding that K.H.'s conduct constituted HIB. (J-1(G).)

Dr. S.'s testimony served to underscore how deeply cruel words hurt, particularly when those words are racially charged. Dr. S. was a compelling and poignant witness. She described how upset she and her family were to learn that A.S. had been teased in school, and that he had reacted by hitting a peer. She was deeply troubled that he felt unable to confide in her sooner so that she could have intervened on his behalf. Even after the incident came to light, A.S. would not share the names of his tormentors; he not want to get them in trouble. Always a lively participant in sports, A.S. left a recent

[3] Moreover, K.H.'s testimony was at variance with the information he shared with Brennan. This further diminished his credibility. When interviewed by Brennan, K.H. never once mentioned that his use of the word "kool-aid" was a reference to a television program.

game early and without explanation. He always welcomed his mother's attendance at school musical concerts; A.S. now asked her not to come. Dr. S. testified through tears that she feared he may be embarrassed by her because she is Black. I thus **FIND** that K.H.'s conduct was upsetting to A.S. and that A.S. was made to feel uncomfortable in his school and extra-curricular environments.

CONCLUSIONS OF LAW

Franklin Lakes' HIB policy was adopted in response to comprehensive amendments to the New Jersey Anti-Bullying Law. N.J.S.A. 18A:37-14. The 2010 amendments, which were approved on January 5, 2011, and took effect with the 2011-2012 school year, strengthened the definition of HIB to include:

> [A]ny gesture, any written, verbal or physical act . . . whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic such as race, color . . . or by any other distinguishing characteristic . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or be severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

Districts are required by law to adopt policies that prohibit HIB; that outline expectations for student behavior; that set forth consequences for inappropriate behavior; and create procedures for reporting HIB related concerns. N.J.S.A. 18A:37-15. A school anti-bullying specialist must be assigned to each school, and the results of HIB

investigations must be shared with the Superintendent of Schools and the Board of Education. Parents are entitled to receive written information about the investigation within five school days after the results of the investigation have been reported to the board. Parents may request a board-level hearing, to be conducted within ten days of the request. N.J.S.A. 18A:37-15(6)(d). Regulations promulgated by the Department of Education further assist local districts in complying with these statutory requirements. N.J.A.C. 6A:16-7.9.

I **CONCLUDE** that K.H.'s actions constituted HIB, as that term is defined by law. The Board correctly points out that "in order to constitute HIB, K.H.'s conduct need only satisfy one of the three prongs of the sub-parts of N.J.S.A. 18A:37-14"; this is plain from the statute's use of the word "or" as a conjunction. But the Board likewise correctly points out that K.H.'s conduct satisfied all three prongs. K.H.'s use of the word "kool-aid" was directed at A.S. because of his race; insulted and demeaned A.S.; and his actions interfered with A.S.'s education. Upset and embarrassed children are not fully available for learning. Petitioners' unpersuasive argument that at worst K.H.'s conduct was a single incident and thus cannot rise to HIB ignores both the factual record and the explicit statutory definition to the contrary.

I recognize that in October 2012 K.H. was only thirteen years old and in every other respect a solid school citizen. He certainly impressed me as a well-mannered child, and one with a bright and promising future. But K.H.'s behavior relative to A.S. was inappropriate and hurtful, and the intent of the HIB law is to ensure that such misconduct is properly redirected at an early age. Every action has a reaction; better to learn young and in school that racial epithets are intolerable and will garner a negative reaction then later, in the workplace or on the street. In light of K.H.'s spotless school record, the discipline imposed by the district was measured and appropriate. I **CONCLUDE** that the actions of school personnel, and the Board, were consistent with the letter and spirit of N.J.S.A. 18A:37-14 and N.J.A.C. 6A:16-7.9.

Petitioners disagree, urging that administration and the Board were unfair to their son. The Commissioner will not overturn a local board in the absence of a finding that its actions were arbitrary, capricious, or unreasonable. T.B.M. v. Moorestown Bd. of

Educ., EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/> (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)). The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, petitioners must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., supra, EDU 2780-07. It is a weighty burden; one which I **CONCLUDE** these petitioners have not met. This record has presented me with no evidence that would suggest that the actions of this Board, or its personnel, were taken in bad faith or in utter disregard of the circumstances presented.[4]

ORDER

Based on the foregoing, I **ORDER** that the petition of appeal be **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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[4] Petitioners unpersuasively argue that the Board carried the burden of proving the charges against K.H. by a preponderance of the credible evidence, citing In re East Park High School, 314 N.J. Super. 149, 168 (App. Div. 1998). East Park High School pertains to charges against a school employee and is inapposite. The provisions of N.J.S.A. 18A:37-14 expand upon the existing body of statutory provisions governing student conduct. These provisions make it clear that it is necessary for school administration and staff to control student conduct in the interest of orderly and effective schools. See N.J.S.A. 18A:37-1. Since local Boards must be afforded the discretion to operate their schools in a manner that best serves their unique communities, the Commissioner has consistently declined to interfere with local discretion and has consistently applied the arbitrary, capricious, and unreasonable standard to appeals of student disciplinary matters, including HIB matters. See J.D. and E.D. o/b/o B.D. v. Toms River Bd. of Educ., EDU 6009-97, Initial Decision (November 19, 1997), adopted, Comm'r (December 29, 1997), <http://njlaw.rutgers.edu/collections/oal/>; J.M.C. v. E. Brunswick Bd. of Educ., EDU 4144-12, Initial Decision (November 26, 2012), adopted, Comm'r (January 10, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 24, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: February 24, 2014

Date Mailed to Parties: FEB 25 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

WITNESSES

For Petitioner:

K.H.

For Respondent:

A.S.

Dr. S.

Cory Banta

Kaitlin Brennan

EXHIBITS

Joint:

J-1 Joint Stipulation of Facts

J-1(A) Board policy

J-1(B) Email dated October 5, 2012

J-1(C)(1) through (15) Investigatory statements

J-1(D) Investigation Summary Report

J-1(E) letter dated, October 25, 2012

J-1(F) letter dated, November 7, 2012

J-1(G) letter dated, May 29, 2012

For Petitioners:

P-1 Summary Investigation Report, Student #2 (C.H.)

P-2 Summary Investigation Report, Student #4 (K.C.)

For Respondent:

R-1 Student Handbook 2012-2013

161-14

OAL DKT. NO. EDU 17411-13
AGENCY DKT. NO. 281-11/13

N.H., on behalf of minor child, H.H.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed. Upon such review, the Commissioner observes that in paragraph 5 of the Agreement, the parties stipulate that:

> The District will never report H.H.L.'s name, initials, student number, or any other identifying information to the State of New Jersey in connection with its obligation to provide data regarding incidents of violence or vandalism or incidents of HIB, and the District represents that it is not obligated to provide any student's name, initials, student number, or any other identifying information to the State of New Jersey regarding incidents of violence or vandalism or incidents of HIB.

Pursuant to *N.J.A.C.* 6A:16-5.3(d)1, the chief school administrator is required to submit each instance of HIB to the Commissioner of Education utilizing the Electronic Violence and Vandalism Reporting System (EVVRS). The reports must be submitted twice each year, once for incidents occurring between September 1 and January 1 and once for incidents occurring between January 1 and June 30. *N.J.A.C.* 6A:16-5.3(d)1i. The HIB incident in this case occurred on or about April 26, 2013; therefore, the incident should have already been entered into EVVRS. More importantly, districts are

not authorized to waive the reporting requirements. See, *N.J.A.C.* 6A:16-5.3(d)1 and *N.J.S.A.* 18A:17-46.

Moreover, the EVVRS requires that the district enter the NJSMART number of each victim and offender involved in all HIB incidents. Therefore, the Commissioner cannot approve an Agreement wherein the district represents that it is not obligated to provide the student's identifying information to the State of New Jersey. It should be noted, however, that the data in EVVRS and NJSMART are not connected in any way; therefore it is not possible for the data entered into EVVRS to be accessed by another district or any other unauthorized user.

Additionally, in paragraph 14 of the Agreement it states that the "Agreement is not subject to approval by the Springfield Board of Education." Under *N.J.A.C.* 6A:3-1.13, "[w]here a district board of education is a party to a contested matter, any proposed settlement ... shall indicate, by signature of the board attorney or inclusion of the district board of education's resolution authorizing settlement, that the district board of education has consented to the terms of the settlement." Therefore, the Commissioner cannot approve an Agreement containing language expressly stating that the Agreement is not subject to approval by the district board of education.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/21/14
Date of Mailing: 4/22/14

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 17411-13

AGENCY DKT. NO. 281 11/13

N.H. ON BEHALF OF MINOR CHILD H.H.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,

Respondent.

George M. Holland, Esq. (Wanderpolo and Siegel, LLC, attorneys)

Raquel S. Lord, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: February 27, 2014 Decided: February 27, 2014

BEFORE **CAROL I. COHEN,** ALJ:

This matter was transmitted to and filed with the Office of Administrative Law ("OAL") on December 4, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

2/28/14
DATE

Carol I Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: 3/4/14

Date Mailed to Parties:
db 3/4/14

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AGREEMENT AND RELEASE

This Settlement Agreement and Release ("this Agreement") is made and entered into by and between the Springfield Board of Education (hereinafter "the Board") and N.H. o/b/o H.H.L. (hereinafter, "Petitioner") (collectively, the "Parties"), for full settlement of all claims which were alleged and/or could have been alleged against the Board by Petitioner in the Verified Petition of Appeal arising out of an incident of harassment, intimidation or bullying ("HIB") that occurred on or about April 26, 2013.

RECEIVED
2013 FEB 28 P 1:05
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

WITNESSETH:

WHEREAS, H.H.L. is a student in the Springfield School District (the "District"); and

WHEREAS, on or about April 26, 2013, H.H.L. was involved in an incident (the "HIB incident") wherein H.H.L. was found to have engaged in HIB (the "finding of HIB"); and

WHEREAS, Petitioner N.H. has filed a Verified Petition of Appeal against the Board, bearing Agency Reference No. 281-11/13, in connection with the finding of HIB (the "Petition"); and

WHEREAS, the Parties desire to amicably resolve their differences and avoid the expense and uncertainty of further litigation, and

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the Parties as follows:

1. The finding of HIB is not a part of H.H.L.'s cumulative or disciplinary record and will never be made a part of same.

2. The finding of HIB will never be made a part of any transcript of H.H.L. by the District.

3. The finding of HIB will never be transferred by the District to any other school in or outside of the District, nor to any college, university or other secondary education institution, or to any employer.

4. All documents reflecting the finding of HIB are kept under lock in the office of the District's HIB Coordinator and will remain there until such time as H.H.L. graduates from high school or transfers out of the District, at which time they will be immediately destroyed.

5. The District will never report H.H.L.'s name, initials, student number, or any other identifying information to the State of New Jersey in connection with its obligation to provide data regarding incidents of violence or vandalism or incidents of HIB., and the District represents that it is not obligated to provide any student's name, initials, student number, or any other identifying information to the State of New Jersey regarding incidents of violence or vandalism or incidents of HIB.

6. H.H.L. has not been subject to any disciplinary action related to the finding of HIB and will never be subject to disciplinary action based on this finding of HIB in the future.

7. **Release and Waiver:** In exchange for the terms set forth herein, Petitioner releases and gives up any and all claims and rights she may have against the Board, its officers, employees and representatives, arising out of alleged acts or omissions, whether known or unknown, that have taken place through the date of this Agreement, in connection with the her Verified Petition of Appeal arising out of the HIB incident.

8. **Agreement To Withdraw and Not To Sue:** Petitioner agrees not to file any lawsuit or claim against the Board, its officers, employees or representatives, based on any events, whether known or unknown, regarding the HIB incident, in any court or tribunal of the

United States, New Jersey or any other state, city, county, or locality, for any claims released in this Agreement. Petitioner further agrees to voluntarily withdraw the Petition.

9. **Confidentiality:** The parties agree that neither they nor their attorneys or representatives shall reveal to anyone, verbally or in writing, other than as may be mutually agreed to in writing or to a court of law or government entity, any of the terms of this Agreement, including the existence of this agreement, to the extent permitted by law. Petitioner acknowledges that this confidentiality requirement is a material term to this Agreement.

10. **No Precedent:** The parties agree that this Agreement may not be used to establish precedent in any future proceeding of any type whatsoever involving the Board and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of same. This Agreement is a compromise of disputed claims and shall not be construed as an admission by any party of any of the acts or omissions alleged or those that could have been alleged by any party against another party in this matter. This Agreement shall not be construed as an admission by the Board of any wrongdoing. The Petitioner is not a prevailing party entitled to recover attorneys' fees and costs in connection with this matter.

11. **Who is Bound:** The Board is bound by this Agreement. Petitioner and her agents are bound by this Agreement. Those who succeed to Petitioner's rights and responsibilities, such as heirs, the executors of her estate, or her personal or legal representatives, are also bound.

12. **Entire Agreement:** This Agreement contains the sole and the entire agreement between Petitioner and the Board, and fully supersedes any and all prior agreements and understandings between Petitioner and the Board pertaining to the subject matter of this Agreement. Petitioner represents and acknowledges that she has not relied upon any

representation or statement by the Board, or its counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth in this Agreement. No other promises or agreements shall be binding unless in writing, signed by Petitioner and the Board, and expressly stated to be a modification of this Agreement.

13. **Counterparts**: This Agreement may be executed in counterparts.

14. **Approval of this Agreement**: The Parties understand and agree that this Agreement is not subject to approval by the Springfield Board of Education. The parties further understand and agree that this Agreement is subject to execution by the District's Director of Human Resources/HIB Coordinator, as well as Petitioner, who shall execute this Agreement with the consent of H.H.L.'s biological father, H.L. The parties further understand and agree that this Agreement is subject to review and approval by the Commissioner of Education, as it will constitute an "Initial Decision" by Administrative Law Judge Carol Cohen, before whom the Parties appeared for a settlement conference on January 29, 2014.

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15. Signatures:

BY SIGNING THIS AGREEMENT, PETITIONER STATES THAT:

A. SHE HAS READ IT;

B. SHE AGREES WITH EVERYTHING IN IT;

C. SHE HAS HAD AN OPPORTUNITY TO CONSULT WITH AN ATTORNEY; AND

D. SHE HAS SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY.

Petitioner

N.H.

Dated: 2/19/14

Springfield Board of Education

Ellyn Atherton, Director of Human Resources, HIB Coordinator

Dated: 2/20/14

162-14

BOARD OF EDUCATION OF THE BOROUGH OF INTERLAKEN, MONMOUTH COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF THE SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS.

AND

M.L., on behalf of minor children, J.F. and D.F.; E.O. and B.O., on behalf of minor children, D.O. and G.O.; J.P. and M.P., on behalf of minor children, A.P. and M.P.; and L.R. and M.R., on behalf of minor children, S.R. and F.R.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF INTERLAKEN, MONMOUTH COUNTY; BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY; BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY; AND BOARD OF EDUCATION OF THE SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

This consolidated matter involves an application to change where the Borough of Interlaken – a non-operating school district – sends its pre-K through 12th grade students to receive a public education. The Interlaken Board of Education (Interlaken) filed a petition of appeal in April 2012 which sought to sever its send-receive relationship with the Asbury Park Board of Education (Asbury Park), and permission to establish send-receive relationships with the West Long Branch and Shore Regional Boards of Education (*Interlaken I*). Petitioner also sought and received an order permitting those Interlaken students who were registered to attend school in West Long Branch and/or Shore Regional – as of the date of the order – to

attend school in those districts pending the final outcome of the case. *Interlaken II* was filed by a group of Interlaken parents after this initial order was granted, and sought permission to allow their children to also be registered in West Long Branch and/or Shore Regional. The Commissioner's Order in *Interlaken II* granted relief to all children residing in the Borough of Interlaken and permitted them to attend school in West Long Branch and Shore Regional pending the final outcome of *Interlaken I*. Subsequently, Asbury Park submitted a letter – in response to a motion for summary decision from petitioners in the now consolidated matter – stating that it did not oppose the severance of its send-receive relationship with Interlaken.

The ALJ found, *inter alia*, that: although there is no party opposing the petitioners' motion for summary decision, a change in a sending/receiving relationship cannot be made "except upon application made to and approved by the commissioner," *N.J.S.A.* 18A:38-13; as no facts are contested in this matter, a hearing is not warranted; however, the record must be reviewed to determine if petitioners' request satisfies the requirements of *N.J.S.A.* 18A:38-13; summary decision is appropriate here as a feasibility study and accompanying certifications and exhibits demonstrate that petitioners have satisfied all of the statutory elements required for severance of the relationship with Asbury Park and entrance into new sending/receiving relationships with the West Long Branch and Shore Regional school districts; the demographic enrollment in Asbury Park schools will not change if severance is granted; dissolution of the sending/receiving relationship and creation of the new relationships will have no negative impact upon the education of students in any of the implicated school districts; and the proposed changes to Interlaken's sending/receiving relationship will have little financial impact on any of the districts involved, with the exception of a possible tax increase for Interlaken residents. The ALJ concluded that petitioners have satisfied the criteria of *N.J.S.A.* 18A:38-13, and accordingly recommended granting their request to sever the sending/receiving relationship with Asbury Park, and to enter into new sending/receiving relationships with West Long Branch and Shore Regional.

Upon review, the Commissioner found, *inter alia*, that – pursuant to *N.J.A.C.* 6A:3-6.1(f) – there is not a sufficient adversarial perspective in the record for the Commissioner to assess Interlaken's compliance with *N.J.S.A.* 18A:38-13; and the record does not include a response or opposition to the March 2013 feasibility study that provides the Commissioner with any adversarial perspective on Interlaken's proposed change in its send-receive relationship. The Commissioner determined that this matter must be treated as an unopposed application for termination and a change in the allocation under *N.J.A.C.* 6A:3-6.1. Accordingly, the Commissioner ordered that the boards of education of Interlaken, Asbury Park, West Long Branch, and Shore Regional shall each, at their next respective public meeting, announce that the record before the Commissioner shall remain open for a period of 20 days from the date of the announcement in order for interested persons or entities to submit written comments to the Commissioner; thereafter, the remaining procedures outlined in *N.J.A.C.* 6A:3-6.1 shall be followed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

April 21, 2014

OAL DKT. NO. EDU 5340-12, 11302-12 (CONSOLIDATED)
AGENCY DKT. NO. 109-4/12, 228-8/12

BOARD OF EDUCATION OF THE BOROUGH OF INTERLAKEN, MONMOUTH COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF THE SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS.

AND

M.L., on behalf of minor children, J.F. and D.F.; E.O. and B.O., on behalf of minor children, D.O. and G.O.; J.P. and M.P., on behalf of minor children, A.P. and M.P.; and L.R. and M.R., on behalf of minor children, S.R. and F.R.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF INTERLAKEN, MONMOUTH COUNTY; BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY; BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY; AND BOARD OF EDUCATION OF THE SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

This consolidated matter involves an application to change where the Borough of Interlaken, a non-operating district, sends its students to be educated from pre-K through 12th grade.[1] In April 2012, the Interlaken Board of Education (Interlaken) filed a petition of appeal seeking severance of its send-receive relationship with respondent Asbury Park Board of Education (Asbury Park), and the Commissioner's permission to establish send-receive relationships with the respondents West Long Branch Board of Education (West Long Branch) and Shore Regional Board of Education (Shore Regional). Interlaken also filed a motion for emergent relief seeking an order permitting those Interlaken students who were registered to attend school in West Long Branch and/or Shore Regional to continue attending school in those districts pending the final outcome of the petition. On June 14, 2012, Interlaken's request for emergent relief was granted by the Commissioner (*Interlaken I*).

In August 2012, M.L., on behalf of minor children, J.F. and D.F., et. als. (parent petitioners), filed a petition of appeal and a motion for emergent relief (*Interlaken II*). The parent petitioners were the parents of minor children who resided in Interlaken but who had not registered to send their children to West Long Branch or Shore Regional prior to the Order in *Interlaken I*. The parent petitioners sought emergent relief from the Commissioner to allow their children to register in West Long Branch and/or Shore Regional pending the final outcome of *Interlaken I*. On August 30, 2012, the Commissioner issued an Order in *Interlaken II* granting relief to all children residing in Interlaken and permitting them to attend school in West Long

[1] The procedural history is thoroughly outlined in the Initial Decision and will not be fully repeated here.

Branch and Shore Regional pending the final outcome of *Interlaken I*. On January 9, 2013, *Interlaken I* and *Interlaken II* were consolidated.

After the cases were consolidated, Interlaken filed a motion for summary decision seeking to sever its current relationship with Asbury Park and to enter into a new send-receive relationship with West Long Branch and Shore Regional. The motion for summary decision included a feasibility study, dated March 2013, that was conducted on behalf of Interlaken. This study evaluated the potential educational, financial and racial implications that Interlaken's request would have on each of the districts. The parent petitioners joined Interlaken in its request for summary decision, and neither West Long Branch nor Shore Regional opposed the motion. Additionally, Asbury Park submitted a response to the motion for summary decision at the OAL, stating that it no longer opposed the severance of the send-receive relationship. The Administrative Law Judge determined that there was no substantial negative impact on the districts under *N.J.S.A.* 18A:38-13, and recommended granting Interlaken's request to sever its current relationship with Asbury Park and enter into a new send-receive relationship with West Long Branch and Shore Regional.

In accordance with *N.J.A.C.* 6A:3-6.1(f), the Commissioner finds that there is not a sufficient adversarial perspective in the record for the Commissioner to assess Interlaken's compliance with *N.J.S.A.* 18A:38-13. Although Asbury Park opposed the requests for emergent relief made by Interlaken and the parent petitioners, Asbury Park withdrew its opposition to the severance of the sending-receiving relationship at the OAL. As a result, the record before the Commissioner does not include a response or opposition to the March 2013 feasibility study that provides the Commissioner with any adversarial perspective on Interlaken's proposed change in

its send-receive relationship.[2] Therefore, each of the district boards of education must follow the process set forth in *N.J.A.C.* 6A:3-6.1 before Interlaken's application to sever its current relationship with Asbury Park and enter into a new send-receive relationship with West Long Branch and Shore Regional can be granted.

Accordingly, this matter will now be treated as an unopposed application for termination and a change in allocation under *N.J.A.C.* 6A:3-6.1. At the next public meeting of each board of education, Interlaken, Asbury Park, West Long Branch and Shore Regional shall announce that the record before the Commissioner shall remain open for a period of 20 days from the date of the announcement in order for interested persons or entities to submit written comments to the Commissioner. Thereafter, the remaining procedures outlined in *N.J.A.C.* 6A:3-6.1 shall be followed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/21/14

Date of Mailing: 4/22/14

[2] The petitions of appeal requesting emergent relief in *Interlaken I* and *Interlaken II* were filed prior to the completion of the March 2013 feasibility study.

[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NOS. EDU 5340-12 and EDU 11302-12 (Consolidated)

AGENCY DKT. NOS. 109-4/12 and 228-8/12

BOARD OF EDUCATION OF BOROUGH OF INTERLAKEN, MONMOUTH COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY AND BOARD OF EDUCATION OF SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY.

Respondents,

and

M.L. O/B/O MINOR CHILDREN J.F. AND D.F.; E.O. AND B.O. O/B/O MINOR CHILDREN D.O. AND G.O.; J.P. AND M.P. O/B/O MINOR CHILDREN A.P. AND M.P.; AND L.R. AND M.R. O/B/O MINOR CHILDREN S.R. AND F.R.,

Petitioners,

v.

BOARD OF EDUCATION OF BOROUGH

OF INTERLAKEN, MONMOUTH COUNTY, BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY AND BOARD OF EDUCATION OF SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY.

Respondents.

Anthony P. Sciarrillo, Esq., for Board of Education of Borough of Interlaken, petitioner and parent petitioners (Lindabury, McCormack, Estabrook & Cooper, attorneys)

Michael Gross, Esq., for respondent Board of Education of the City of Asbury Park, Monmouth County (Kenney, Gross, Kovats & Parton, attorneys)

Viola Lordi, Esq., for respondent West Long Branch Board of Education, Monmouth County, respondent (Wilentz, Goldman & Spitzer, attorneys)

Alexis Tucci, Esq., for respondent Shore Regional Board of Education, Monmouth County (Tucci, Hot & Crupi, attorneys)

Record Closed: February 24, 2014 Decided: March 7, 2014

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

The moving parties in this action for summary decision are the Board of Education of the Borough of Interlaken (hereinafter referred to as "Interlaken") and

parent petitioners: M.L. o/b/o minor children J.F. and F.F.; E.O. and B.O. o/b/o minor children D.O. and G.O.; J.P. and M.P. o/b/o minor children A.P. and M.P.; and L.R. and M.R. o/b/o minor children S.R. and F.R. (hereinafter collectively referred to as "petitioners"). Interlaken, the "sending district" in a sending-receiving relationship with respondent-Asbury Park Board of Education (hereinafter "Asbury Park"), the "receiving district", seeks withdrawal from any sending-receiving relationship which exists between the parties and a ruling that severance further satisfies the requirements of N.J.S.A. 18A:38-1. Interlaken further requests authorization to enter into new sending-receiving relationships with respondent-West Long Branch Board of Education (hereinafter "West Long Branch") and respondent-Shore Regional School District Board of Education (hereinafter "Shore Regional").

PROCEDURAL HISTORY

On March 12, 2012, the Executive County Superintendent ("ECS") for Monmouth County advised Interlaken by letter that approval by the Commissioner of Education ("Commissioner") was necessary to validate the sending-receiving relationships it had established with West Long Branch and Shore Regional and that any action implementing the arrangements for the upcoming 2012-13 school year would be done at their own peril. After receipt of the letter, Interlaken chose to file a Verified Petition of Appeal and a Motion for Emergent Relief with the Bureau of Controversies and Disputes ("Bureau") of the New Jersey Department of Education ("Department"). The request for emergent relief was transmitted to the Office of Administrative Law ("OAL") on April 25, 2012, and scheduled for oral argument on April 30, 2012. At the request of all parties, the oral argument was rescheduled to, and held on, May 3, 2012. The parties' request to file additional pleadings on the emergent motion was granted until the end of day on May 10, 2012.

On May 11, 2012, an Order on Emergent Relief was issued in Bd. of Educ. of the Borough of Interlaken, Monmouth County v. Bd. of Educ. of the City of Asbury Park, Monmouth County; Bd. of Educ. of the Borough of West Long Branch, Monmouth County and Bd. of Educ. of Shore Regional School District, Monmouth County, EDU

5340-12, adopted, Comm'r (June 14, 2012) <http://njlaw.rutgers.edu/collections/oal/> (hereinafter referred to as "Interlaken I"). The Order on Emergent Relief granted Interlaken's request to permit those Interlaken students who were registered to attend school in West Long Branch and/or Shore Regional, as of the date of the Order, to attend school in those districts pending the final outcome of the Petition. Ibid. Accordingly, the Commissioner returned the matter to the OAL for a hearing on the merits. Ibid.

In a separate matter, on August 17, 2012, M.L., on behalf of minor children, J.F. and D.F., et. als. (hereinafter collectively referred to as the "M.L. petitioners"), filed a Verified Petition of Appeal and a Motion for Emergent Relief with the Bureau. The M.L. petitioners were the parents of minor children who resided in Interlaken but who had not registered to send their children to West Long Branch or Shore Regional prior to the Order in Interlaken I. The M.L. petitioners sought emergent relief from the Commissioner to allow their children to register in West Long Branch and/or Shore Regional pending the final outcome of Interlaken I. The request for emergent relief was transmitted to the OAL on August 21, 2012, with oral argument held on August 27, 2012. Thereafter, also on August 27, 2012, an Order on Emergent Relief was issued in the case of M.L. o/b/o minor children J.F. and D.F.; E.O. and B.O. o/b/o minor children D.O. and G.O.; J.P. and M.P. o/b/o minor children A.P. and M. P.; L.R. and M.R. o/b/o minor children S.R. and F.R. v. Bd. of Educ. of the Borough of Interlaken, Monmouth County; Bd. of Educ. of the City of Asbury Park, Monmouth County; Bd. of Educ. of the Borough of West Long Branch, Monmouth County and Bd. of Educ. of Shore Regional School District, Monmouth County, EDU 11302-12, adopted, Asst. Comm'r (August 30, 2012) <http://njlaw.rutgers.edu/collections/oal/> (hereinafter referred to as "Interlaken II"). The Order in Interlaken II granted relief to all children residing in the Borough of Interlaken and permitted them to attend school in West Long Branch and Shore Regional pending the final outcome of Interlaken I. Ibid.

Subsequently, Asbury Park filed a Motion to Stay the Assistant Commissioner's August 30, 2012, Decision in Interlaken II pending an appeal of the matter with the Appellate Division of the New Jersey Superior Court. On September 14, 2012, the

Assistant Commissioner issued a decision denying Asbury Park's Motion to Stay because Asbury Park failed to establish justification for reconsideration of the August 30, 2012 Decision. No appeal was made after the denial of the Motion to Stay.

On January 9, 2013, an Order consolidating the Interlaken I and Interlaken II matters was entered and counsel for Interlaken assumed representation of the petitioners in Interlaken II. On August 1, 2013, the OAL received a motion for summary decision from petitioners in Interlaken I and II arguing that there is no material fact in dispute and that petitioners' request to terminate any sending-receiving relationship with Asbury Park should be granted as a matter of law. On August 29, 2013, the OAL received a responsive letter from Asbury Park stating that it did not oppose petitioners' motion. Respondent-West Long Branch also filed a response on August 20, 2013, stating that it did not oppose petitioners' motion. Respondent-Shore Regional does not oppose the motion.

FACTUAL DISCUSSION

As Asbury Park has not filed a response in opposition to the motion for summary decision, the facts in the matter are not contested. As such, based upon a review of the certifications and exhibits presented by petitioners, with significant review given to the statutorily required feasibility study, the following facts are determined:

1. The Borough of Interlaken is a small community located in Monmouth County, New Jersey, comprising a total land area of .383 square miles of which .330 square miles is land and .053 square miles is water. (Petitioner Feasibility Study at 9.)

2. The 2010 U.S. Census reported 820 residents in the Borough of Interlaken with a racial breakdown as follows: 807 Whites, 4 Asians, 3 Other, and 6 identified by two or more races. (Ibid.)

3. The Board of Education of the Borough of Interlaken is a non-operating school district which sends its students to other districts in the area to be educated from Pre-K through 12th grades by paying tuition to those districts. (Id. at 7.)

4. Asbury Park is a seaside community of Monmouth County with a population of 16,116 according to the 2010 U.S. Census and a racial breakdown as follows: 5,875 Whites, 8,275 African-Americans, 79 American Indians and Alaska Natives, 77 Asians, 20 Native Hawaiian and Pacific Islanders, 1,232 Other, and 558 identified by two or more races. (Id. at 10-11.)

5. Asbury Park School District provides Pre-K through 12th grade educational services and in 2011-12 school year, it served 1,985 students. (Petitioner Feasibility Study, Appendix 17 at 1.)

6. For the 2011-12 school year, Asbury Park School District was comprised of 1,936 minorities (97.53%) and 49 non-minorities (2.47%). (Ibid.)

7. For the 2011-12 school year, Asbury Park School District's racial summary was 64.69% African-American, 32.54% Hispanic, 2.47% White, and 0.3% Asian and Native American.

8. Asbury Park School District is an Abbott district as identified by the New Jersey Department of Education and each of its five schools have been designated by the State as "Schools in Need of Improvement" for a range of 4-11 years through the 2010-11 school year. (Petitioner Feasibility Study at 8,10.)

9. Based upon the federal standards under the "No Child Left Behind Act", the educational program in Asbury Park is currently failing and it has been identified as a "District In Need of Improvement" continuously since the 2003-04 school year. (Id. at 28.)

10. West Long Branch is a suburban, residential community of Monmouth County with a population of 8,097 according to the 2010 U.S. Census and a racial breakdown as follows: 7,647 Whites, 179 African-Americans, 5 American Indians

and Alaska Natives, 96 Asians, 1 Native Hawaiian and Pacific Islander, 77 Other, and 91 identified by two or more races. (Id. at 12-13.)

11. West Long Branch Board of Education operates a Pre-K through 8th grade school system and in the 2011-12 school year, it served 592 students. (Petitioner Feasibility Study, Appendix 17 at 20-21.)

12. For the 2011-12 school year, West Long Branch School District was comprised of 68 minorities (11.49%) and 524 non-minorities (88.51%). (Ibid.)

13. For the 2011-12 school year, West Long Branch School District's racial summary was .51% African-American, 6.42% Hispanic, 88.51% White, 2.03% Asian, and 2.53% identified by two or more races. (Ibid.)

14. Shore Regional School District Board of Education operates a regional high school for grades 9 through 12 and serves students from Monmouth Beach, Sea Bright, and Oceanport. (Petitioner Feasibility Study at 13.)

15. For the 2011-12 school year, Shore Regional High School served 634.5 students comprised of 40 minorities (6.3%) and 594.5 non-minorities (93.7%). (Petitioner Feasibility Study, Appendix 17 at 17.)

16. For the 2011-12 school year, Shore Regional High School's racial summary was .78% African-American, 4.1% Hispanic, 93.7% White, .16% Asian, and 1.26% identified by two or more races. (Ibid.)

17. From the early 1940s until the 1997-98 school year, a sending-receiving relationship existed between Interlaken and Asbury Park with regular education public school students residing in Interlaken attending Asbury Park schools on a tuition basis. The relationship existed without a formal sending-receiving agreement, but has historically been effectuated by tuition contracts of which the last known instance occurred for the 1996-97 school year. (See Certification of Paul E. Griggs, Esq., ¶ 15 (citing Ex. L).)

18. From the 1997-98 school year through the present, Interlaken has not sent any regular education students to Asbury Park. (Id. at ¶ 16.)

19. Interlaken students requiring special education services have attended and still attend pre-school handicapped classes in Asbury Park but transfer out into various other schools and districts as they age out of the district's pre-school program. (Petitioner Feasibility Study at 7.)

20. The per pupil 2012-13 tuition rate Interlaken would have paid to Asbury Park if it had sent a regular education student to Asbury Park schools during the 2012-13 school year was $19,506 for PreK-K, $17,595 for Grades 1-5, $18,022 for Grades 6-8, and $18,945 for Grades 9-12. (Petitioner Feasibility Study at 38.)

21. The per pupil 2012-13 tuition rate for grades PreK-K at West Long Branch was $5,000. (Ibid.)

22. The per pupil 2012-13 tuition rate for grades 9 through 12 at Shore Regional was $10,000. (Ibid.)

23. Interlaken has paid tuition to send students to Red Bank Regional High School and Monmouth County Technical Vocational School District under approval of the Monmouth County Superintendant of Schools since Asbury Park did not offer these specialized programs. (Ibid.)

24. In the 2012-13 school year, Interlaken sent twenty Pre-K to high school students to various local public schools, with four students going to Asbury Park for Pre-K special education services. (Id. at 33.) Four of the students went to Monmouth County Vocational High School and seven attended Red Bank Regional High School. (Id. at 33-34.) Five other special education students from Interlaken were sent to Howell Township, Point Pleasant Beach and Hawkswood, a private school for the disabled. (Id. at 34.)

25. In the 2012-2013 school year, Interlaken paid Asbury Park a total of $19,506 per student in tuition for the four students going to Asbury Park for Pre-K special education services. (Ibid.)

26. This revenue source from Interlaken was of such insignificance to Asbury Park that it was not listed as part of their approved budgets for the last three years ending with the 2012-2013 school year. (Ibid.) This is demonstrated by the fact that the evidence of the tuition payments comes from Interlaken.

27. Asbury Park will not see any impact to its state and federal aid if severance is granted because Interlaken students do not attend Asbury Park schools beyond the preschool disabled program. (Id. at 40.)

28. When legislation concerning the elimination of non-operating school districts took effect in 2009,[1] Interlaken was advised by the Department that it was scheduled for elimination or consolidation. (See Certification of Meredith Fox Wong (hereinafter referred to as "Wong"), ¶ 8.)

29. Interlaken was notified on April 29, 2010, by the then ECS for Monmouth County that "the proposed plan to eliminate and/consolidate has been officially suspended" but that Interlaken was encouraged to "investigate all opportunities to create jointures or shared services", with an admonition to be mindful of costs. (Id. at ¶ 9 (citing Ex. A).)

30. Interlaken then began to review its educational options and, in June 2011, Interlaken entered into tuition contracts with West Long Branch and with Shore Regional such that students residing in Interlaken could be sent to the respective districts on a tuition basis. (See id. at ¶ 10-14.)

31. After Interlaken, West Long Branch, and Shore Regional approved the contracts, they were reviewed by the new ECS for Monmouth County, Joseph F. Passiment, who informed Interlaken by letter of August 19, 2011, that the contracts implicated at least three statutes and any change in a sending-receiving relationship required the approval of the Commissioner of Education. (Id. at ¶ 15 (citing Ex. C).)

[1] N.J.S.A. 18:7-8(g) provides that the Executive County Superintendents (ECS) shall eliminate districts not operating schools on the effective date of N.J.S.A. 18A:8-43, which in turn defines a non-operating district. See also N.J.S.A. 18A:8-44.

32. Passiment instructed that, in the absence of Commissioner approval, Interlaken must rescind the contracts with West Long Branch and Shore Regional. (Wong, Ex. C.)

33. Based on the contracts, Interlaken sent students to West Long Branch and Shore Regional schools during the 2011-2012 school year. (Id. at ¶ 22.)

34. As a result of the Assistant Commissioner's September 14, 2012, decision denying Asbury Park's Motion to Stay, Interlaken continued to send students to West Long Branch and Shore Regional during the 2012-13 school year. (Id. at ¶ 23.)

35. Interlaken, as the district seeking to sever any relationship, employed Dr. Maria Nuccetelli and Cathie Sousa to conduct and prepare a feasibility study that analyzed the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts.

36. The feasibility study recommends that Interlaken be permitted to sever any sending-receiving relationship with Asbury Park and form new sending-receiving relationships with West Long Branch and Shore Regional because the severance would not result in a substantial negative impact on the education, finances, or racial composition of any of the involved districts. (Petitioner Feasibility Study at 46-47.)

37. The study examined Asbury Park's failing status under the "No Child Left Behind Act" and concluded that Interlaken students are unable to receive a thorough and efficient education in Asbury Park. (Id. at 14-34.)

38. In part due to the increased tuition costs under the proposed sending-receiving relationships, for the 2013-2014 school year, the school tax for the average

assessed home in Interlaken would be $1,339 for a net increase over the last five years of $323 or $27 per month. (Id. at 40.)

39. The study examined the financial impact of a severance and finds that none of the involved districts would experience a substantial negative impact as a result of Interlaken's formal withdrawal from any relationship with Asbury Park, despite the expected tax increase for Interlaken. (Id. at 33-40.)

40. Finally, the study concludes that neither Asbury Park nor any of the involved districts will experience a substantial negative impact on the racial composition of its school district if Interlaken formally severs its sending-receiving relationship with Asbury Park. (Id. at 40-44.)

41. The primary reason for the severance request is to ensure the Interlaken Board of Education can provide its district with the option of a thorough and efficient free public education in high performing schools. (Id. at 45-46.)

42. If the severance request was denied, Interlaken parents will not send their children to Asbury Park schools except for the Pre-K disabled program, but will continue to send their children to private schools or public schools accepting outside tuition payments. (Id. at 46.)

43. West Long Branch received 17 Interlaken students in the 2011-2012 school year pursuant to tuition agreements. (Certification of Anthony Sciarrillo, Ex. C, Certification of Herbert Massa, ¶ 5.)

44. West Long Branch has sufficient capacity to continue the enrollment of Interlaken students. (Id. at ¶ 7.)

45. On the 2010-11 New Jersey Assessment of Skills and Knowledge (NJASK), for language arts, math, and science, West Long Branch students in Grade 8 outperformed their counterparts both statewide and in their District Factor Group, which categorizes demographically similar school districts for comparison. (Petitioner Feasibility Study at 21.)

46. On the 2010-11 NJASK, West Long Branch students in Grade 6 and 7 outperformed their counterparts in Math both statewide and in their District Factor Group. However, they were slightly lower than their peers in language arts in their District Factor Group, but exceeded the statewide average. (Id. at 22, 24.)

47. On the 2010-11 NJASK, West Long Branch students in Grade 5 were on par with their counterparts in Math in their District Factor Group, but exceeded the statewide average. They were slightly lower than their peers in language arts in their District Factor Group, but again exceeded the statewide average. (Id. at 25.)

48. On the 2010-11 NJASK, West Long Branch students in Grade 4 outperformed their counterparts both statewide and in their District Factor Group in language arts and science. However, they scored below their peers both statewide and in their District Factor Group in Math. (Id. at 27.)

49. On the 2010-11 NJASK, West Long Branch students in Grade 3 had a lower proficiency than their counterparts both statewide and in their District Factor Group in language arts and math. (Id. at 28.)

50. Shore Regional also has sufficient resources, capacity, and professional staff to accept and enroll Interlaken students. (Certification of Anthony Sciarrillo, Ex. D, at 1.)

51. On the 2010-11 New Jersey High School Proficiency Assessment (HSPA), for language arts and math, Shore Regional students outperformed their counterparts both statewide and in their District Factor Group. (Petitioner Feasibility Study at 19.)

52. For the 2010-11 school year, Shore Regional had a 91.4% graduation rate with students passing the HSPA. (Id. at 32.)

53. Under the New Jersey Quality School Assessment Continuum (NJQSAC), both West Long Branch and Shore Regional are "high performing districts" since they

scored 80% or higher in all areas of review: Operations, Personnel, Instruction and Program, Governance, and Fiscal Management. (Ibid.)

54. Because only a minimal number of Interlaken students could attend West Long Branch and Shore Regional, spread over various grade levels, their attended would have no noticeable impact on the budgets of the respective school districts. (See id. at 34.)

55. West Long Branch and Shore Regional's support of the petitioners' motion for summary decision indicates they are ready, willing, and capable of receiving Interlaken students through a sending-receiving relationship. Additionally, Interlaken contends that it effectively abandoned any sending receiving relationship that once existed with Asbury Park. Nevertheless, it seeks summary decision formally dissolving any relationship that may exist in law in compliance with New Jersey law on sending-receiving relationships.

LEGAL ANALYSIS

Summary Decision Standard

A motion for summary decision shall be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(a). If "a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

A motion for summary decision before the OAL must be analyzed "in accordance with the principles set forth by the New Jersey Supreme Court in **Brill** v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)." Nat'l Transfer, Inc. v. New Jersey Dep't of Envtl. Prot., 347 N.J. Super. 401, 408 (App. Div. 2002). The rule the Court announced was that a determination that there is a genuine issue of material fact:

> requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself (or herself) to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2. The import of our holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment. It is critical that a trial court ruling on a summary judgment motion not 'shut a deserving litigant from his [or her] trial.' ... To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'
>
> [Brill, supra, 142 N.J. at 540-41 (emphasis added).]

In this case, although no party opposes petitioners' motion for summary decision, a change in a sending-receiving relationship cannot be made "except upon application made to and approved by the commissioner." N.J.S.A. 18A:38-13. In this matter, the facts are not contested, and a plenary hearing is not warranted. However, to grant the relief requested by petitioners the record must be reviewed to determine if petitioners' request satisfies the requirements of N.J.S.A. 18A:38-13. As set forth more fully below, summary decision is appropriate here as the feasibility study and accompanying certifications and exhibits demonstrate that petitioners have satisfied all the required elements set forth in N.J.S.A. 18A:38-13 to sever any relationship with Asbury Park and to enter into new sending-receiving relationships with West Long Branch Board of Education and Shore Regional School District Board of Education.

Statutory Analysis

N.J.S.A. 18A:38-11 mandates that any school district that lacks high school facilities, like Interlaken, must designate a high school for its pupils through a sending-receiving relationship[2]. To subsequently change or sever such relationship between school districts requires the approval of the Commissioner of Education. Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood, 257 N.J. Super. 413, 458 (App. Div. 1992), aff'd 132 N.J. 327 (1993), cert. den. 510 U.S. 991 (1993) ("termination of a sending-receiving relationship is subject ... to the approval of the Commissioner of Education") (citing N.J.S.A. 18A:38-13). Approval requires satisfaction of the criteria of N.J.S.A. 18A:38-13, which provides in pertinent part:

> [To change a sending-receiving relationship requires an] application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.
>
> [N.J.S.A. 18A:38-13 (emphasis added).]

"[W]hen a local board of education applies for permission to alter or terminate a sending-receiving relationship with another board [,the] commissioner is required to grant the requested change in designation or allocation if no substantial negative impact will result." Englewood, supra, 257 N.J. Super. at 459 (quoting Assembly Statement accompanying Assembly Bill No. 2072, L.1986, c.156 (1986)). The statutory analysis pursuant to N.J.S.A. 18A:38-13 for evaluating a modification request does not follow a

[2] Although the statute expressly states that it applies to high schools, the Commissioner has expanded the scope of the statute to include elementary schools as well. Bd. of Educ. of Mine Hill v. Bd. of Educ. Dover, EDU 1147-99, Comm'r (Feb 15, 2001), remanded, State Bd. (Aug 3, 2001), Comm'r on remand (Dec. 15, 2004), adopted, State Bd. (May 6, 2005) <http://njlaw.rutgers.edu/collections/oal/>.

traditional balancing process. Id. at 462. Instead, **any** finding of a substantial negative impact, regardless of the benefits or positive impacts in other areas, defeats the petition for termination of the sending-receiving agreement. Ibid. "The focus of the Commissioner's inquiry is whether a substantial negative impact exists **at all**; if it does, severance is to be denied.... There is simply no place in this analysis for the weighing of positive impacts once a substantial negative impact has been found." Ibid. (emphasis in original). In determining the impact of changing a sending-receiving relationship, N.J.S.A. 18A:38-13 specifies the factors to consider "including: the educational (offerings) and financial (budgetary) implications for both districts, the impact on the quality of education in both districts, and the effect on the racial composition of the pupil population in both districts. Ibid. (emphasis in original). Therefore, once a party has established that there would be no substantial negative impact on the racial composition, quality of education, or the financial standing of either district, the Commissioner shall grant the petition.

a. Impact on Racial Composition

N.J.S.A. 18A:38-13 requires that the Commissioner consider the impact on the racial composition of the pupil population of both districts. To determine whether granting severance will result in upsetting the racial balance of the present receiving district, it is necessary to examine the demographic composition of students. In the present matter, the enrollment statistics for the three school districts involved clearly indicates that, statistically, they are racially unbalanced. For the 2011-12 school year, minorities comprised 97.53% of the student population in the Asbury Park School District. By contrast, in the 2011-12 school year, West Long Branch School District was 11.49% minority and Shore Regional High School was 6.3% minority.

The case law on sending-receiving disputes indicates that exacerbation of a racially imbalanced student population necessitates a finding of a substantial negative impact on the racial composition. See Longport Bd. of Educ. v. Atlantic City Bd. of Educ. and Ocean City Bd. of Educ., EDU 8152-12, Initial Decision (June 26, 2013)[3] (citing Bd. of Educ. of Merchantville v. Bd. of Educ. of Pennsauken, 93 N.J.A.R.2d

[3] As of the date of this decision, no final was issued in this matter.

(EDU) 464, modified, State Bd. (Jan. 7, 1998), <http://www.nj.gov/education/legal/> and North Haledon Bd. of Educ. v. Passaic County Manchester Regional High School District, 181 N.J. 161, 165 (2004)). In Merchantville, the Commissioner and State Board denied Merchantville's severance petition where if granted it would have resulted in a decrease in the proportion of white students by 1.7%, resulting in an increase in the minority population from 42% to 43.7%. Merchantville, supra, 93 N.J.A.R.2d (EDU) at 486–47. The State Board stated that "given the substantial negative educational implications of permitting our State's student populations to be separated by race and because of the difficulties involved in correcting such a situation once it has developed, it would be counterproductive to allow an existing sending-receiving relationship to be disturbed where the change may contribute to the development of racial imbalance." Id. at 12–13. Similarly, in North Haledon, the New Jersey Supreme Court denied severance where "[t]he withdrawal of North Haledon from [Manchester Regional would] result in a decrease in the school-wide white population by 9% and increases of 1% of African-American students, 7% of Hispanic students and 1% of Asian students." North Haledon Bd. of Educ., supra, 181 N.J. at 171.

However, in the present matter, the severance will not result in a substantial negative impact as no Interlaken students attend Asbury Park Schools beyond Pre-K. Further, if the severance request was denied, attendance history since 1996 shows that Interlaken parents likely will not send their children to Asbury Park schools beyond Pre-K. No precedent was found evaluating a change to a sending-receiving relationship where the only students potentially involved were preschool disabled students. In this matter, from the 1997-98 school year through the present, Interlaken has not sent any regular education students to Asbury Park and, the conclusion of the feasibility study is uncontested that the demographic enrollment in Asbury Park schools will not change if the severance is granted. While the severance will clearly not improve the racial balance, there is no evidence in the feasibility report that severance will contribute to the development of further racial imbalance as no students will be removed from Asbury Park beyond the pre-school disabled program. Thus despite the present racially unbalanced school districts, petitioner has established that termination of any sending-

receiving relationship with Asbury Park would cause no substantial negative impact on the racial composition of the districts.

b. Impact on Quality of Education

N.J.S.A. 18A:38-13 requires that the Commissioner consider the impact on the quality of the education of both districts. As Asbury Park will not experience a substantial negative racial impact if severance is granted, as no students from Interlaken attend Asbury Park schools beyond the preschool disabled program, similarly Asbury Park also will not experience a substantial negative educational impact. As no regular education student has attended an Asbury Park school in over fifteen years, there will be no impact upon the education the Asbury Park students upon formal dissolution of the sending-receiving relationship.

Turning to West Long Branch and Shore Regional, the feasibility study demonstrates that those districts also will not experience any substantial negative impact on education as a result of forming a sending-receiving relationship with Interlaken. The superintendents of both districts have confirmed they have the capacity and resources to accept and educate Interlaken students. Secondly, the NJQSAC and NJASK/HSPA test scores indicate that Shore Regional and West Long Branch are high-performing school districts capable of offering Interlaken students an appropriate public education. Although West Long Branch has some deficiencies in the Grade 3 compared to its peer groups, it shows strong improvement by Grade 8, where it outperforms its peer group and the state in language arts, math, and science. Furthermore, the report provides no evidence that the introduction of the Interlaken students will have any negative impact on the educational programs in either district. This is evidenced by the fact that both districts have already been receiving Interlaken students for the past two school years without issue. Consequently, the feasibility study has established that termination of the sending-receiving relationship with Asbury Park and the proposed new sending-receiving relationships with West Long Branch and Shore Regional would cause no substantial negative impact on the educational program or the quality of education in each of the districts.

c. Impact on Financial Conditions

Finally, N.J.S.A. 18A:38-13 requires that the Commissioner consider the impact on the financial conditions of both districts. Again, because Interlaken students have not attended Asbury Park schools beyond the preschool disabled program, the financial impact to Asbury Park would be the loss of the $19,506 per student in tuition dollars paid on behalf of the four students. The absence of these expected tuition payments from the Asbury Park school budget indicates that it is not a significant revenue source for the district and that it will not have an impact to its budget by the loss of the four preschool students because their tuition is not budgeted. The feasibility report also states that Asbury Park will not see any impact to its state and federal aid because no Interlaken students have attended the district beyond the preschool disabled program. Thus, as demonstrated by the feasibility report, Asbury Park will not have a substantial negative financial impact if the sending-receiving relationship is formally terminated.

As for West Long Branch and Shore Regional school districts, the feasibility report indicates that the minimal number of Interlaken students that could attend, spread over various grade levels, would have no noticeable impact on the budgets of the respective school districts. In fact, there would be a monetary benefit in that the districts would realize additional revenues without a significant increase in students.

The impact on Interlaken is somewhat different because it is expected that the district will see a tax increase due, in part, to the increase in tuition payments as Interlaken students participate in the proposed sending-receiving relationships with West Long Branch and Shore Regional. As of June 30, 2011, Interlaken school taxes were the second lowest in Monmouth County and among the lowest in the state because Interlaken parents have sent their children to private schools or to public school districts in the area that accept parent-paid tuition students. (See Petitioner Feasibility Study at 34.) As a result of the new costs anticipated for the 2013-14 school year, the feasibility study indicates that the school tax for the average assessed home in Interlaken would be $1,339 for a net increase over the last five years of $323 or $27

per month. (Id. at 40.) As a result of the budget increase, Interlaken may have to propose a separate question to the residents for approval to raise the necessary taxes in excess of the 2% cap imposed by state law. While the report notes that a majority of this increase can be attributed to the new sending-receiving relationships, this is not the sole factor as there has been an increase in other costs, such as special education. (See id., Appendix 16 at 1.) Additionally, the feasibility report notes that the Interlaken school board budget is artificially low because so many Interlaken parents have borne the burden of individually paying their child's tuition because the district has not offered a free and appropriate public education alternative for them. (Id. at 34.)

While it cannot be denied that the residents of Interlaken will likely see a tax increase as a result of the district entering new sending-receiving relationships with West Long Branch and Shore Regional, there is no known case law precedent demonstrating that the circumstances in this case rise to the level of a substantial negative impact. See I/M/O Application of the Bd. of Educ. of the Town of Boonton and the Borough of Lincoln Park, EDU 5623-04, Initial Decision, (Dec. 23, 2005), adopted, Comm'r. (April 25, 2006) <http://njlaw.rutgers.edu/collections/oal/> (finding no substantial negative financial impact where the average homeowner in Boonton would see a tax increase of $175 in the first year and $368 in the second if severance were granted.) As stated by the ALJ there, "an increase in taxes does not automatically translate into a substantial negative impact." Ibid. Thus, in the absence of any contravening precedent, the conclusion in the feasibility report is uncontested. Therefore, petitioner has established that termination of the sending-receiving relationship with Asbury Park and the proposed new sending-receiving relationships with West Long Branch and Shore Regional would cause no substantial negative impact on the financial conditions in each of the districts.

Having satisfied the criteria of N.J.S.A. 18A:38-13, petitioners' request to terminate any existing sending-receiving relationship with Asbury Park and to enter into new sending-receiving relationships with West Long Branch and Shore Regional is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/4/14
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 3/7/14

Date Mailed to Parties: 3/7/14

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OAL DKT. NO. EDU 10009-10
AGENCY DKT. NO. 331-8/10

DEBRA STALLONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Settlement Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

According to the Settlement Agreement, the parties agreed that the gross amount of back pay owed to the petitioner for the period between September 1, 2010 and December 6, 2010 is $19,131.21. The Settlement Agreement further states that the gross amount of back pay owed to the petitioner must be reduced by $8,400.00 in unemployment benefits received by the petitioner during the same period. The Settlement Agreement then states that the remaining gross pay – after the reduction for unemployment benefits – is $10,731.90; further, the agreement goes on to state that petitioner had no earnings from other employment during the period in question. Finally, the Settlement agreement states that the Final Gross Amount of back pay owed to the petitioner is $9,657.90. Based on the proper calculation of the numbers listed above, the petitioner would actually be owed $10,731.21 in back pay for the period between

September 1, 2010 and December 6, 2010. Therefore, the Commissioner cannot approve the within Settlement Agreement as it is currently written.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/24/14

Date of Mailing: 4/25/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10009-10
AGENCY DKT. NO. 331-8/10

DEBRA STALLONE,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gail Oxfeld Kanef, Esq. for petitioner (Oxfeld Cohen, LLC, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: March 17, 2014 Decided: March 19, 2014

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 14, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated December 23, 2013.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

4. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 19, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 3-21-14

Mailed to Parties: MAR 21 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

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BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education has discussed a resolution of the Office of Administrative Law matters listed below; and,

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement on file with the Board Secretary, provided that it is fully signed by all parties.

Susy Basilici	Agency Docket No. 639-11/10	OAL Docket No. EDU 13416-2010
Beth Ann Clayton	Agency Docket No. 324-11/11	OAL Docket No. EDU 12774-2012
Milena Maya	Agency Docket No. 338-08/10	OAL Docket No. EDU 10165-2010
Wilfredo Romero	Agency Docket No. 299-08/10	OAL Docket No. EDU 9657-2010
Debra Stallone	Agency Docket No. 331-08/10	OAL Docket No. EDU 10009-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD DECEMBER 23, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

DEBRA STALLONE Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU-10009-2010N Agency Ref. No. 331-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, __DEBRA STALLONE__ ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned _DEBRA STALLONE_ v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU _10009-2010N___, Agency Dkt. No. __331-8/10_ (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ _19131.21_, for the period from _September 1, 2010_ through _December 6, 2010__. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from __September 1, 2010_ through __December 6, 2010_. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, _2010_, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, _2010_ at that time

and the back pay due to Petitioner runs from _September 1, 2010_.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from _September 1, 2010_ through __December 6, 2010__ was $ __8,400__.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $ _10,731.90_.

4. The Parties agree that Petitioner had no earnings from other employment during the period from __September 2010_ through _December 6, 201___. Thus, the Final Gross Amount of back salary due to petitioner is $ __9,657.90__. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "__Debra Stallone__".

5. In addition to back salary, the Board shall pay Petitioner the sum of $_0_ as money damages based on amounts paid by Petitioner for medical bills during the period from _____ to _____ that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "_____N/A_____" and

will not be subject to income tax withholding or payroll deductions since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the __2010-2011___ school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from ___September 1, 2010____ to __December 6, 2010_____. In addition, Petitioner's seniority will be credited for one full year for the entire school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the __2010-2011__ school year, less any days used during any portion of

that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the ___2010-2011__ school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the _2011-2012__ school year or thereafter.

8. The Parties agree that Petitioner's seniority as of __January 31, 2013_ as a result of this settlement is:

a) __7.42_____ years as an __elementary school teacher___.

b) _____ years as a _____.

9. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the _2010-2011_ school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

14. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding

action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this agreement.

15. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR PETITIONER

Date: 9/17/13

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 3/11/14

168-14

CHANCELLOR ACADEMY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Chancellor Academy (Chancellor) appealed the Department's determination that petitioner – a private school for students with disabilities (PSSD), which is authorized to receive special education students from public school districts on a tuition basis – may not include in its tuition charges for the 2008-09 school year: 1) the cost of health insurance premiums paid on behalf of the school nurse while she was on an unpaid leave of absence, and 2) that portion of the salary paid to a teacher, Lisa McConagly, which exceeded the maximum salary permitted for vocational teachers under Department regulations. Petitioner asserted that these costs should be allowed in the calculation of its actual cost per pupil for the year in question. The Department contended that these costs must be disallowed under applicable regulations.

The ALJ found, *inter alia*, that: regarding the cost of health care premiums for Chancellor's school nurse while she was on an unpaid leave of absence, *N.J.A.C.* 6A:23A-18.5(a)(7) is clear and unambiguous in precluding a PSSD from passing such an expense on to the taxpayers of New Jersey; regarding the salary paid to McConagly during the 2008-09 school year, credible testimony supported Chancellor's assertion that McConagly was employed during that year as a "general teacher" who provided instruction in home economics/food preparation; McConagly did not serve as a vocational teacher, and therefore her job category was not misclassified as the Department contended; further, the April 8, 2013 letter from the school's former principal, John Syvertsen – which stated that he had made an error in McConagly's job description for the 2008-09 school year – conflicts with the Department's claim that Chancellor failed to offer any information that would have permitted it to change its determination that McConagly was a vocational teacher. The ALJ concluded that: 1) the Department correctly disallowed the expenses related to the school nurse's health benefits for the period in question; and 2) the Department erred in disallowing the portion of McConagly's salary that exceeded the maximum permitted for a vocational teacher. Accordingly, the ALJ ordered the Department to reverse the disallowance associated with McConagly's salary.

Upon a thorough review of the record, the Commissioner concurred with the ALJ's findings and conclusion in regard to the disallowance of the cost of health insurance for the school nurse during her unpaid leave of absence. However, the Commissioner disagreed with the ALJ's determination to overturn respondent's disallowance of a portion of McConagly's salary, as he found that the disallowance was in accord with *N.J.A.C.* 6A:23A-18.5(a)(8), and was not arbitrary, capricious, or unreasonable. The Commissioner found that petitioner's *ex post facto* presentation of contradictory evidence at the OAL did not undermine the reasonableness of respondent's determination during the internal appeal process. The Initial Decision of the OAL was adopted as modified, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

April 24, 2014

OAL DKT. NO. EDU 0340-13
AGENCY DKT. NO. 357-12/12

CHANCELLOR ACADEMY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and respondent's reply to petitioner's exceptions – submitted in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

Petitioner is a private school for students with disabilities (PSSD), authorized by the New Jersey Department of Education (Department) to receive special education students from public school districts on a tuition basis. Petitioner appeals from respondent's September 21, 2012 determination that the following costs, which petitioner included in the calculation of its certified actual cost per student (CACPS) for the 2008-09 school year, were non-allowable costs: 1) health insurance premiums paid on behalf of the school nurse while she was on an unpaid leave of absence, and 2) that portion of the salary paid to Lisa McConagly which exceeded the maximum salary permitted for vocational teachers under Department regulations.

In the Initial Decision, the Administrative Law Judge (ALJ) upheld respondent's disallowance of the health insurance premiums paid on behalf of the school nurse, finding that *N.J.A.C.* 6A:23A-18.5(a)(7) clearly and unambiguously precludes a PSSD from passing such an expense on to the taxpayers of New Jersey. However, regarding McConagly's salary, the ALJ found that respondent's disallowance was in error and should be reversed. To that end, the ALJ was persuaded by testimony at the hearing that McConagly's actual job function during the 2008-09 school year was that of a "general teacher" rather than a "vocational teacher," notwithstanding statements to the contrary in her job description and employment contract. Accordingly, the ALJ determined that the maximum allowable salary for vocational teachers was inapplicable to McConagly's salary, and the disallowance should, therefore, be reversed.

On exception, with respect to the issue of the health insurance premiums paid on behalf of the school nurse, the parties essentially recast and reiterate the arguments they advanced before the ALJ below. In that the Commissioner finds that those arguments were fully considered and appropriately addressed in the Initial Decision, they will not be revisited here.

On the issue of McConagly's salary, respondent takes exception to the ALJ's factual and legal conclusions, underscoring that its determination may not be overturned unless it can be characterized as arbitrary, capricious, or unreasonable. Respondent argues that its determination to disallow a portion of McConagly's salary was reasonable based upon the documentation petitioner had submitted for respondent's review, and that the ALJ failed to properly consider the evidence that was before respondent at the time it made its determination.

More specifically, respondent cites page 10 of the Initial Decision, where the ALJ states:

> The Department urges that Chancellor failed to offer any information that would have permitted it to change its

> determination that McConagly was a vocational teacher. But Syvertsen's letter made it plain that any provisions of the contract or job description that would lead the Department to so conclude was in error. So did subsequent correspondence from counsel for Chancellor.

Respondent points out that, contrary to the ALJ's implication, respondent did not have the benefit of Syvertsen's letter prior to issuing the September 21, 2012 decision on petitioner's internal appeal. In fact, Syvertsen's *mea culpa* letter of April 8, 2013, postdated respondent's decision by more than six (6) months. Thus, the information contained therein could not possibly have informed respondent's decision.

More generally, respondent argues that it must be permitted to rely upon the accuracy of the documents submitted by a PSSD during the desk review process. Respondent emphasizes that PSSDs are well aware of the audit program and the significance of the review process. Thus, respondent has every reason to believe that PSSDs submit accurate documentation for its review. Respondent further emphasizes that PSSDs are afforded multiple opportunities to submit documentation and information for its consideration during the review and internal appeal processes. Respondent contends that, in this case, despite having been afforded those opportunities, petitioner failed to offer anything that would have permitted it to change its determination respecting the disallowance of a portion of McConagly's salary. Respondent further contends that it did not act in an arbitrary, capricious, or unreasonable manner in issuing a decision based upon the evidence that was submitted to it by petitioner.

Upon a review of the record, the Commissioner concurs with the ALJ's conclusion that, pursuant to *N.J.A.C.* 6A:23A-18.5(a)(7), petitioner was not permitted to pass on to the taxpayers of New Jersey the expenses incurred in continuing the school nurse's health insurance benefits during her unpaid leave of absence. Accordingly, the Commissioner agrees

with the ALJ's determination to uphold respondent's disallowance of those expenses. The Commissioner disagrees, however, with the ALJ's determination to overturn respondent's disallowance of a portion of McConagly's salary. The Commissioner finds that the disallowance was in accord with *N.J.A.C.* 6A:23A-18.5(a)(8), and was not arbitrary, capricious, or unreasonable.

As a PSSD, petitioner is required to set its tuition rate annually in accordance with the Department's regulations. Pursuant to *N.J.S.A.* 18A:46-21, the tuition rate may not exceed the actual cost per pupil, as determined in accordance with *N.J.A.C.* 6A:23A-18.1 *et seq.* Those regulations specify that certain enumerated costs are not allowable in the calculation of the CACPS. *N.J.A.C.* 6A:23A-18.5. Among the enumerated costs that are not allowable in the CACPS are "[t]he salary and fringe benefits of a staff member for time not expended and/or services not performed" and "[a] salary in excess of the associated maximum allowable salary...for a staff member or consultant whose position requires certification." *N.J.A.C.* 6A: 23A-18.5(a)(7); *N.J.A.C.* 6A: 23A-18.5(a)(8).

Like all PSSDs, petitioner is required to annually submit to the Department a Fiscal and Program Information Form, as well as audited financial statements. The Department reviews that documentation to, *inter alia*, verify the calculation of the CACPS, ensuring that non-allowable expenses are not included in the tuition rate. Here, upon the Department's request for additional information, petitioner submitted an employment contract and job description for McConagly, which indicated that McConagly was employed as a teacher of "Family and Consumer Sciences-Foods/Nutrition & Food Science," and that she was responsible for implementing various elements of the "Food Service/Culinary Arts Program Curriculum." On

this basis, the Department reasonably concluded that McConagly was a vocational teacher, and disallowed a portion of her salary.

Although petitioner requested an internal appeal on the issue, it submitted no evidence during the appeal process upon which respondent could base a determination to overturn the disallowance. Rather, the only thing offered in support of the appeal was a statement by counsel that, while McConagly's job description listed her as being "partially involved with the school's culinary arts program," she also "taught the Earth science program that year, substituted in any courses that required a substitute during the year, and supervised and ran the testing and curriculum development programs." In the absence of anything more than the bald assertion of counsel, respondent reasonably declined to overturn the disallowance.

The ALJ correctly asserted that, in making disallowances involving job duties, respondent must be guided by the actual job functions of the PSSD employee at issue. It is, however, incumbent upon the PSSD to submit documentation and information that accurately reflects the employee's job functions. It would be inappropriate to place the burden upon respondent to conduct extraneous investigations to determine the accuracy or inaccuracy of the information contained in documentation submitted by a PSSD. Rather, it is reasonable for respondent to expect that a PSSD has submitted accurate documentation for its review, and to rely upon the information contained therein in making its determination.

Furthermore, a determination that is reasonably based upon the documentation submitted by a PSSD is not rendered arbitrary, capricious, or unreasonable by the PSSD's subsequent presentation of contradictory documentary and/or testimonial evidence at an administrative hearing before the Office of Administrative Law. The reasonableness of

respondent's determination must be assessed in light of the evidence before it at the time of its decision.

The Commissioner finds respondent's initial determination, disallowing the portion of McConagly's salary that exceeded the maximum salary permitted for vocational teachers, reasonable in light of the documentation and information petitioner submitted for respondent's desk review. The Commissioner further finds that petitioner failed to submit sufficient information and/or documentation during the internal appeal process to serve as a reasonable basis to overturn the disallowance. Petitioner's *ex post facto* presentation of contradictory evidence at the OAL does nothing to undermine the reasonableness of respondent's determination.

Accordingly, the recommended decision of the OAL, as modified above, is adopted as the final decision in this matter.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/24/14
Date of Mailing: 4/25/14

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00340-13
AGENCY DKT. NO. 357-12/12

CHANCELLOR ACADEMY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,
Respondent.

David Rubin, Esq., for petitioner

Lauren Cooley Jensen, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of the State of New Jersey, attorney)

Record Closed: November 21, 2013 Decided: December 9, 2013

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Chancellor Academy (Chancellor), is a private school for the disabled, that has been approved by the State of New Jersey, Department of Education (the Department), to receive public school special education students on a tuition basis. Chancellor challenges the Department's disallowance of certain expenses during the

2008-2009 fiscal year. These expenses factor into Chancellor's calculation of its "actual cost per pupil," and form the basis of its tuition rate. The Department replies that the disallowances in question are required by applicable regulation.

PROCEDURAL HISTORY

Chancellor filed a petition of appeal with the Commissioner of Education (Commissioner) on December 12, 2011. An answer was filed and the contested case was transmitted to the Office of Administrative Law (OAL) on January 4, 2013. A hearing was conducted on September 16, 2013. Counsel filed post-hearing submissions and the record closed on November 21, 2013.[1]

ISSUES PRESENTED

The petition challenges two disallowances by the Department, raising the following issues for consideration:

1. Did the Department properly disallow moneys paid for the school nurse's health insurance premiums from October 10, 2008, through March 14, 2009, when she was on an unpaid leave of absence due to illness? If not, what should be the remedy?

2. Did the Department properly characterize the services of Lisa McConagly during the 2008-2009 school year as that of a "vocational teacher," and thus properly disallow that portion of her compensation deemed in excess of that permitted by regulation? If not, what should be the remedy?[2]

[1] Chancellor filed a brief on October 31, 2013, and the Department did so on November 7, 2013. The record remained open until November 21, 2013, to permit Chancellor to file a reply brief, but it chose not to do so.

[2] Correspondence between the parties reveals that there were additional disallowances in contention; at the hearing I was advised by counsel that only the disallowances in regard to the school nurse's medical benefits and McConagly's salary remain controverted.

FINDINGS OF FACT

The events leading up to the dispute between Chancellor and the Department are uncontroverted, and I **FIND**:

Chancellor is a private school that has been approved by the Department to receive special needs students from local public school districts. As such, Chancellor must abide by Department regulations governing the setting of tuition rates. Chancellor is required to share fiscal and program information with the Department; and did so in 2008-2009 via a "Private Schools for Students with Disabilities Annual Fiscal and Program Information" form (R-1), and through submission of an annual audit, completed on Chancellor's behalf in 2009 by David A. Kaplan, CPA. (R-2.) Approval of the audit typically lags behind its submission by several years. Accordingly, it was not until January 2012 that Kaplan received a letter from the Department seeking clarification regarding several matters. (R-3.) Elise Sadler-Williams is employed by the Department as the supervising planning associate in the Division of Finance. She conducted a "desk review" of the information supplied by Chancellor, and in a letter dated January 17, 2012, expressed concern that Chancellor had made an expenditure of $23,919 for fringe benefits for the school nurse, when this employee's salary was about the same amount, $25,711. (R-3.) This seemed incongruous to her. Sadler-Williams also inquired about Lisa McConagly's job functions and responsibilities.

Kaplan replied via letter dated January 30, 2012. (R-4.) He explained that in or about October 2008, Chancellor's school nurse, B.H., was diagnosed with breast cancer. She began a regimen of medical interventions, and went on an unpaid leave of absence effective October 10, 2008. B.H. resumed active employment on March 14, 2009. During her leave, B.H. was unpaid and entered the State Disability program. But Chancellor continued to pay her medical insurance premiums through the school's group health insurance program. Relative to Lisa McConagly, Kaplan enclosed her job description and contract, as requested. He noted that upon further review it was determined that the payroll expenditure for her position had been improperly coded, and was being changed from "special education instruction" to "other professional staff."

Chancellor next heard from the Department via letter dated March 16, 2012. (P-1.) Relative to the insurance premiums paid on behalf of the school nurse, Sadler-Williams advised that these amounts must be disallowed, citing N.J.A.C. 6A:23A-18.5(a)(7). She wrote that the "Chancellor Academy administrative team's decision to pay medical insurance premiums during a period in which the employee was unable to perform their [sic] work duties is a non-allowable cost and a cost that would not be incurred by an ordinarily prudent person in the administration of public funds." (P-1.) The letter went on to state that "[w]hile it is unreasonable for such expenses to be paid with public funds of the sending districts, Chancellor Academy's administrative team may elect to fund the school nurse's insurance premiums through a direct charge to retained earnings." (P-1.) Sadler-Williams advised that McConagly's position remained improperly classified, as in actuality she was a "vocational teacher." The maximum allowable salary for vocational instructors in 2008-2009 was $120,858. Since McConagly was paid $126,841, the excess salary and any related fringe benefits were considered a non-allowable expense by the Department.

Chancellor filed an internal appeal via letter dated April 16, 2012. (P-2.) The Department replied via letter dated September 21, 2012, and declined to change its position. (P-3.)

The Medical Benefits Paid to the School Nurse

Robert Molinaro has been the business manager for Chancellor for the past eleven years. The additional facts he shared were uncontroverted, and I **FIND**:

The Chancellor Board elected to continue B.H.'s health insurance coverage based upon Molinaro's recommendation, which he made in a thoughtful and business-like way. B.H. had been working for Chancellor for a mere year and a half, but was nonetheless considered a valuable employee when she became ill. She was unsure how long her treatment would take; how she would respond to it; and when she would be physically able to return to her duties. But B.H. knew that she wanted to return to work and Chancellor's leadership team knew that it wanted her to do so.

Molinaro reviewed materials related to the Family Medical Leave Act (FMLA); these gave the impression that although Chancellor employed fewer than fifty employees, the FMLA was applicable and required continued coverage. (P-8.) Employee rights under the FMLA are referenced in the Chancellor Employee Manual. (P-9.) Molinaro considered the fact that health benefits continue for his teachers during the summer months, even though they provide services only during the academic year. He reviewed the matter with his insurance broker, who advised that continuing coverage under the circumstances would be a fairly standard business practice.

During B.H.'s leave, nursing services were supplied to Chancellor's students through a temporary agency.

Lisa McConagly's Salary

McConagly has worked at Chancellor for twenty years, and is a part-owner of the school. She holds certificates issued by the State Board of Examiners as a supervisor, teacher of the handicapped, and teacher of home economics. McConagly shared copies of her contracts of employment dating back to 2007. These revealed that she had been employed as a "teacher of the handicapped" until the 2008-2009 school year, when her contract described her position as teacher of "Family and Consumer Sciences-Food/Nutrition and Food Science," at a salary of $126,841 per annum. McConagly explained that until 2008 she taught special education science, provided in-class support for other academic subjects, and served as the test coordinator. She also taught an elective foods class, which focused on practical living skills and was not a trade oriented class. In 2009-2010, McConagly again was issued a contract as a teacher of the handicapped.

McConagly's 2008-2009 contract came following the retirement of Phil O'Grady. "Chef O'Grady" was a professional cook who instructed upperclassmen with an interest in a career in food preparation. His class was presented at an off-campus location that had access to an industrial kitchen. Conversely, McConagly's elective class was offered to younger students. Instruction took place in a kitchen that replicated one that would be found in the average home. When O'Grady retired, it was decided to expand

the scope of the living skills class taught by McConagly, and to offer that class in lieu of the one previously taught by O'Grady. McConagly convincingly testified that while her new class met more frequently, and was offered to older students, it was never intended to be a vocational offering. Rather, it remained a life-skills course, akin to the class traditionally taught by her. McConagly stressed that she lacked the skill, training, and licensure needed to instruct students in quantity food production.

McConagly's contract and job description were drafted by Chancellor Principal John Syvertsen. Syvertsen confirmed that while Chancellor operated a vocational foods program prior to the 2007-2008 school year, the program ended with the retirement of Chef O'Grady. The certification that was required for McConagly's position was changed to "Teacher of Home Economics" both in the job description and the contract, and according to McConagly, this was the appropriate certification for the course she taught. But Syvertsen neglected to revise those parts of the job description which assigned McConagly responsibility for the culinary-arts program, a vocational program. Syvertsen's testimony was a mea culpa reiteration of his April 8, 2013, letter to the Department in which he admitted that, "I committed an error in my writing and/or reviewing of Lisa McConagly's job description for School Year 2008-2009," by failing to make it reflective of the school's goal of "[maintaining] some of the positive aspects of teaching students about nutrition, food handling, food preparation, food economics, etc. within the certification limits of Ms. McConagly [sic] Home Economics Certification . . . ." (P-5.)

Sadler-Williams shared a salary chart that reflected that the maximum salary for a "vocational teacher" in Morris County was $120,858 during 2008-2009. (R-8.) The maximum salary for a "Special Education Teacher" was $124,009; for a "general teacher" it was $128,915 that year. The Department viewed McConagly as a "vocational teacher"; her salary of $126,841 thus exceeded the maximum permitted. Sadler-Williams explained how she determined that McConagly was employed as a "vocational teacher." She made inquiries with the County Superintendent's office, a

representative of which confirmed that the position would be considered vocational.[3] Sadler-Williams was unpersuaded that the job description contained vocational duties in error, urging that she would have wanted to have seen an amended contract and job description. But I was so persuaded. McConagly and Syvertsen both testified in a credible, professional, and consistent manner that McConagly did not, and could not, teach a vocational cooking class.

Conversely, the amended documents Sadler-Williams had hoped to receive would have post-dated the events in question by several years; both witnesses credibly stated that they were unaware of an error at the time. Any advice supplied by County Office personnel was uncorroborated hearsay; moreover, the record left it unclear how the County Office could have reached such a conclusion about a class its representatives had neither taught nor observed. Indeed, Sadler-Williams ultimately retreated from her earlier testimony, stating, "I don't know if they specifically said that [McConagly] was providing [vocational instruction], but the employment contract indicate[d] that she was providing [vocational instruction]." Accordingly, I **FIND** that McConagly was employed during 2008-2009 as a "general teacher," who provided instruction in home economics/food classes. She did not serve as a vocational teacher.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Chancellor is approved to receive public school special needs students pursuant to N.J.S.A. 18A:46-15, and as such, must comply with complex statutory and regulatory provisions which govern the tuition it may charge. N.J.S.A. 18A:46-21 states that Chancellor may determine a tuition rate to be paid by its sending boards of education, "but in no case shall the tuition rate exceed the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education." The statute recognizes that tuition is paid to schools like Chancellor with public funds, and that these funds are utilized to educate public school students with multifaceted needs that cannot be met within their home school districts. Council of Private Sch. for Children with Special Needs v. Cooperman, 205 N.J. Super. 544 (App.

[3] Chancellor points out that in answers to interrogatories, Sadler-Williams made no mention of her inquiries to the County Superintendent.

Div. 1985). Accordingly, the clear intent of the statute is that the tuition charged be fair and reasonably related to the educational services actually provided by the private school. Regulations promulgated by the Department are designed to implement this statutory intent. N.J.A.C. 6A:23A-18.1 to -18.16.

Chancellor bears the burden of demonstrating that the Department's disallowance of certain expenditures in its calculation of actual cost per pupil was arbitrary, capricious or unreasonable. Titusville Acad. v. N.J. Dep't of Educ., EDU 00651-06, Initial Decision (May 21, 2007), adopted, Comm'r (July 6, 2007), <http://njlaw.rutgers.edu/collections/oal/>; Catholic Family and Cmty. Servs. v. N.J. Dep't of Educ., EDU 01051-01, Initial Decision (January 14, 2003), adopted, Comm'r (March 3, 2003), adopted, State Bd. (July 2, 2003), <http://www.nj.gov/education/legal/>. I **CONCLUDE** that Chancellor has met its burden as to the salary paid to Lisa McConagly, but has not done so as to the medical benefits paid to the school nurse.

The Benefits Paid to the School Nurse

In disallowing the moneys paid to continue medical benefits for B.H. while she was on a medical leave of absence, the Department relied on N.J.A.C. 6A:23A-18.5(a)(7), which provides that "[c]osts that are not allowable in the calculation of the certified actual cost per student include . . .[t]he salary and fringe benefits of a staff member for time not expended and/or services not performed . . . ." Since it is uncontroverted that the school nurse provided no services during the controverted time period, the Department asserts that it correctly disallowed this expense. Moreover, the Department asserts that these were not funds that would be expended by "an ordinarily prudent person in the administration of public funds." N.J.A.C. 6A: 23A-18.2(a)(iv).

It is well-established that an administrative regulation is subject to the same canons of construction as a statute. In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297, 306 (App. Div. 1987). When interpreting a statute or regulation, our courts assume that the framers intended to ascribe to words their ordinary meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008). The intent of a statute or regulation should be gleaned

from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220 (1959). An agency's interpretation of its own regulations is entitled to deference. Matturi v. Bd. of Tr. of the Judicial Ret. Sys., 173 N.J. 368, 381 (2002).

I disagree with the Department's determination that the expenditure of these funds was not prudent, or that assisting a valued employee who has fallen ill, as Chancellor did here, is not businesslike, appropriate, and even commonplace. Chancellor acted with compassion and respect for the dignity of its employee; attempted to preserve for her the thing she needed most at the time, access to medical care; and its actions unequivocally were morally sound. But the regulation is clear and unambiguous and allows me no leeway to support Chancellor's claims. Chancellor's Board of Directors and administrators were within their rights to assist B.H. by paying her health insurance premiums when she was ill, but were not permitted under N.J.A.C. 6A:23A-18.5(a)(7) to pass that expense on to the taxpayers of New Jersey.

Chancellor's arguments to the contrary were compelling, but in the end unpersuasive. It urges that an annualized salary can no longer be viewed as a "day's work for a day's pay," and points out that ten-month employees continue to receive health benefits during the summer months. But these employees fully fulfill the requirements of their contract; conversely, the Chancellor nurse was absent from her post of duty for about six months. It is uncontroverted that the Family Medical Leave Act, 29 U.S.C.A. § 2611(2)(B), did not require continued health coverage here; likewise, the cases cited by Chancellor do not stand for the proposition that continued coverage is required by any other provision of state or federal law. See, e.g., Svarnas v AT&T Commc'n, 326 N.J. Super. 59 (App. Div 1999); Malone v. Aramark Serv., 334 N.J. Super. 669 (Law Div. 2000). Accordingly, I **CONCLUDE** that the Department correctly disallowed the expenses attached to continuing the school nurse's health benefits during her unpaid leave of absence.

Lisa McConagly's Salary

Included in the regulatory list of non-allowable costs is "[a] salary in excess of the associated maximum allowable salary determined in N.J.A.C. 6A:23A-18.2(o), (p) and (q) for a staff member or consultant whose position requires certification . . . ." N.J.A.C. 6A:23A-18.5(a)(8). Relying on this regulatory language, and its erroneous perception that McConagly's job category had been misclassified, the Department disallowed that portion of her salary in excess of $120,858. The Department urges that Chancellor failed to offer any information that would have permitted it to change its determination that McConagly was a vocational teacher. But Syvertsen's letter made it plain that any provisions of the contract or job description that would lead the Department to so conclude were included in error. So did subsequent correspondence from counsel for Chancellor.

Accordingly, having determined that McConagly served as a "general teacher" and not as a "vocational teacher" during the school year at issue, I **CONCLUDE** that the disallowance by the Department was made in error and should be reversed. Chancellor correctly asserts that in making disallowances that involve job duties the Department is required to be guided by the actual job functions of the employee at issue. Cerebral Palsy League of Union County v. N.J. Dep't of Educ., EDU 11301-07, Initial Decision (June 14, 2010), adopted, Comm'r (July 29, 2010), <http://njlaw.rutgers.edu/collections/oal/>. The testimony of McConagly and Syvertsen made it clear that McConagly actually served as a general teacher, any statements in her job description and employment contract to the contrary notwithstanding.

ORDER

Based on the foregoing, it is **ORDERED** that the action of the Department of Education is **AFFIRMED** as to the disallowance of medical benefit premiums and **REVERSED** as to the disallowance of salary for Lisa McConagly during the 2008-2009 school year.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 9, 2013

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: December 9, 2013

Date Mailed to Parties: DEC 10 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

Robert Molinaro

Lisa McConagly

John Syvertsen

For Respondent:

Elise Sadler-Williams

Exhibits

For Petitioner:

P-1 Letter from E. Sadler-Williams to K. McNaught, dated March 16, 2012

P-2 Letter from D. Rubin to D. Corso, dated April 16, 2012

P-3 Letter from D. Corso to D. Rubin, dated September 21, 2012

P-4 NJDOE Certifications/Endorsements of L. McConagly

P-5 Statement of John Syvertsen, dated April 8, 2013

P-6 "M/W Electives," revised September 8, 2008

P-7 Employment Agreements for L. McConagly, 2007-2008 to 2012-2013

P-8 FMLA Authorities

P-9 Employee Handbook (Excerpt)

P-10 State Temp. Disability Application for B. Haff, dated October 22, 2008

P-11 Notice of Eligibility Determinations

P-12 Wages/Fringe Benefits Analysis for B. Haff

P-13 Interrogatories

For Respondent:

R-1 Chancellor Academy's 2008-2009 Annual Fiscal and Program Information Form

R-2 Chancellor Academy's Report of Audit for Fiscal Year Ended June 30, 2009

R-3 January 17, 2012, letter from Elise Sadler-Williams to David Kaplan

R-4 January 30, 2012, letter from David Kaplan to Elise Sadler-Williams

R-5 Admitted as P-1

R-6 Admitted as P-2

R-7 Admitted as P-3

R-8 Table of Maximum Salaries for the 2008-2009 School Year, Appendix I to the Audit Program

R-9 Chancellor Academy's Job Description for School Nurse

R-10 Not admitted

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH A. GRECO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH OF	:	DECISION
PARK RIDGE, BERGEN COUNTY.	:	

SYNOPSIS

Petitioning Board filed tenure charges of conduct unbecoming against respondent Joseph A. Greco, a tenured teaching staff member, and sought to terminate his employment. The matter was held in abeyance pending the resolution of a concurrent criminal proceeding arising from the same allegations. Respondent subsequently pled guilty to Criminal Sexual Contact in connection with allegations that he engaged in sexual relations with a former student. His plea agreement included relinquishment of his New Jersey teaching certificates – with the force and effect of revocation – to the State Board of Examiners (Examiners). On December 6, 2013, the Examiners ordered the revocation of respondent's certificates.

The Commissioner concluded that this tenure matter has been rendered moot by the Examiner's decision to revoke respondent's certificates and, accordingly, dismissed the charges.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

April 24, 2014

AGENCY DKT NO. 37-2/12

IN THE MATTER OF THE TENURE	:	
HEARING OF JOSEPH A. GRECO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF PARK RIDGE, BERGEN COUNTY.	:	

In February 2012, the Board of Education of the Borough of Park Ridge certified tenure charges against respondent, Joseph A. Greco, a tenured teaching staff member, alleging unbecoming conduct. The matter was subsequently placed in abeyance pending resolution of a concurrent criminal proceeding arising from the same allegations.

On May 28, 2013, respondent pled guilty to Criminal Sexual Contact. Thereafter, respondent agreed to relinquish, with the force and effect of revocation, the teaching certificates issued to him by the New Jersey Department of Education, State Board of Examiners (Examiners). The Examiners determined to accept the relinquishment and, on December 6, 2013, ordered the revocation of respondent's certificates.

The Commissioner finds that this matter has been rendered moot by the Examiners' decision to revoke respondent's certificates, as he is now prohibited by law from continuing his tenured employment with the Board and, indeed, is no longer eligible for employment as a teaching staff member in the public schools of this State.

Accordingly, the instant tenure charges are hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/24/14
Date of Mailing: 4/28/14

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

170-14

OAL DKT. NOS. EDU 18718-13 (EDU 3566-11 and 12241-11 ON REMAND)
AGENCY DKT. NOS. 68-3/11 and 217-8/11

BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CHESILHURST, CAMDEN COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
WINSLOW TOWNSHIP EDUCATION ASSOCIATION, SYLVIA COVINGTON, JOANN FRITSCHE, MARIANNA GREEN, SANDRA NIBLIC, and CANDIS THOMAS,	:	
PETITIONERS/INTERVENORS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/25/14
Date of Mailing: 4/28/14

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 18718-13
(On Remand OAL DKT. NOS. EDU 3566-11 and EDU 12241-11)
AGENCY DKT. NOS. 68-3/11 AND 217-8/11

THE BOARD OF EDUCATION OF WINSLOW TOWNSHIP, CAMDEN COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CHESILHURST, CAMDEN COUNTY,

Respondent,

And

WINSLOW TOWNSHIP EDUCATION ASSOCIATION AND INDIVIDUALS SYLVIA COVINGTON, JOANN FRITSCHE, MARIANNA GREEN, SANDRA NIBLIC AND CANDIAS THOMAS,

Petitioner/Interveners,

v.

BOARD OF EDUCATION OF WINSLOW TOWNSHIP, CAMDEN COUNTY,

Respondent.

Leonard Wood, Esq., for Winslow Township Board of Education (Wade, Long, Wood & Kennedy, attorneys)

Rocky Peterson, Esq., for Chesilhurst School District, Camden County (Hill & Wallack, attorneys)

Keith Waldman, Esq., for Winslow Township Education Association and individual interveners, Sylvia Covington, Joann Fritsche, Marianna Green, Sandra Niblic and Candis Thomas

Record Closed: February 14, 2014 Decided: March 7, 2014

BEFORE **PATRICIA M. KERINS**, ALJ:

By Order dated May 8, 2012, the above captioned matters were consolidated and leave granted for intervention to Sylvia Covington, Joann Fritsche, Marianna Green, Sandra Niblic and Candis Thomas. Subsequent to that Order the parties entered into settlement agreements resolving the issues between the parties. The Board of Education of Winslow Township (Winslow) and the Board of Education of the Borough of Chesilhurst (Chesilhurst) resolved the issues set forth in the matter bearing OAL Docket No. EDU 03566-2011 by agreement dated April 25, 2013, attached hereto. By agreement dated March 22, 2013, and attached hereto, the Winslow Township Education Association (Association), the individual intervenors and Winslow resolved the issues set forth in the matter bearing OAL Docket No. EDU 12241-11. A final executed version of the Settlement Agreement in the EDU 12241-11 matter was filed with the OAL on October 28, 2013, and the record closed. An Initial Decision was rendered on October 31, 2013.

By Decision of December 18, 2013, the Commissioner of Education remanded the matter for inclusion in the Initial Decision of Exhibit A to the Stipulation of Settlement between the parties. That document is hereby included in this Decision.

I have reviewed the record and the terms of the settlements and I **FIND**:

1. The parties have voluntarily agreed to the settlements as evidenced by their signatures or their representatives' signatures.

2. The settlements fully dispose of all issues in controversy and are consistent with the law.

I **CONCLUDE** that these agreements meet the requirements of N.J.A.C. 1:1-19.1 and that the settlements should be approved. I approve the settlements and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

3/4/14
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 3/10/14

Date Mailed to Parties: 3/10/14

/lam

Leonard J. Wood, Esquire
Wade, Long, Wood & Kennedy, LLC
1250 Chews Landing Road, Suite 1
Laurel Springs, New Jersey 08021

Keith Waldman, Esquire
Selikoff & Cohen, P.A.
700 East Gate Drive, Suite 502
Mt. Laurel, New Jersey 08054

SETTLEMENT AGREEMENT

OAL DKT. NOS. EDU 3566-11 and EDU 12241-11

AGENCY DKT. NOS. 68-3/11 AND 217-8/11

THE BOARD OF EDUCATION OF WINSLOW TOWNSHIP, CAMDEN COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CHESILHURST, CAMDEN COUNTY,

Respondent,

And

WINSLOW TOWNSHIP EDUCATION ASSOCIATION AND INDIVIDUALS SYLVIA COVINGTON, JOANN FRITSCHE, MARIANNA GREEN, SANDRA NIBLIC AND CANDIS THOMAS,

Petitioner/Interveners,

v.

BOARD OF EDUCATION OF WINSLOW TOWNSHIP, CAMDEN COUNTY,

Respondent.

1. The parties repeat and incorporate the terms of the Settlement Agreement and General Release and Waiver ("Agreement") attached to this Stipulation of Settlement as Exhibit A.

2. The Board voluntarily recognizes Candis Thomas's tenure and seniority rights per the attached Agreement.

3. Pursuant to the terms of paragraph 15 of the Agreement, this settlement is expressly conditioned upon the entry of an initial decision (settlement) by the Administrative Law Judge and the Commissioner of Education's approval of the settlement without modification. Upon such approval, this stipulation shall serve as a stipulation of dismissal with prejudice and without costs.

4. In the event that the Administrative Law Judge or the Commissioner have any objections to any terms of the settlement, the parties agree, in advance, to negotiate in good faith to reform the Agreement to the extent possible to meet those objections. Should such reformation prove impossible, the settlement agreement will become void.

5. Counsel for the respective parties agree that this stipulation of settlement may be executed in counterparts and that facsimiles or electronically-transmitted versions of their signatures may be submitted to the Office of Administrative Law and the Commissioner in lieu of originals.

SELIKOFF & COHEN, P.A.
Counsel for Petitioners

By: _____
Keith Waldman

Dated: 3-22-13

WADE, LONG, WOOD & KENNEDY
Counsel for Respondent

By: _____
Leonard J. Wood

Dated: 3/22/13

EXHIBIT A

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is being entered into between Petitioner, Candis M. Thomas ("Ms. Thomas"), and Respondent, Winslow Township Board of Education ("Board"), with regard to *Candis M. Thomas, et al., v. Winslow Township Board of Education, Camden County,* OAL Dkt. No. EDU-12241-2011, Agency Ref. No. 217-8/11, having agreed to amicably resolve their differences, it is hereby stipulated and agreed that this matter shall be settled upon the following terms:

1. The Board voluntarily recognizes Ms. Thomas's tenure and seniority rights. Specifically, the Board recognizes that at all times during her employment, Ms. Thomas has possessed an instructional certificate with an Elementary School Teacher endorsement. A true copy of the certificate and endorsement is attached to this agreement as Exhibit A. The Board voluntarily recognizes that Ms. Thomas has tenure and seniority rights in the category of Elementary School Teacher and that she worked full-time from September 2003 to June of 2009 with the Chesilhurst Board of Education and that she has worked full-time from September of 2009 to June of 2011 with the Winslow Township Board of Education within the scope of her certificate and endorsement. As such, Ms. Thomas has 8 years, zero months of seniority in the category of Elementary School Teacher. This calculation excludes one year of seniority for the 2011-2012 school year.

2. The Board agrees to reinstate Ms. Thomas to employment on a time-is-of-the essence basis effective retroactive to Monday, September 4, 2012: (a) on a seamless basis with tenure, seniority, longevity, accrued sick leave, pension credit and other similar benefits of employment; (b) placement on Step 9 of the contractual salary guide; (c) with payment of all salary, benefits and emoluments of employment for the 2012-2013 school year and (d) the days

CMT
9/14/12

from September 4, 2012 to September 14, 2012 will be characterized as an unpaid leave of absence of fewer than 30 days, without pay and without benefits of employment.

3. The parties agree to characterize the 2011-2012 school year as an unpaid leave of absence without pay and without benefits of employment. The Board will not attempt to interfere with any attempt by Ms. Thomas to seek to buy back the time from the Division of Pensions. No representations are made by the Board or anyone else that the time can be bought back and this settlement is not binding on the Division of Pensions. The parties agree to characterize the dates between September 1, 2011 and June 30, 2012 as an unpaid leave of absence without benefits and emoluments of employment.

4. The consideration described in Paragraphs 1 through 3 above shall constitute the entire settlement of the matters encompassed by this Agreement.

5. In exchange for the promises and undertakings of the Board as set forth in Paragraphs 1 through 3 above, Ms. Thomas:

A. Waives her tenure, seniority and recall rights for the 2011-2012 school year.

B. Waives back pay, benefits and emoluments of employment for the 2011-2012 school year.

C. Agrees to withdraw her petition of appeal with prejudice and without costs as to her and authorizes her attorney to file a Stipulation of Dismissal with Prejudice with respect to her claims and causes of action with the Commissioner of Education in this action. Specifically, Ms. Thomas acknowledges that she would have otherwise had a right to have her case decided following a hearing or motion practice before an Administrative Law Judge of the Office of Administrative Law subject to that decision's adoption, rejection or modification by the Commissioner of Education and that by entering into this settlement she waives the right to a

CMT
9/14/12

hearing on the merits of her cause and her right to such a decision. If the case had litigated to conclusion, Ms. Thomas may or may not have received an adjudication that she had seniority for the 2011-2012 school year and back pay, benefits and emoluments of employment and pension credit for that year. Ms. Thomas specifically acknowledges that she is relinquishing these claims.

D. Agrees to execute a General Release and Waiver ("General Release") to the Board in the form annexed. Ms. Thomas expressly acknowledges that this Agreement and the General Release and Waiver are intended to extinguish and waive all claims which she may have against any person or entity identified as a releasee in the General Release and Waiver resulting from anything which has happened up to the date of the execution of the General Release and Waiver and which were or could have been asserted, including those claims unknown to her and claims for attorneys fees and costs.

E. Ms. Thomas hereby acknowledges that the execution of this Agreement and the General Release and Waiver which accompanies it shall absolutely bar any such claim, action or suit against any releasee identified in the General Release and Waiver. This release specifically excludes any workers compensation or pension claims. Ms. Thomas is unaware of any factual basis for such claims.

6. The parties recognize that the petition of appeal filed in this matter has more than one petitioner and that the petition will be dismissed as to Ms. Thomas and as to Ms. Thomas only. Nothing in this settlement agreement is intended to dismiss nor does it dismiss or in any way compromise the claims of any other petitioner to tenure, seniority or bumping rights or to reinstatement with back pay. This Settlement Agreement shall be inadmissible for any purpose in the litigation of that petition and any appeals or remands arising therefrom.

CMT
9/14/12

7. The parties agree that any breach of any obligation under this Agreement will constitute a breach of this Agreement. In the event of a breach of this Agreement by one of the parties hereto, the breaching party shall pay a penalty to the non-breaching party to be established in the discretion of the Superior Court of New Jersey, Camden County, for said breach of any term of this Agreement. In the event that either party is required to commence an action in law or equity to enforce its rights under this Agreement and prevails, the party against whom the action is brought shall be required to pay the prevailing party reasonable attorneys fees and costs in addition to any damages which may be recoverable.

8. It is understood that neither the execution of this Agreement nor any other action taken by either party in connection with this settlement constitutes an admission by any party, including the Board or, any other person or entity identified in the General Release and Waiver as a releasee, of any violation of any law, duty or obligation, or that any decision or action with respect to the employment of Ms. Thomas was unwarranted, unjustified, retaliatory, discriminatory or otherwise unlawful. The Board specifically disclaims any liability to Ms. Thomas or any other person. The parties have entered into this Agreement solely to compromise disputed claims. No findings of any kind have been made or issued by the Office of Administrative Law or the Commissioner on the merits of the claims in this action and neither party purports to be the prevailing party in this action.

9. Ms. Thomas and the Board, its members, administrators, agents and officers, agree not to make disparaging statements concerning each other or to defame each other in any manner to any person or entity. The parties also agree not to authorize any person or entity to make any disparaging statements about each other to any person or entity.

CMT
9/14/12

10. Ms. Thomas and the Board, its members, administrators, agents and officers and their counsel participated in the negotiation and drafting of this Agreement as equals. No particular party shall be deemed the drafter or provider of this Agreement, and the parties agree that the Agreement shall not be construed against any particular party.

11. This Agreement and the General Release and Waiver referred to herein set forth the entire agreement between Ms. Thomas and the Board. This Agreement supersedes all prior agreements or understandings, if any, between the parties regarding the subject matter of this Agreement.

12. Ms. Thomas acknowledges that she has consulted with her attorney regarding this Agreement and the General Release and Waiver that accompanies it prior to executing it; that the terms of this Agreement and the General Release and Waiver have been explained to her by her attorney; and that she has represented to her attorney that she has read this Agreement and the General Release and Waiver and fully understands them and agrees to be bound by them. Ms. Thomas has also acknowledged that she has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement and General Release and Waiver prior to executing them.

13. Any notice or other communication under this Agreement shall be in writing and shall be considered given when mailed by regular mail or delivered personally, to the parties at the following addresses:

To Ms. Thomas:
Keith Waldman, Esquire
Selikoff & Cohen
700 East Gate Drive, Suite 502
Mount Laurel, New Jersey 08054

To Board:
Leonard J. Wood, Esquire
Wade, Long, Wood & Kennedy, LLC
1250 Chews Landing Road
Laurel Springs, NJ 08021

or at such other address as a party may specify by notice to the other.

CMT
9/14/12

14. Nothing contained herein or in the Release shall be intended to bar either party from initiating such action as may be necessary to enforce the terms of this Agreement.

15. This settlement is expressly conditioned upon the entry of an initial decision by the Administrative Law Judge and the Commissioner's approval of this Agreement without modification. Upon such approval, the parties will submit a stipulation of dismissal with prejudice and without costs. In the event that the Administrative Law Judge or the Commissioner have any objections to any terms of this agreement, the parties agree, in advance, to negotiate in good faith to reform this agreement to the extent possible to meet those objections. Should such reformation prove impossible, this agreement will become void.

16. The Board's representative certifies that he or she has been duly authorized to sign this agreement by a motion adopted by the Board at a duly-noticed open public meeting. A true copy of the Board's minutes (or of a resolution) adopting the settlement memorialized by this Agreement are (is) attached as Exhibit B.

17. The parties agree that this Agreement may be signed in counterparts and facsimile signatures may be acceptable in lieu of originals. The foregoing terms and provisions are hereby agreed to and accepted:

9/14/12
Dated:

Candis M. Thomas
CANDIS M. THOMAS

BOARD OF EDUCATION OF TOWNSHIP
OF WINSLOW

9/14/12
Dated:

By: Julie C Peterson

Print Name and Title:

Julie C Peterson, Board Secretary

Leonard J. Wood, Esquire
WADE, LONG, WOOD & KENNEDY, LLC
1250 Chews Landing Road, Suite 1
Laurel Springs, NJ 08021
(856) 346-2800
Attorney for Petitioner, Winslow Township Board of Education

2013 MAY -1 A 10:51
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

BOARD OF EDUCATION OF CHESILHURST, Petitioner v. BOARD OF EDUCATION OF WINSLOW TOWNSHIP, Respondent.	OFFICE OF ADMINISTRATIVE LAW OF THE STATE OF NEW JERSEY DOCKET NO.: EDU-3566-11 **STIPULATION OF SETTLEMENT AND DISMISSAL**

IT IS hereby stipulated and agreed that this matter shall be dismissed with prejudice and without costs as to either party subject to the following Stipulation and understanding:

1. As a result of an Independent Accounting Report issued by Gary Higgins dated November 26, 2012, and the further discussions and adjustments between the parties, it is agreed and stipulated by and between the parties that the Borough of Chesilhurst Board of Education shall pay to the Winslow Township Board of Education the sum of One Hundred Eighty-Three Thousand Sixty-One ($183,061.03) Dollars in full and complete satisfaction of the issues raised in the litigation concerning reimbursements and other charges for the 2009 -2010 school year.

1. The parties repeat and incorporate the terms of the Settlement Agreement and General Release and Waiver ("Agreement") attached to this Stipulation of Settlement as Exhibit A.

2. The Board voluntarily recognizes Candis Thomas's tenure and seniority rights per the attached Agreement.

3. Pursuant to the terms of paragraph 15 of the Agreement, this settlement is expressly conditioned upon the entry of an initial decision (settlement) by the Administrative Law Judge and the Commissioner of Education's approval of the settlement without modification. Upon such approval, this stipulation shall serve as a stipulation of dismissal with prejudice and without costs.

4. In the event that the Administrative Law Judge or the Commissioner have any objections to any terms of the settlement, the parties agree, in advance, to negotiate in good faith to reform the Agreement to the extent possible to meet those objections. Should such reformation prove impossible, the settlement agreement will become void.

5. Counsel for the respective parties agree that this stipulation of settlement may be executed in counterparts and that facsimiles or electronically-transmitted versions of their signatures may be submitted to the Office of Administrative Law and the Commissioner in lieu of originals.

SELIKOFF & COHEN, P.A.
Counsel for Petitioners

By: _____
Keith Waldman

Dated: 3-22-18

WADE, LONG, WOOD & KENNEDY
Counsel for Respondent

By: _____
Lebnard J. Wood

Dated: 3/22/18

172-14

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDREW DAZZ,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
JERSEY CITY, HUDSON COUNTY.	:	

SYNOPSIS

Petitioning Board filed tenure charges of incapacity, conduct unbecoming, and neglect of duty against respondent, a tenured teacher, and sought to terminate his employment with the district. Neither respondent nor any attorney acting on his behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant termination of the respondent from his tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from his tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

April 28, 2014

AGENCY DKT NO. 73-3/14

IN THE MATTER OF THE TENURE	:	
HEARING OF ANDREW DAZZ,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
JERSEY CITY, HUDSON COUNTY.	:	

For the Petitioner, Hope R. Blackburn, Esq.
No appearance by or on behalf of Respondent, Andrew Dazz

This matter was opened before the Commissioner of Education on March 21, 2014, through certification of tenure charges of incapacity, conduct unbecoming, and neglect of duty, filed together with supporting evidence by the Secretary of the Jersey City Board of Education against Andrew Dazz, a tenured teacher in the petitioner's employ. Petitioner provided respondent with written notice of such certification via regular and certified mail, sent on or about March 20, 2014.

On March 25, 2014, the Commissioner directed respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioning Board of Education in this matter indicate that respondent has been chronically and excessively absent from his duties as a teacher, resulting in an adverse impact on the continuity of the educational process for the students of petitioner's district. Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against him, the Commissioner finds that petitioner's charges of incapacity, unbecoming conduct, and neglect have been proven and warrant respondent's dismissal.

Accordingly, summary decision is hereby granted to petitioner, and respondent is dismissed from his tenured position. A copy of this decision shall be forwarded to the State Board of Examiners for review and action as that body deems appropriate.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/28/14

Date of Mailing: 4/29/14

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

OAL DKT. NO. EDU 12774-12
AGENCY DKT. NO. 324-11/11

BETH ANN CLAYTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/29/14

Date of Mailing: 4/30/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 12774-12
AGENCY DKT. NO. 324-11/11

BETH ANN CLAYTON,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gail Oxfeld Kanef, Esq. for petitioner (Oxfeld Cohen, LLC, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: March 17, 2014 Decided: March 19, 2014

BEFORE **ELLEN S. BASS**, ALJ:

This matter is before me via remand order dated September 17, 2012. Petitioner, Beth Ann Clayton, (Clayton) had filed a petition of appeal before the Commissioner of Education (the Commissioner) on October 31, 2011. That matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 on November 22, 2011, and bore docket number EDU 14386-11.

Clayton's petition was dismissed for failure to appear via Initial Decision dated August 1, 2012. Thereafter, she filed exceptions with the Commissioner in which she sought leave to reopen her case, citing a lack of notice as excuse for her

nonappearance. The Commissioner reinstated her appeal, noting that the "interests of justice and fair play dictate that petitioner's explanation for her failure to appear be accepted..."

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated December 23, 2013.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 and 2011-2012 school years. These cases were case managed together via regular case management conferences with counsel. The attached settlement is the culmination of years of discussion and negotiation; fairly, reasonably, and efficiently resolves the claims raised in the petition; and is in the best interest of the parties and the taxpayers of Elizabeth.

4. The settlement fully disposes of all issues in controversy and is consistent with the law.

5. It is noted that the agreement consists of three pages but appears to be missing pages due to an error in the numbering of the paragraphs. This is clarified via letter from counsel for the Board dated March 17, 2014, in which he confirms that the three page agreement is the complete agreement.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore

ORDER that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 19, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 3-21-14

Mailed to Parties: MAR 21 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

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STATE OF NEW JERSEY
OFFICE OF A.D.M.R. LAW

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education has discussed a resolution of the Office of Administrative Law matters listed below; and,

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement on file with the Board Secretary, provided that it is fully signed by all parties.

Susy Basilici	Agency Docket No. 639-11/10	OAL Docket No. EDU 13416-2010
Beth Ann Clayton	Agency Docket No. 324-11/11	OAL Docket No. EDU 12774-2012
Milena Maya	Agency Docket No. 338-08/10	OAL Docket No. EDU 10165-2010
Wilfredo Romero	Agency Docket No. 299-08/10	OAL Docket No. EDU 9657-2010
Debra Stallone	Agency Docket No. 331-08/10	OAL Docket No. EDU 10009-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD DECEMBER 23, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-83

SETTLEMENT AGREEMENT

Between

ELIZABETH BOARD OF EDUCATION

And

BETH CLAYTON

WHEREAS the Elizabeth Board of Education (hereinafter "Board") and Beth Clayton (hereinafter "Ms. Clayton") agree that it would be in the best interest of both parties to settle all aspects of Ms. Clayton's employment relationship amicably, and to avoid all further litigation; and therefore the parties

RESOLVE and agree to the following terms:

1. **Compensation and Benefits**

The parties agree that Ms. Clayton will be compensated retroactively to December 1, 2012 in accord with her proper step on the teacher salary guide as a teaching staff member during the 2012-2013 school year.

2. **Mutual Release & Waiver**

By entering into this agreement, each party releases the other with respect to all claims and rights that either party may have or involving the other up until the date of the execution of this agreement. This release includes a release of all claims Ms. Clayton may have or wish to pursue against all agents of the Board for anything which has happened up until the date of the execution of this agreement.

The parties agree that neither party will bring any action or file any suit or claim against the other party or against any agent of the Board. Any matters, claims, suits or charges which

may be pending at any level shall be withdrawn as soon as this agreement is signed by the parties.

This release includes a waiver of all rights to sue or bring a claim for any reason including rights secured by board policy, contract, employment laws, civil right laws and all other State and Federal laws.

3 BC **Attorney Consultation**

The Board hereby specifically advises Ms. Clayton to consult with an attorney prior to signing this agreement, and recognizes that she has done so, and that she is fully satisfied with her representation in this matter.

The parties acknowledge that each has had an ample opportunity to seek independent legal counsel, financial or other advice regarding this agreement. The parties further acknowledge that each party fully understands the terms of this agreement and that each party is signing this agreement freely and voluntarily, without any coercion, duress, or pressure from the other party.

4 BC **Withdrawal**

The Petitioner agrees to withdraw her Petition in the matter of Beth Ann Clayton v. The Elizabeth Board of Education, OAL Docket No. EDU 14386-2011; Agency Docket No.: 324-11/11 as a condition of the settlement.

5 BC **Entire Agreement**

This document contains the entire agreement of the parties and may not be altered, amended, or modified except by an instrument in writing signed by the parties.

The parties agree that if any portion of this settlement agreement is deemed unenforceable, the remainder of this settlement agreement shall be fully enforceable.

ELIZABETH BOARD OF EDUCATION

By: _____
HAROLD KENNEDY JR.
BUSINESS ADMINISTRATOR/BOARD SEC.

Witness: _____

Date: 3/11/14

Print Name: MARVIN LEHRMAN, ESQ.

BETH CLAYTON

_____
Beth Clayton

Witness: _____

Date: 5-1-13

Print Name: Nancy Clayton

SETTLEMENT AGREEMENT

Between

ELIZABETH BOARD OF EDUCATION

And

BETH CLAYTON

WHEREAS the Elizabeth Board of Education (hereinafter "Board") and Beth Clayton (hereinafter "Ms. Clayton") agree that it would be in the best interest of both parties to settle all aspects of Ms. Clayton's employment relationship amicably, and to avoid all further litigation; and therefore the parties

RESOLVE and agree to the following terms:

1. **Compensation and Benefits**

The parties agree that Ms. Clayton will be compensated retroactively to December 1, 2012 in accord with her proper step on the teacher salary guide as a teaching staff member during the 2012-2013 school year.

2. **Mutual Release & Waiver**

By entering into this agreement, each party releases the other with respect to all claims and rights that either party may have or involving the other up until the date of the execution of this agreement. This release includes a release of all claims Ms. Clayton may have or wish to pursue against all agents of the Board for anything which has happened up until the date of the execution of this agreement.

The parties agree that neither party will bring any action or file any suit or claim against the other party or against any agent of the Board. Any matters, claims, suits or charges which

may be pending at any level shall be withdrawn as soon as this agreement is signed by the parties.

This release includes a waiver of all rights to sue or bring a claim for any reason including rights secured by board policy, contract, employment laws, civil right laws and all other State and Federal laws.

6. **Attorney Consultation**

The Board hereby specifically advises Ms. Clayton to consult with an attorney prior to signing this agreement, and recognizes that she has done so, and that she is fully satisfied with her representation in this matter.

The parties acknowledge that each has had an ample opportunity to seek independent legal counsel, financial or other advice regarding this agreement. The parties further acknowledge that each party fully understands the terms of this agreement and that each party is signing this agreement freely and voluntarily, without any coercion, duress, or pressure from the other party.

7. **Withdrawal**

The Petitioner agrees to withdraw her Petition in the matter of Beth Ann Clayton v. The Elizabeth Board of Education, OAL Docket No. EDU 14386-2011; Agency Docket No.: 324-11/11 as a condition of the settlement.

8. **Entire Agreement**

This document contains the entire agreement of the parties and may not be altered, amended, or modified except by an instrument in writing signed by the parties.

The parties agree that if any portion of this settlement agreement is deemed unenforceable, the remainder of this settlement agreement shall be fully enforceable.

ELIZABETH BOARD OF EDUCATION

By: _____
HAROLD KENNEDY, JR.
BUSINESS ADMINISTRATOR/BOARD SEC.

Date: 3/11/14

Witness: _____

Print Name: MARVIN LEHMAN, ESQ.

BETH CLAYTON

_____
Beth Clayton

Date: 5-1-13

Witness: _____

Print Name: Nancy Clayton

174-14

OAL DKT. NO. EDU 13416-10
AGENCY DKT. NO. 639-11/10

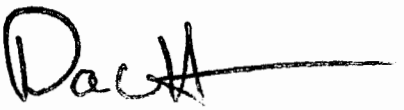
SUSY BASILICI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Settlement Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

According to the Settlement Agreement, the parties agreed that the gross amount of back pay owed to the petitioner for the period between September 1, 2010 and March 15, 2011 is $40,799.20. The Settlement Agreement further states that the gross amount of back pay owed to the petitioner must be reduced by $14,160.00 in unemployment benefits received by the petitioner during the same period. The Settlement Agreement then states that the amount of back pay owed to the petitioner is $23,975.28. Based on the proper calculation of the numbers listed above, the petitioner would actually be owed $26,639.20 in back pay for the period between September 1, 2010 and March 15, 2011. Therefore, the Commissioner cannot approve the within Settlement Agreement as it is currently written.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/30/14

Date of Mailing: 4/30/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13416-10
AGENCY DKT. NO. 639-11/10

SUZY BASILICI,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gail Oxfeld Kanef, Esq. for petitioner (Oxfeld Cohen, LLC, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: March 17, 2014 Decided: March 19, 2014

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 1, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

SIGN HERE

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated December 23, 2013.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

4. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 19, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 3-21-14

Mailed to Parties: MAR 21 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

SUSY BASILICI Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 13416-2010N Agency Ref. No. 639-11/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, __Susy Basilici__ ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned __Susy Basilici__ v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU __13416-2010__, Agency Dkt. No. __639-11/10__ (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

MAR-11-2014 15:12 OXFELD COHEN, P.C. 9738021055 P.002

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ _40,799.20_, for the period from _September 1, 2010__ through __March 15, 2011_. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from ___September 1, 2010____ through __March 15, 2011_. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, _2010__, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, _2010 at that time

and the back pay due to Petitioner runs from _September 1, 2010_.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from __September 2010__ through __March 2011__ was $ _14,160_.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $ _23,975.28_.

4. The Parties agree that Petitioner had no earnings from other employment during the period from __September 2010__ through _March 2011__. Thus, the Final Gross Amount of back salary due to petitioner is $ __23,975.28__. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "_Susy Basilici_".

5. In addition to back salary, the Board shall pay Petitioner the sum of $_638.69_ as money damages based on amounts paid by Petitioner for medical bills during the period from _September 1, 2010__ to __March 15, 2011_ that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "_Susy Basilici__" and

will not be subject to income tax withholding or payroll deductions since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the __2010-2011__ school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from _September 1, 2010 to __March 15, 2011___. In addition, Petitioner's seniority will be credited for one full year for the entire school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the __2010-2011__ school year, less any days used during any portion of that year when

MAR-11-2014 15:12 OXFELD COHEN, P.C. 9738021055 P.005

Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the __2010-2011___ school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the _2011-2012__ school year or thereafter.

8. The Parties agree that Petitioner's seniority as of _January 31, 2013_ as a result of this settlement is:

a) _6.25__ years as an _elementary school teacher__.

b) _____ years as a _____.

9. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the _2010-2011_ school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

14. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding

MAR-11-2014 15:12 OXFELD COHEN, P.C. 9738021055 P.007

action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this agreement.

15. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR PETITIONER

Date:

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date:

MAR-11-2014 15:13 OXFELD COHEN, P.C. 9738021055 P.008

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education has discussed a resolution of the Office of Administrative Law matters listed below; and,

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement on file with the Board Secretary, provided that it is fully signed by all parties.

Susy Basilici	Agency Docket No. 639-11/10	OAL Docket No. EDU 13416-2010
Beth Ann Clayton	Agency Docket No. 324-11/11	OAL Docket No. EDU 12774-2012
Milena Maya	Agency Docket No. 338-08/10	OAL Docket No. EDU 10165-2010
Wilfredo Romero	Agency Docket No. 299-08/10	OAL Docket No. EDU 9657-2010
Debra Stallone	Agency Docket No. 331-08/10	OAL Docket No. EDU 10009-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD DECEMBER 23, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-83

176-14

OAL DKT. NO. EDU 13448-13
AGENCY DKT. NO. 189-8/13

D.C., on behalf of minor children, D.C., D.C., and N.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Settlement Agreement), and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner observes that the President of the Board of Education (Board) signed the Settlement Agreement on behalf of the Board. The Board certificate attached to the Settlement Agreement states that an extract from the minutes of the Board meeting during which the Settlement Agreement was approved is appended to the certificate. However, there are no minutes attached to the certificate. In that neither the file nor the Settlement Agreement contains a copy of the Board's resolution approving the settlement and designating the Board President to sign the Settlement Agreement on its behalf, nor, in the alternative, is the Settlement Agreement signed by the Board attorney – who is the Board's duly authorized representative in litigation – the Commissioner cannot approve the within Settlement Agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/30/14

Date of Mailing: 4/30/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13448-13

AGENCY DKT. NO. 189-8/13

D.C., ON BEHALF OF MINOR CHILDREN,

D.C., D.C. AND N.C.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Respondent.

D.C., parent, pro se

Sanmathi Dev, Esq., for respondent (Capehart & Scatchard, P.A., attorney)

Record Closed: March 10, 2014 Decided: March 17, 2014

BEFORE **PATRICIA M. KERINS**, ALJ:

The matter was transmitted to the Office of Administrative Law for determination as a contested case September 20. 2013, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and their acceptance of the terms on the record on October 25, 2013.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that these agreements meet the requirements of N.J.A.C. 1:1-19.1 and that the settlements should be approved. I approve the settlements and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

3/17/14
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 3/18/14

Date Mailed to Parties: 3/18/14

/bal/lam

Board of Education
HAMILTON TOWNSHIP PUBLIC SCHOOLS
90 Park Avenue
Hamilton, NJ 08690

CERTIFICATE

I, Peter Frascella, Interim Secretary of the Board of Education of the Township of Hamilton, in the County of Mercer, State of New Jersey, HEREBY CERTIFY that the foregoing annexed extract from the minutes of a meeting of the Board of Education of said School District duly called and held on February 26, 2014, has been compared by me with the original minutes as officially recorded in my office in the Minute Book of said Board of Education and is a true, complete and correct copy thereof and of the whole of said original minutes so far as the same relate to the subject matters referred to in said extract.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said Board of Education this 27th day of February, 2014.

Peter Frascella
Interim Board Secretary

SETTLEMENT & MUTUAL RELEASE AGREEMENT

2014 MAR 11 P 2:09

DUNO CLENOR (DOB: 2/21/2002)
D'OR CLENOR (DOB: 6/4/2003)
NICE CLENOR (DOB: 11/24/2005)

OAL Docket No. EDU 13448-2013 S
Agency Ref. No. 189-8/13

This Settlement and Mutual Release Agreement ("Agreement") is made on this _____ day of _____, 2013, by and between **DULHOMME CLENOR** and the **HAMILTON TOWNSHIP BOARD OF EDUCATION** (hereinafter "Board").

WHEREFORE, DULHOMME CLENOR is the natural father of Duno Clenor, D'Or Clenor, and Nice Clenor (the "Students").

WHEREFORE, DULHOMME CLENOR has a current address of 621 East Howell Street, Hamilton, New Jersey 08610.

WHEREFORE, the Board is organized by the laws of the State of New Jersey with a principal place of business at 90 Park Avenue, Hamilton, New Jersey 08690 in Mercer County.

WHEREFORE, the Board sought payment of tuition for the Students' attendance between January 1, 2013 and June 17, 2013 in a total amount of $18,306.00.

WHEREFORE, on October 25, 2013, DULHOMME CLENOR and the Board participated in a conference and proceeding before the Honorable Patricia M. Kerins and advised Judge Kerins that a settlement has been reached. The parties then placed the terms of the settlement on the record before Judge Kerins.

WHEREFORE, the parties seek to memorialize the terms of the agreement reached on October 25, 2013 in a written settlement agreement and release.

NOW THEREFORE, the undersigned parties hereby agree as follows:

1. DULHOMME CLENOR shall pay the Board a total maximum amount of $4,500.00. On or before February 20, 2014, DULHOMME CLENOR shall pay the Board $4,000.00. On or before June 30, 2014, DULHOMME CLENOR shall pay the Board $500.00.

2. DULHOMME CLENOR shall contact the Director of Administration to coordinate the payments described in Paragraph 1. All checks shall be issued to the Hamilton Township Board of Education. Upon receiving payment, the Board shall provide a receipt of such payment to DULHOMME CLENOR.

3. If DULHOMME CLENOR fails to comply with the terms of payment described in Paragraph 1, the Board shall have the right to seek payment of tuition in the full amount of $18,306.00. The Board shall have the right to enforce this Agreement in the Superior Court of New Jersey, Mercer County.

4. DULHOMME CLENOR agrees that Students were not eligible to attend school in the District between January 1, 2013 and June 17, 2013 and waives any and all rights to challenge the District's decision that the Students were not eligible to attend school in the District with the Commissioner of Education, state or federal court, or in any other forum.

5. The parties mutually agree to **RELEASE, WAIVE AND FOREVER DISCHARGE,** through the date of full execution of this Agreement, each other from any and all claims and causes of action, in law or in equity, whether known or unknown, whether asserted or unasserted, contingent or otherwise, arising from or relating directly or indirectly to the Students' education, special education program, placement, IEP, related services, discipline, counseling, and/or attendance within the District from the beginning of the Students' enrollment in District, including but not limited to: (a) compensatory education; (b) reimbursement of any medical, behavioral, or education evaluations; (c) transportation; (d) any claim of improper placement, supervision, monitoring and/or implementation of the Students' educational programming; and/or (e) attorney fees and expert witness fees. By way of further illustration, this Mutual Release and Waiver also includes, but is not limited to, any claim concerning and/or alleging a denial of FAPE, discrimination, state or federal constitutional rights violations, state or federal civil rights violations, monetary damages, pain and suffering, personal injury, property damage, reimbursement, prevailing party status, attorneys fees and costs, and expert fees, claims or causes of action arising under state or federal statutes, regulations, or common law, including but not limited to the New Jersey statutes and regulations pertaining to special education (inclusive of N.J.A.C. 18A:46-1 et seq. and N.J.A.C. 6A:14 et seq.), the New Jersey Law Against Discrimination, N.J.A.C. 10:5-1 et seq., the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., Section 504 of the Rehabilitation Act, 29 U.S.C. §701 et seq., the American with Disabilities Act, 42 U.S.C. §12101 et seq., the New Jersey Constitution, the United States Constitution, and the Civil Rights Act, 42 U.S.C. §1983, §1985, and §1988.

6. This Agreement constitutes the full and complete agreement of the parties and may not be changed or modified absent mutual agreement of the parties. This Agreement is binding upon the parties and their respective heirs, assigns or successors in interest.

7. This Agreement shall be governed by and construed in accordance with New Jersey law.

8. The terms and conditions of this Agreement shall be kept strictly confidential and will not be disclosed to any individual that is not acting directly on behalf of any party. In the event the Agreement is required to be disclosed in any litigation, including an action to enforce the Agreement, the party or parties involved shall make every effort to have it disclosed to the court *in camera* and subject to an appropriate protective order maintaining the confidentiality of the Agreement to the fullest extent possible.

9. The parties hereby verify, affirm and represent that they have each had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and are entering into this Agreement voluntarily and with a full understanding of its meaning.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

Date: 1/10/14

DULHOMME CLENOR, Father
of Duno Clenor, D'Or Clenor, and Nice Clenor

Date: 2/28/14

Al Galyzik

~~JEFF HEWITSON~~, President
HAMILTON TOWNSHIP BOARD OF EDUCATION

177-14

OAL DKT. NO. EDU 16635-13
(ON REMAND EDU 4572-13)
AGENCY DKT. NO. 58-3/13

K.B. and D.B., on behalf of minor child, K.B.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record, settlement agreement (Agreement), and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. On November 18, 2013, the Commissioner remanded this matter to OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge ("ALJ") contained several deficiencies, including the lack of requisite Board of Education approval.

Upon review of the revised agreement and the record on remand, the Commissioner finds that the deficiencies identified in the prior agreement have been corrected. Accordingly, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/01/14
Date of Mailing: 5/01/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04572-13

AGENCY DKT. NO. 58-3/13

K.B. AND D.B. on behalf of minor child, K.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,

Respondent.

George M. Holland, Esq., for petitioners (Lentz and Gengaro, attorneys)

Isabel Machado, Esq., for respondent (Machado Law Group, LLC, attorneys)

Record Closed: March 17, 2014 Decided: March 24, 2014

BEFORE **EVELYN J. MAROSE**, ALJ:

On November 18, 2013, the Commissioner of Education issued a Decision that the settlement Agreement submitted regarding the above referenced matter was deficient and remanded the matter to the Office of Administrative Law (OAL) for revision of the Agreement or for a hearing.

The parties conferred and thereafter modified the settlement Agreement consistent with the Decision of the Commissioner. A revised Agreement signed by the parties, including the Board's attorney, and is attached hereto.

I have reviewed the record and terms of the revised settlement Agreement and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties or their representatives' signatures on the attached settlement Agreement. The Board of Education of the Township of Pequannock, Morris County has approved the settlement, as evidenced by the attached Board resolution dated March 11, 2013.

2. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that the Agreement meets the safeguard requirements of N.J.A.C. 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the terms and that these proceedings be **CONCLUDED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 25, 2014
DATE

Evelyn J. Marose
EVELYN J. MAROSE, ALJ

Date Received at Agency: 3-27-14

Date Mailed to Parties: MAR 27 2014

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

KB KB D.B DB Superintendent

Machado Law Group, LLC
136 Central Avenue
Clark, New Jersey 07066
Tel: (732) 540-8276
Fax: (732) 540-8296
Attorneys for Respondent

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STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

OFFICE OF ADMINISTRATIVE LAW

K.B. and D.B. o/b/o K.B.

Petitioner,

v.

Township of Pequannock Board of Education,

Respondent.

OAL Docket No.: EDU 04572-2013
Agency Ref. No.: 58-3/13

SETTLEMENT AGREEMENT

WHEREAS, the Pequannock Township Board of Education, with principal offices located at Pequannock Township, Pompton Plains, Morris County, New Jersey 07440 ("Board" OR "District") and K.B. and D.B. o/b/o minor child K.B., residing at 755 Turnpike, Pompton Plains, New Jersey 07444 ("Parents") hereby set forth this Settlement Agreement, as follows:

WHEREAS, K.B. is a third grade student enrolled at the North Boulevard Elementary School, located at 363 Boulevard, Pompton Plains, New Jersey, 07444 which is operated by the Board; and

WHEREAS, K.B. was involved in an incident on school grounds on December 19, 2012 for which he was suspended for one (1) school day by the District; and

KB KB D.B DB Superintendent

WHEREAS, his parents, on his behalf, have filed a Verified Petition of Appeal captioned K.B. and D.B. on behalf of minor child, K.B. v. Township of Pequannock Board of Education, Docket No. EDU 04572-2013, Agency Ref. No. 58-3/13;

NOW THEREFORE, the parties having a desire to settle and resolve the incident hereby agree as follows ("Agreement"):

1. K.B.'s school record, specifically the Computerized Incident Summary Report attached hereto as Exhibit A, regarding the December 19, 2012 incident will be revised. The language "it's a shotgun" in the Description field will be changed to "an inappropriate statement in the hallway with students and staff." Remaining language will be deleted. The typewritten incident summary dated 12/19/12 (Exhibit B) will remain part of his file.

2. The parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of litigation.

3. The parties have entered in this Agreement freely and voluntarily with a full understanding of their rights and the content of this Agreement. The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed this Agreement in detail with counsel or a representative and fully understand its requirements and limitations.

4. This Agreement shall be governed by the laws of the State of New Jersey.

5. This Agreement shall remain confidential and Petitioners shall not disclose its form or contents to third parties other than their attorneys or court of law, or as

required by government agencies or for purpose of having it explained or enforced, or if it is required by the New Jersey Open Public Records Act.

6. In consideration of the settlement of the captioned matter, Parents waive their right to take any actions, civil actions, complaint investigations, OCR investigations or any other action through the date of the execution of this Settlement Agreement.

7. In consideration of the settlement of the captioned matter, Parents shall release the District from any and all claims, rights and liability, including but not limited to any and all claims for attorney's fees and costs, transportation, compensatory education, money damages, civil liability, or any other equitable or legal relief through the date of the execution of this Agreement.

8. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

9. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.

10. This Agreement shall require the approval of the Administrative Law Judge assigned to his matter, but shall not require the approval of the Board to become effective, meaning that the District shall have the authority to make this Agreement binding.

KB KB D.B DB Superintendent M

K.B. and D.B., o/b/o K.B.,

K.B., Father

Dated: 2/14/14

Deana Bauer

D.B., Mother

Dated: 2/14/14

ON BEHALF OF PEQUANNOCK TOWNSHIP OF BOARD OF EDUCATION

Dr. Victor Hayek, Superintendent of Schools

Dated: 3/10/14

Isabel Machado, Esq.
Board Attorney

Dated: 3/10/14

EXHIBIT A

North Boulevard Elementary School

Incident Summary Report - #121920126

Incident Details			
Created:	12/19/2012 by tloeffler		
Posting Date:	12/19/2012	School:	North Boulevard Elementary School
Incident Date:	12/19/2012	Location:	INSIDE
Time Period:	Period 5	HIB Incident:	NO
Reported By:	Emigrodski, Alyce	Administrator:	Loeffler, Theodore
Bias Incident:	NO	Offender Known:	YES
Police Notification:	NONE	Police Contacts:	
Description:	Karlson yelled "its a shotgun" in a hallway full of students and staff. Students and staff were startled and alarmed.		

Incident Infractions				
	Infraction Group	Infraction Type	Infraction Code	Primary/Secondary
1	MISCOND		Isolated incident of inappropriate language,gestures,comments.	Primary

Offender Information					
	Offender	Grade	School	Offender Type	Points
1	2220102-Bauer, Karlson Taylor	03	NBS	REG	0
	Conference with Parent, Teacher, Administrator, and Counselor	Dates: 12/19/2012			
	Out-of-School Suspension - 1 day	Dates: 12/20/2012			

Victim Information				
	Victim	Grade	School	Victim Type
No Victims Listed.				

An inappropriate statement

EXHIBIT B

Exhibit B

North Boulevard Elementary School

2012-2013

Incident Summary 12/19/12

Student: Karlson Bauer, 3F

As the students were returning to the classroom from lunch, Mrs. Zmidgrodski was walking down the hall and heard Karlson scream out "it's a shotgun". The students and staff were startled. Mrs. Zmidgrodski responded right away and escorted Karlson to the main office. Mr. Loeffler met with Karlson. Initially Karlson began to cry and could not tell Mr. Loeffler what happened or why he said it. The nurse was called in to help calm down Karlson. During that time, he told Mr. Loeffler that he said "it's a shotgun" but still could not tell him what was happening that caused him to say such a thing. Eventually Karlson calmed down and told Mr. Loeffler and Mrs. LaTempa that he was talking with his friend about hunting and guns. He said his family goes hunting together with the other family. He then told Mrs. LaTempa that his friend made a Joke and said "when is a shotgun a shotgun?" He said he yelled by saying "when it is a shotgun". We had Karlson meet with Mrs. Montalbetti (Student assistance counselor) and Mrs. Coughlin (school psychologist) in order to make sure that there were no other concerns involved in this situation. We also wanted Karlson to be able to talk with someone else that might be able to gain a more insight from Karlson as to why he yelled "It's a shotgun" since his previous reason did not clearly make sense. The following is a summary from that meeting below:

He was teary-eyed and overwhelmed, at first, but he relaxed when we told him that we just want to understand what happened. Karlson stated that he was talking with his friend, M, who he goes hunting with. M said that he has a shotgun and K said, "I have a shotgun too." He stated that this was in a "loud" voice but not a yelling voice. Karlson stated that his family owns guns and goes hunting on their farm and in the woods. He told us about the safety precautions that they follow, in detail. They hunt for deer, bear, and wild turkeys. He also goes horseback riding and hunts from horseback. He said that he would never bring a gun to school and would only use it for hunting. He also stated that the guns are kept in a safe in "his room that he shares with his dad." He said that it would be a problem to bring a gun into school because it could "explode his backpack." He understood why the other students could get nervous when they hear about guns in school and also understood why we cannot have those conversations in school.

After speaking with Mrs. Montalbetti and Mrs. Coughlin, Mr. Loeffler brought Karlson into his office to speak with his parents at their request. During that time Karlson told his dad that he started the conversation with his Friend, M, before he yelled "It's a shotgun" and that he said it because of a joke his friend told him. Mr. Bauer told him that that did not make sense and asked him to explain further. Mr. and Mrs. Bauer explained to Karlson why it was inappropriate to do what he did in school. He explained how important it is for Karlson to understand that there are certain things he can talk about while outside of school because of what they do as a family and certain things that cannot be talked about at schools. Guns, knives, and violence were examples of things he should not be talking about at school.

PEQUANNOCK TOWNSHIP BOARD OF EDUCATION
Pompton Plains, New Jersey

EXTRACT OF MEETING MINUTES

RECEIVED
2013 MAR 24 A 3:12
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

TYPE OF MEETING:

(x) Regular ( ) Workshop ( ) Special ( ) Other

DATE OF MEETING: March 10, 2014 CALLED TO ORDER AT 7:00 pm

PLACE OF MEETING: Pequannock Township High School
85 Sunset Road, Pompton Plains, NJ 07444

PRESENT:	James Farrell	Ann Maier
	Douglas Muzzio	Rosemary Phalon
	Kimberley Quigley	Tom Salerno
	Matthew Tengi	William Sayre
ABSENT:	David Swezey	

AT THE MEETING IDENTIFIED ABOVE, THE FOLLOWING ACTION TRANSPIRED TO WIT:

RESOLUTION NO. PMC-174-14

APPROVAL OF AGREEMENT RESOLVING ALL ISSUES IN THE DISCIPLINARY MATTER OF EDU-04572-2013 AS RECOMMENDED BY THE SUPERINTENDENT AND BOARD ATTORNEY

RESOLVED, that the Board of Education approve the agreement resolving all issues in the disciplinary matter of EDU-04572-2013 as recommended by the Superintendent and Board Attorney.

Motion by: Quigley	Second by: Phalon	Roll Call Vote: 8-0

CERTIFICATION

The foregoing information is hereby certified to be a true copy of the official records of the Pequannock Township Board of Education, having been extracted from and compared with the contents of the official minutes of the subject meeting.

March 11, 2014
Date

Barbara A. Decker
Business Administrator/Board Secretary

178-14

OAL DKT. NO. EDU 2115-14
(EDU 9658-10 ON REMAND)
AGENCY DKT. NO. 226-8/10

MELISSA ORTIZ,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed revised Settlement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

The Commissioner approves the revised Agreement and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/01/14

Date of Mailing: 5/01/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
REMAND
OAL DKT. NO. EDU 02115-14
AGENCY DKT. NO. 226-8/10

MELISSA ORTIZ,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: March 25, 2014 Decided: March 25, 2014

BEFORE **ELLEN S. BASS**, ALJ:

This matter is before me via remand order dated January 31, 2014. Petitioner, Melissa Ortiz, had filed a petition of appeal before the Commissioner of Education (the Commissioner) on August 2, 2010. That matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 on September 2, 2010, and bore docket number EDU 9658-10.

I **FIND** that this matter was settled and an Initial Decision approving the settlement issued by me on December 13, 2013. The remand decision declined to

approve the settlement, noting incongruities in the settlement agreement relative to the amounts payable to petitioner. Specifically, paragraph one of the settlement agreement noted that the gross back pay due and owing petitioner was $14,044.48, but that this amount was subject to a reduction "in an amount equal to the Unemployment Benefits received by Petitioner." Paragraph two noted that petitioner received $12,000 in unemployment benefit payments, yet paragraph three stated that, after the deduction for the unemployment benefits paid, the amount owed petitioner nonetheless remained $14,044.48.

I conferred with counsel who advised that this was a typographical error. Via letter dated February 26, 2014, petitioner's counsel forwarded a revised settlement agreement that corrected paragraph one to read that the $14,044.48 figure was the amount actually owed petitioner, as it "has already been reduced in an amount equal to the Unemployment Benefits received by Petitioner..." Both attorneys advised that this revised agreement was consistent with the original intent of the parties. Via letter dated March 25, 2014, counsel for the Board certified that the revised agreement simply corrected an error, was consistent with the original intent of the Board, and that no further Board action was required.

Accordingly, consistent with my earlier decision, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by a certified Board resolution dated November 21, 2013.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 and 2011-2012 school years. These cases were case managed together via regular case management conferences with counsel. The attached settlement is the culmination of years of discussion and negotiation; fairly, reasonably, and efficiently resolves the claims raised in the petition; and is in the best interest of the parties and the taxpayers of Elizabeth.

4. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 25, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

Mailed to Parties: MAR 26 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

MELISSA ORTIZ, Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 09658-2010N Agency Ref. No. 226-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Melissa Ortiz ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Melissa Ortiz v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 09658-2010N, Agency Dkt. No. 226-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $14,044.48, for the period from September 1, 2010 through January 23, 2011. This

amount has already been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through January 23, 2011. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through January 23, 2011 was $12,000.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $14,044.48.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through January 23, 2011. Thus, the Final Gross Amount of back salary due to petitioner is $14,044.48. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Melissa Ortiz."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to January 23, 2011. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR PETITIONER

Date: 1/12/13

Melissa Ortiz

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 3/11/2014

MARVIN LEHMAN
SUPERVISING GENERAL COUNSEL/BOARD ATTORNEY
500 North Broad Street
Elizabeth, New Jersey 07208
(908) 436-5075
Attorney for Defendants

MELISSA ORTIZ,

Petitioner,

v.

THE ELIZABETH BOARD OF EDUCATION,

Respondent.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY

OAL DOCKET NO.: EDU 09658-2010

AGENCY DOCKET NO.: 226-8/10

Civil Action

CERTIFICATION

MARVIN LEHMAN, of full age hereby certifies:

1. I am the Supervising General Counsel/Board Attorney for the Elizabeth Board of Education. I am fully familiar with the facts and circumstances of this matter.
2. The revised agreement in the above captioned matter simply corrects a typographical error in the original agreement and is consistent with the original intent of the Board when it approved the settlement. Accordingly, no further Board action is required.
3. I certify that the foregoing is true to the best of my knowledge and if it is false I may be subject to punishment.

Marvin Lehman, Esq.

179-14

OAL DKT. NO. EDU 2116-14
(EDU 9669-10 ON REMAND)
AGENCY DKT. NO. 419-8/10

BARBARA MANDELA-CANTA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed revised Settlement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

The Commissioner approves the revised Agreement and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/01/14

Date of Mailing: 5/01/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
REMAND
OAL DKT. NO. EDU 02116-14
AGENCY DKT. NO. 419-8/10

BARBARA MANDELA-CANTA,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: March 25, 2014 Decided: March 25, 2014

BEFORE **ELLEN S. BASS**, ALJ:

This matter is before me via remand order dated January 31, 2014. Petitioner, Barbara Mandela-Canta had filed a petition of appeal before the Commissioner of Education (the Commissioner) on August 12, 2010. That matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 on September 1, 2010, and bore docket number EDU 9669-10.

I **FIND** that this matter was settled and an Initial Decision approving the settlement issued by me on December 13, 2013. The remand decision declined to

approve the settlement, noting incongruities in the settlement agreement relative to the amounts payable to petitioner. Specifically, paragraph one of the settlement agreement noted that the gross back pay due and owing petitioner was $8,551.66, but that this amount was subject to a reduction "in an amount equal to the Unemployment Benefits received by Petitioner." Paragraph two noted that petitioner received $7,200 in unemployment benefit payments, yet paragraph three stated that, after the deduction for the unemployment benefits paid, the amount owed petitioner nonetheless remained $8,551.66.

I conferred with counsel who advised that this was a typographical error. Via letter dated February 26, 2014, petitioner's counsel forwarded a revised settlement agreement that corrected paragraph one to read that the $8,551.66 figure was the amount actually owed petitioner, as it "has already been reduced in an amount equal to the Unemployment Benefits received by Petitioner..." Both attorneys advised that this revised agreement was consistent with the original intent of the parties. Via letter dated March 25, 2014, counsel for the Board certified that the revised agreement simply corrected an error, was consistent with the original intent of the Board, and that no further Board action was required.

Accordingly, consistent with my earlier decision, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by a certified Board resolution dated November 21, 2013.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 and 2011-2012 school years. These cases were case managed together via regular case management conferences with counsel. The attached settlement is the culmination of years of discussion and negotiation; fairly, reasonably, and efficiently resolves the claims raised in the petition; and is in the best interest of the parties and the taxpayers of Elizabeth.

4. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 25, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

MAR 26 2014

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

BARBARA L. MANDELA-CANTA, Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 09669-2010N Agency Ref. No. 419-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Barbara L. Mandela-Canta ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Barbara L. Mandela-Canta v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU 09669-2010N, Agency Dkt. No. 419-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $8,551.66, for the period from September 1, 2010 through November 21, 2010. This

amount has already been reduced in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD). The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010 do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through November 21, 2010 was $7,200.00.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $8,551.66.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 1, 2010 through November 21, 2010. Thus, the Final Gross Amount of back salary due to petitioner is $8,551.66. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Barbara L. Mandela-Canta."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to November 21, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire 2010-2011 school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to

employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon

approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR PETITIONER

Date: 11/8/12 Barbara Mandela-Canta

Barbara L. Mandela-Canta

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 3/11/2014

MARVIN LEHMAN
SUPERVISING GENERAL COUNSEL/BOARD ATTORNEY
500 North Broad Street
Elizabeth, New Jersey 07208
(908) 436-5075
Attorney for Defendants

BARBARA MANDELA-CANTA,

Petitioner,

v.

THE ELIZABETH BOARD OF EDUCATION,

Respondent.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: UNION COUNTY

OAL DOCKET NO.: EDU 02116-2014

AGENCY DOCKET NO.: 419-8/10

Civil Action

CERTIFICATION

MARVIN LEHMAN, of full age hereby certifies:

1. I am the Supervising General Counsel/Board Attorney for the Elizabeth Board of Education. I am fully familiar with the facts and circumstances of this matter.
2. The revised agreement in the above captioned matter simply corrects a typographical error in the original agreement and is consistent with the original intent of the Board when it approved the settlement. Accordingly, no further Board action is required.
3. I certify that the foregoing is true to the best of my knowledge and if it is false I may be subject to punishment.

Marvin Lehman, Esq.

180-14

A.B. on behalf of minor child L.M.D.-R.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her grandson, L.M.D.-R., was not eligible for a free public education in the Burlington Township school district. Petitioner contended that L.M.D.-R. resides with her, and that she shares custody with her daughter, T.O., the child's mother. The Board asserted that – based on a residency investigation – L.M.D.-R. resides with T.O. in Philadelphia, Pennsylvania. The Board filed a counterclaim for tuition reimbursement, submitting that $9,085.04 is due for the period from February 13, 2013 to June 25, 2013, and $9,296.30 for the period from September 9, 2013 to February 4, 2014.

The ALJ found, *inter alia*, that: the weight of evidence, including exhibits and testimony, indicates that L.M.D.-R. resides with his mother, T.O., in Philadelphia, and not with the petitioner in Burlington Township; although T.O. produced a Custody and Parenting Agreement to show that A.B. was designated to have primary residential custody of L.M.D.-R., A.B. is not the legal guardian nor the parent, as required under *N.J.A.C.* 6A:22-3.1(a)(1); petitioner provided no proof that she was supporting L.M.D.-R. gratis, as required by *N.J.S.A.* 18A:38-1(b)(1); the mother, T.O., admitted that she lived in Pennsylvania, and was observed leaving her home in Philadelphia and driving L.M.D.-R. across the Burlington-Bristol Bridge from Pennsylvania to drop him off for school in Burlington Township; and, since A.B. is not L.M.D.-R.'s guardian, any assessment of tuition must be against T.O., and would need to be pursued under a separate action. Accordingly, the ALJ affirmed the Board's determination that L.M.D.-R. is not domiciled in Burlington Township, but – with respect to the question of tuition – dismissed the Board's counterclaim against A.B., as she found that A.B. is not the legal guardian, and the mother, T.O., is not a party to the case herein.

Upon review, the Commissioner concurred with the ALJ's conclusions that 1) the petitioner has failed to sustain her burden of proving that L.M.D.-R. is entitled to a free public education in Burlington schools, and 2) T.O. is not a party to this case, and therefore tuition may not be assessed against her. However, the Commissioner rejected the ALJ's determination that A.B. is not liable to the Board for L.M.D.-R.'s tuition, finding that A.B. – as the court-ordered residential custodian of L.M.D.-R. – was in fact her grandson's guardian as defined in *N.J.A.C.* 6A:22-1.2; further, pursuant to *N.J.S.A.* 18A:38-1(b)(2), the Commissioner must assess tuition against A.B., prorated to the time of L.M.D.-R.'s ineligible attendance in Burlington Township schools. Accordingly, the Commissioner dismissed the petition and assessed petitioner tuition in the amount of $18,381.34.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 5/01/14

180-14

OAL DKT. NO EDU 18369-13
AGENCY DKT. NO. 291-11/13

A.B. on behalf of minor child L.M.D.-R.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is a residency dispute pertaining to L.M.D.-R., a child whose grandmother, A.B., lives in respondent's district and whose mother, T.O., admittedly resides in the home she owns in Philadelphia, Pennsylvania. Petitioner and T.O. represented to respondent that, due to T.O.'s family and economic difficulties, L.M.D.-R. lives with A.B. in Burlington Township. Petitioner also provided a copy of a custody order, approved by the Honorable John L. Call, P.J.F.P., designating A.B. as L.M.D.-R.'s "parent of primary residence."

However, as a result of remarks which L.M.D.-R. made to his teacher, respondent suspected that he was not actually domiciled with petitioner in Burlington Township. A residency surveillance was ordered and the results supported respondent's belief that – notwithstanding the above-referenced custody order – L.M.D.-R. actually lived with T.O. in Philadelphia and was driven from there to school each morning.

Upon consideration of the record, the Commissioner concurs with the Administrative Law Judge (ALJ)[1] that the evidence presented at the hearing in the Office of Administrative Law (OAL) supported respondent's determination that L.M.D.-R. has not been

[1] Neither party filed exceptions to the Initial Decision of the Office of Administrative Law.

residing in Burlington Township with A.B. In such cases, where the facts in evidence are discrepant with the terms of a custody order, the Commissioner will look behind the terms of the order, find that the child is not domiciled in the subject district, and affirm the Board of Education's determination that the child is not entitled to a free public education in its district. *See, e.g., I.B. on behalf of minor child, M.A., III, v. Board of Education of the Township of Belleville, Essex County,* State Board Dkt. No. 51-05, decided December 6, 2006; *D.M. on behalf of minor child, B.N. v. Board of Education of the Township of Ewing, Mercer County,* State Board Dkt. No. 20-02, decided November 5, 2003, where the school districts presented overwhelming evidence that the respective children were not actually living with the individual who had been granted custody.

The Commissioner is also in accord with the ALJ that, since T.O. is not a party to this case, tuition may not be assessed against her. However, the Commissioner disagrees with the ALJ's determination that A.B. is not liable to respondent for tuition covering the period during which L.M.D.-R. attended respondent's schools while living in Philadelphia.

The ALJ correctly recites the portion of *N.J.S.A.* 18A:38-1(b)(2) which states: "[i]f in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district." However, the ALJ's conclusion – that A.B. was not a guardian of L.M.D.-R. and could therefore not be assessed damages for tuition – is incorrect.

N.J.A.C. 6A:22-1.2, one of many regulations promulgated for implementation of *N.J.S.A.* 18A:38-1(b)(2), defines "Guardian" as:

> a person to whom a court of competent jurisdiction has awarded guardianship or custody of a child, provided that a residential custody order shall entitle a

> child to attend school in the residential custodian's school district unless it can be proven that the child does not actually live with the custodian . . .
>
> [Emphasis added.]

Thus, as a court-ordered residential custodian of L.M.D.-R., A.B. was a guardian for purposes of *N.J.S.A.* 18A:38-1(b). Since the Commissioner finds that the evidence does not support the claim of A.B., the petitioner herein, the Commissioner must assess A.B. tuition for L.M.D.-R., prorated to the time of his ineligible attendance in respondent's schools. Were this not so, for each of the unfortunately frequent instances in which relatives or friends agree to assume custody of children who actually do not live with them, school districts would have to participate in a hearing before the Commissioner to establish liability and then another hearing in Superior Court to collect tuition.

Accordingly, the petition is dismissed, respondent's determination that L.M.D.-R. is not eligible for a free public education in its district is affirmed, and petitioner is assessed tuition in an amount found by the ALJ to be $18,381.34.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/01/14

Date of Mailing: 5/02/14

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 18369-13
AGENCY DKT. NO. 129-11/13

A.B. ON BEHALF OF MINOR CHILD
L.M.D.-R.,
Appellant,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF BURLINGTON,
BURLINGTON COUNTY,
Respondent.

A.B., appellant, pro se

David M. Serlin, Esq., for respondent

Record Closed: February 11, 2014 Decided: March 17, 2014

BEFORE **LINDA M. KASSEKERT**, ALJ:

STATEMENT OF THE CASE

On or about November 11, 2013, T.O., the mother of the minor child L.M.D.-R., received a letter from respondent, the Burlington Township Board of Education (BOE), that informed her that her son was to be removed from the Burlington Township schools

because he was not domiciled in the township. A vote of the BOE occurred at a meeting held on December 5, 2013, during which it was determined that L.M.D.-R. did not reside in Burlington Township. The appellant in this matter, A.B., who is the maternal grandmother of L.M.D.-R., contested the determination and timely appealed to the Commissioner of Education.

The appellant argues that L.M.D.-R. resides with her and that she shares custody with her daughter, T.O. Respondent filed a counterclaim, a request for tuition, and submits that the appellant's daughter, T.O., and her grandson reside in Philadelphia, Pennsylvania. Respondent also submits that tuition charges are due the district in the amount of $9,085.04 for the period from February 13, 2013, to June 25, 2013, and in the amount of $9,296.30 for the period from September 9, 2013, to February 4, 2014.

PROCEDURAL HISTORY

The Department of Education, Bureau of Controversies and Disputes, transmitted this case to the Office of Administrative Law (OAL) on December 18, 2013, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A hearing commenced on January 30, 2014, and on the same day the testimony was completed and the record closed. On February 11, 2014, the record was reopened to receive respondent's tuition calculations, and it closed on that same day.

TESTIMONY

Alfred Nagle

Mr. Nagle is the attendance officer for the respondent. He has been employed with Burlington Township for four and one-half years. He is a former Lumberton Township police captain. He retired from the Lumberton police force in 2008 after serving there for twenty-five years. Mr. Nagle testified that he received information from Ms. Yost, L.M.D.-R.'s teacher, that L.M.D.-R. "travels over a bridge every day on his way to school." Mr. Nagle testified that Ms. Yost also told him that L.M.D.-R. told her

that his grandmother lived in Burlington, but that he and his mother did not live there with her. Mr. Nagle identified R-1 as his Residency Investigation report.

Mr. Nagle noted that L.M.D.-R.'s mother, T.O., had been approved by the district on September 25, 2012, for temporary residency for her and her son with A.B. due to alleged economic hardship (A-1).

On October 4, 2013, Mr. Nagle again spoke with Ms. Yost. He stated that she confirmed what L.M.D.-R. had told her with respect to where he lived. Ms. Yost indicated that T.O. dropped L.M.D.-R. off for school in the main lobby at about 8:55 a.m., and said that she would assist Mr. Nagle in identifying T.O. On October 8, 2013, Ms. Yost identified T.O. to Mr. Nagle in the lobby at about 9:00 a.m. He stated that he was able to observe T.O.'s vehicle, which was a blue BMW, and that he obtained the New Jersey license number. He checked the registration and found that the car was registered to T.O. at her mother's address, 11 P. Lane, Burlington, NJ, and that the address on T.O.'s license was also 11 P. Lane.

Mr. Nagle stated that on October 9, 2013, he was in the area of the Burlington-Bristol Bridge. At 8:44 a.m., he observed T.O.'s vehicle approaching the toll plaza from Pennsylvania. T.O. was driving and L.M.D.-R. was seated in a car seat in the back seat of the vehicle. He said he observed T.O. travel in the direction of the school, and noted that L.M.D.-R. was recorded as present and on time for school that day. He also stated that he checked the Philadelphia tax records and determined that T.O. owned property at 8904 R. Street in Philadelphia, which was purchased in 2009.

As R-1 states and Mr. Nagle testified, he was in the area of the Burlington-Bristol Bridge on October 10, October 11, October 14, October 15, and October 21, 2013. On each of those occasions, he observed T.O.'s vehicle crossing the bridge with L.M.D.-R. seated in the back seat. On each of those occasion, L.M.D.-R. was recorded as present and on time for school.

Mr. Nagle also testified that on October 13, 2013, a Sunday evening, he traveled to 8904 R. Street in Philadelphia and observed T.O.'s car parked in front of the

residence. He was also at 8904 R. Street on October 16, 2013, at approximately 7:15 a.m. when he observed T.O.'s vehicle in front of the residence. He reported that at 8:20 a.m. he observed T.O. and L.M.D.-R. exit the house. He stated that he observed T.O. put trash out at the curb and pick up some newspapers. He identified pictures he took of T.O. that day as R-3, pictures 1, 2, and 3. T.O. and L.M.D.-R. then drove away. L.M.D.-R. was recorded present and on time for school that day. Mr. Nagle testified that he drove from the residence to the school, and observed that it was approximately a twenty-minute drive. Mr. Nagle also observed T.O.'s vehicle parked in front of 8904 R. Street, and observed T.O. and L.M.D.-R. exit the house and drive away, on October 17 and October 18. On both of those days, L.M.D.-R. was recorded as present and on time at school.

Mr. Nagle stated that on October 22, 2013, he went to A.B.'s residence at 11 P. Lane at approximately 7:30 a.m. T.O.'s vehicle was not at the location. On October 24, 2013, he went to 11 P. Lane at approximately 5:55 a.m., and did not see T.O.'s vehicle parked there. That same day, he and another attendance officer went to 8904 R. Street at approximately 7:40 a.m. and observed T.O.'s vehicle parked in front of the residence. He reported that at 8:10 a.m. they observed T.O. and L.M.D.-R. exit the house, get into T.O.'s vehicle and drive away. L.M.D.-R. was recorded as present and on time for school that day. He identified the picture he took of T.O.'s vehicle parked outside 8904 R. Street on October 24, 2013, at 8:10 a.m. as R-3, picture 4. As a result of these observations, a Removal Notice was prepared to be hand-delivered to T.O. on October 25, 2013. The notice would also be mailed to 11 P. Lane.

Mr. Nagle testified that he hand-delivered the Removal Notice to T.O. on October 25, 2013, at 9:05 a.m. in the school parking lot, adjacent to T.O.'s vehicle. With him was attendance officer George Bogda. He told T.O. that he investigated residency fraud for the school district. T.O. told him that she resided at 11 P. Lane, and asked him what the problem was. He told her that he had not seen L.M.D.-R. exiting from that address. T.O. stated that it was because she was staying with her boyfriend at 8906 R. Street. She told him she owned the home at 8904 R. Street. Mr. Nagle told T.O. that she needed to set up an appointment with the superintendent to discuss the matter. He stated that T.O. told him that she lived at 11 P. Lane, and that she had lived there all

along. An appointment was scheduled with the superintendent for Monday, October 28, 2013, at 9:00 a.m.

Mr. Nagle testified that he met with Dr. Manno, who was superintendent at that time, Attendance Officer Cox and T.O. on October 28, 2013. At the meeting, T.O. continued to maintain that she lived at 11 P. Lane in Burlington Township.

Mr. Nagle's report states that T.O. told them that she sometimes stays with her boyfriend, J.S., at 8906 R. Street, which is the property next door to 8904. She stated that J.S. owned 8906 R. Street. T.O. also stated that she owned 8904 R. Street, and rents the property because of economic hardship. Mr. Nagle testified that Dr. Manno showed her a picture that Mr. Nagle had taken of T.O. taking the trash out at 8904 R. Street. T.O. told them that she does this on occasion. Dr. Manno told T.O. that Mr. Nagle had observed her exiting 8904 R. Street. T.O. told him that this was certainly a possibility. T.O. provided a property lease for 8904 R. Street. Mr. Nagle reported that this agreement had expired in August 2013. When the district attempted to make a copy, T.O. grabbed the lease back and refused to provide any copies.

Mr. Nagle testified that he returned to R. Street at 11:30 a.m. on that same day. He spoke to the resident at 8906 R. Street, F.L., who told Nagle that he and his wife owned the property and had been living there since 2002. F.L. told him he never heard of J.S., and that he and his wife were the only occupants of the house. He did not know T.O.'s name, but accurately described her, and stated that her blue car was typically parked in front of 8904 R. Street. Mr. Nagle checked the Philadelphia tax records and determined that 8906 R. Street was owned by F.L. and M.L. Mr. Nagle also talked to another neighbor, who wished to remain anonymous, who stated that she regularly sees T.O. at 8904 R. Street and that T.O.'s blue car is consistently parked in front of 8904.

Mr. Nagle identified R-4, a letter dated October 28, 2013, from Dr. Manno to T.O. The letter summarized Dr. Manno's decision with respect to L.M.D.-R.'s eligibility to attend Burlington Township schools as a result of the meeting. The letter stated:[1]

> Thank you for participating in a residency meeting on October 28, 2013, regarding your child, [L.M.D.-R.], grade Pre-K, B. Bernice Young School. The purpose of the meeting was to clarify the residency status of [L.]. Also present were Attendance Officers Al Nagle and Bob Cox. I shared with you that Attendance Officer Nagle's investigation determined, during multiple observations, that you and [L.] did not come to school from your *address of record*, 11 [P.] Lane, Burlington, New Jersey. It should be noted that you completed Temporary Residency paperwork for the 11 [P.] Lane address which is the residence of your Mother on September 25, 2012; the reason for temporary residency was economic hardship.
>
> You stated that your boyfriend, [J.S.], lives at 8906 [R.] Street in Philadelphia, Pennsylvania, that he is the property owner, and that you and [L.] stay with him from "time-to-time". Attendance Officer Nagle visited 8906 [R.] Street after our meeting; he spoke with the property owners, who were an elderly couple who could not recall your name or Mr. [S.]. Your neighbor did however state that you live next door at 8904. He further stated that you normally park your blue car in front of #8904. Furthermore, he stated that you have a son who is about 4 years old.
>
> You stated clearly during our meeting that you reside at the [P.] Lane address with your Mother the majority of the time. Mr. Nagle shared the results of his investigation. He stated that on multiple observations he observed you bringing [L.] to school from Pennsylvania 100 percent of the time. On multiple occasions he observed you exiting 8904 [R.] Street, Philadelphia, PA 19152. On one occasion he observed you exiting 8904 and taking out the trash. You stated that you own 8904 and that you rent it to a tenant. This is inconsistent with Attendance Officer Nagle's observations and findings. I questioned why you would be coming out of 8904 and taking out the trash if you rent the property to a tenant. You could not provide a coherent answer. You

[1] All excerpts of memos, letters and other documents included as exhibits have been typed verbatim into this decision. It should be assumed that any typographical, grammatical and spelling errors are the products of the respective authors of these materials. Therefore, terms such as sic have not been utilized.

produced a lease agreement with your tenant for 8904 [R.] Street. Upon inspection, Attendance Officer Nagle informed you that it was expired. You stated that it was the old agreement and that it has been extended; however, you shuffled through your papers and were unable to produce the renewed lease agreement. After advising that 8904 is currently rented by you, Attendance Officer Cox attempted to make a copy of the lease for our files. He returned to the room with a copy of the lease which you aggressively retrieved from his hand, and put back in your paperwork saying you refused to give a copy of the document.

Based on Attendance Officer Nagle's investigation and the information you shared during our October 28th meeting, it is my conclusion that [L.] does not reside in Burlington Township and is ineligible to attend school in Burlington Township. I request that you withdraw him from school immediately and enroll him in his *District of Residence* or inform us of how he will be educated per the New Jersey Compulsory Education Act.

You have the right to due process. You may appeal this decision to the Board of Education. Please inform me in writing by Friday, November 1st, if you choose to do so. If you choose to appeal, I will inform you of a Board of Education residency appeal date and time. You have a right to representation during such appeal. The appeal hearing will be presided over by the Board of Education Solicitor, Mr. David Serlin, Esq., and you have the right to present witnesses during such appeal.

If the Board of Education finds [L.] ineligible, I will send you a "final determination of ineligibility" and inform you of your final appeal rights to the New Jersey Commissioner of Education. As stated during our meeting, if [L.] is found ineligible, the Burlington Township School District will assess you tuition for the time during which [L.] attended school in Burlington Township and we believe he was ineligible. It is also our practice to file Residency Fraud, "disorderly persons," charges with the Burlington Township Police Department.

I look forward to hearing from you in writing **by Friday, November 1, 2013**.

Sincerely,
Dr. Christopher M. Manno
Superintendent of Schools

Mr. Nagle reported that on October 29, 2013, at about 6:00 a.m. he drove past 11 P. Lane and, for the first time during the investigation, saw T.O.'s car parked in front of the residence.

On November 3, 2013, at about 3:00 p.m., Mr. Nagle returned to 8904 R. Street and saw T.O.'s vehicle parked in front of the residence. He identified photographs he took that day as R-3, pictures 6 and 7.

The BOE hearing in this matter was held on November 6, 2013. Mr. Nagle testified that he attended the hearing and provided testimony. At the hearing, the BOE determined that L.M.D.-R. was not eligible to attend school in the Burlington Township district. T.O. was notified of the determination by letter dated November 11, 2013. The Notice of Final Ineligibility, from superintendent Dr. Christopher Manno, was addressed to T.O. as follows:

> This is to express the Board of Education's determination as a result of the Board Residency Hearing of November 6, 2013 regarding your son, [L.M.D.-R.], Grade PK, B. Bernice Young School. You attended the hearing along with your mother, who resides at 11 P. Lane, Burlington, NJ 08016. During the hearing, the Board heard testimony from Attendance Officer, Mr. Alfred Nagle. You also addressed the Board regarding the matter.
>
> The Board has determined that L. is not eligible to attend schools in Burlington Township as he is not domiciled in the Township as established by the testimony of Attendance Officer Al Nagle, which was confirmed by your testimony. You were provided with a copy of his report during the hearing. The following summarizes the matter:
>
> > 1. You enrolled [L.] in [the Burlington Township school district] under Affidavit of Temporary Residency on September 25, 2012. You did not include your residence in Philadelphia on the application.
> >
> > 2. An investigation into [L.'s] residency was initiated in October 2013. [L.] stated to his teacher that he "goes over a bridge" to come to school.

3. At least 15 direct observations revealed [L.] not residing at the address of record, 11 [P.] Lane, Burlington, NJ 08016. Direct observations determined [L.] residing with you at 8904 [R.] Street, Philadelphia, PA.

4. Per the attached letter, I met with you on October 28, 2013 to ascertain [L.'s] residency status. You maintained that you and [L.] reside at 11 [P.] Lane in Burlington Township. When confronted with direct evidence to the contrary, you stated that you rent out 8904 [R.] Street, Philadelphia, PA and frequently stay with your boyfriend, [J.S.], at 8906 [R.] Street, Philadelphia, PA, the residence adjacent to 8904.

5. Immediately after the meeting, Mr. Nagle visited 8906 [R.] Street, Philadelphia, PA. As noted in his report, he spoke with the owners, an elderly couple who have resided there for many years. They did not know of a [J.S.], and stated that you reside at 8904 [R.] Street and described [L.] as well, and stated he resides with you.

6. You admitted to not being truthful during the October 28, 2013 meeting with the Supt. In the attached response dated October 30, 2013 to my letter of October 28, 2013 you stated you were not "totally honest" during our meeting. During the BoE hearing, you stated that you lied because you were afraid and under duress in the Supt. meeting. You ably masked these emotions as in my judgment your demeanor and actions during the meeting were confident, aggressive, hostile, and confrontational. You stated during the Board hearing that you were alone and felt intimidated at our meeting on October 28, however, you never voiced this at our meeting. You were made aware of the purpose of the meeting in advance via the attached Initial Notice of Ineligibility and chose to participate in the meeting alone. At all times during the meeting, the Attendance Officers were respectful and professional, even when you were confrontational.

7. No evidence was offered during the October 28, 2013 Supt. meeting or during the November 6, 2013 Board hearing to contest Mr. Nagle's observations.

> 8. You referred to or presented documents that included the 11 [P.] Lane address, including a NJ 1040 tax document, pay stubs and other documents, which do not prove domicile at the address, but only that this mail is being delivered to that address, or that you have used the 11 [P.] Lane address when filing documents. You took the documents back and at this time I am not in possession of such documents.
>
> 9. The follow-up letter from my October 28, 2013 meeting with you is attached and summarizes the matter.
>
> 10. At the BoE hearing there was no testimony that you, or your son, are residing at the Burlington Township address or that your parents are supporting your son gratis. Joint custody alone will not rectify these defects.
>
> 11. The Board members expressed concern regarding your trying circumstances, however, your residence is not in Burlington Township as the evidence was that you reside in Philadelphia where you return to from your employment in New Jersey and where you pay real estate taxes.

The rest of the letter provided T.O. with her appeal rights and information regarding the assessment of tuition.

T.O.

T.O. testified that she votes and pays taxes in New Jersey. She stated that she was nervous and intimidated at the residency hearing. She stated that because of economic hardship, she rented her property to a family friend from August 1, 2012, to August 13, 2013. She indicated that she had filed an Affidavit of Temporary Residence for her and her son to stay with A.B. due to economic hardship. This was approved by the district on September 25, 2012. She stated that her employment as an auditor with Express Scripts requires that she travel every two to three months. Her mother, A.B., is her support system with respect to her son. She admitted that she resides in

Pennsylvania. She stated that she rented 8904 R. Street to a friend, but went back to live there when the lease expired on August 1, 2013.

On cross-examination, she identified R-5, which is the Burlington Township Schools Emergency Card. This card was signed on September 5, 2013, by T.O. The card lists L.M.D.-R.'s address as 11 P. Lane. She also identified R-6 and R-7, two reports issued by Children's Hospital of Philadelphia. R-6 is a report by the Regional Autism Center and R-7 is a report by the Department of Speech-Language Pathology. She testified that L.M.D.-R. was speech delayed and had some developmental issues. T.O. also stated that L.M.D.-R.'s clothing and toys were at her mother's at 11 P. Lane.

T.O. also identified R-8, a letter dated October 30, 2013, that she indicated she wrote to Dr. Manno. The letter stated:

> I would like to appeal the decision of my son being ineligible to attend school in Burlington Twp. I do respect your decision. I'm sorry that during the meeting on Monday, October 28th, I didn't have all the documents and information as I should have. I felt as though I was not totally honest nor was I prepared for this meeting. I thought, as the parent I'm supposed to live with the child in the home (here in NJ) and discovered I didn't have to be consistence with my residing. This is why I was defensive.
>
> I do own my home in Philadelphia; however, I go back and forth to my mother's home. It's unfortunate that when I was under inspection; I just came back from a business trip and giving my mother a break here and there. [L.] is a lot to deal with. He is special needs and is under Child Study team watch. In your statement you included that [L.] is at 8904 [R.] St. 100% of the time (from a week's watch). I still would like to contest that. My mother also takes care of [L.] while I am on business trips during the week as well as the weekends. Witnesses (teachers) can say they have seen my mother dropping [L.] off at school. I can truly admit that we are not in the house every single night, but [L.] is there enough. Currently I work in NJ, pay taxes in NJ. In addition, most of my bills and proof of residency is here in NJ.
>
> I did file temporary residency when I enrolled [L.]. I was and still am having financial difficulty. My home is being evaluated for foreclosure. Also, I am a single parent with no

> support system in Philadelphia. My mother, [L.'s] grandmother is the only person I have to help. [L.'s] father was deported back to Jamaica in 2011, leaving all bills and so on in Philadelphia; I am struggling to take care of, and I'm not receiving any type of financial assistance. As of October 28th (same day of our meeting); [J.R.], [L.'s] father became inadmissible to returning back to this country. Again, I am sorry I didn't bring this matter up (I am ashamed and embarrassed).
>
> It's important that I get the necessary assistance, as my mother is offering. I thought there could have been more of a warning to be sure my son is solely at 11 [p.] lane day to day. Going forward, [L.] will be at 11 [P.] Lane during the week and sometimes come with me on the weekends. During the appeal, I'll be sure to bring the necessary document to dispute the decision. Thank you.

T.O. signed the letter and added a postscript:

> P.S. please send me the pictures and forms that were read out to me. I would like to know exactly the days and times I was being watch.

At the hearing, T.O. produced a Custody and Parenting Agreement dated November 19, 2013, approved by the Honorable John L. Call, Jr., P.J.F.P., in Burlington County. (R-9.) The agreement stated that A.B. was designated as the parent of primary residence and T.O. as the parent of alternate residence. This document was also produced at the BOE residency hearing.

When T.O. was asked if she would consider returning to Burlington Township to live, she indicated that she would not.

A.B.

A.B. testified that L.M.D.-R. stays with her most of the time. She has been caring for him since he was a baby. She has lived in Burlington Township for thirty years. She stated that her daughter has had a lot of difficulties. She wishes that T.O. would move to New Jersey. She also stated that L.M.D.-R. has difficulties as well, and she worries

about putting him on the bus. She stated that L.M.D.-R. lives with her and will continue to live with her and attend school in Burlington Township.

FACTUAL DISCUSSION

Based on the testimony and documentary evidence presented, I **FIND** the following as **FACT**:

1. The Burlington Township School District had good cause to request a residency investigation when appellant's grandson told his teacher, Ms. Yost, that that he "travels over a bridge every day on his way to school" and that his grandmother lived in Burlington, but that he and his mother did not live there with her.

2. On September 5, 2013, T.O. completed a Burlington Township Schools Emergency Card for L.M.D.-R. listing 11 P. Lane, Burlington, as his address. She checked the box indicating that the address had not changed over the past year.

3. The residency investigation by Attendance Officer Nagle included his observations of T.O. crossing the Burlington-Bristol Bridge from Pennsylvania to New Jersey with L.M.D.-R. seated in the back seat on the following days: October 9, 10, 11, 14, 15 and 21, 2013. Mr. Nagle also observed T.O.'s vehicle parked outside a residence at 8904 R. Street, Philadelphia, PA, on October 13, 16, 17, and 18, 2013.

4. Mr. Nagle checked the Philadelphia tax records and determined that T.O. owned property at 8904 R. Street in Philadelphia, which was purchased in 2009.

5. Mr. Nagle also checked the residence located at 11 P. Lane, Burlington Township, on October 22, and 24, 2013. T.O.'s car was not parked there on those dates. On October 24, 2013, Mr. Nagle went to 8904 R. Street and

observed T.O. and L.M.D.-R. leaving the house and getting in the car. On all the days in question, L.M.D.-R. was recorded present and on time for school.

6. On October 28, 2013, Mr. Nagle returned to R. Street in order to determine if J.S., T.O.'s boyfriend, lived at 8906 R. Street. He spoke to the owner of 8906 R. Street, F.L., who told Nagle that he and his wife owned the property and had been living there since 2002. F.L. told him he never heard of J.S. and that he and his wife were the only occupants of the house. He did not know T.O.'s name, but accurately described her and stated that her blue car was typically parked in front of 8904 R. Street. Mr. Nagle checked the tax records for 8906 R. Street and determined that the residence was owned by F.L. and M.L.

7. On October 29, 2013, Mr. Nagle observed T.O.'s car parked outside the appellant's residence. He noted that this was the day after T.O. met with the superintendent and others about the residency issue, and that this was the only time he observed T.O.'s car parked at that location.

8. On November 3, 2013, at about 3:00 p.m., Mr. Nagle returned to 8904 R. Street and saw T.O.'s vehicle parked in front of the residence. He took pictures of the vehicle.

9. At the hearing, T.O. admitted that she resides in Pennsylvania. Although she testified that she votes and pays taxes in New Jersey, no evidence with respect to this was presented.

10. No evidence was presented that the appellant was supporting L.M.D.-R. gratis as provided for by N.J.S.A. 18A:38-1(b)(1).

LEGAL DISCUSSION AND CONCLUSION

Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school district. N.J.S.A.

18A:38-1(a). A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district. N.J.A.C. 6A:22-3.1(a)(1). The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374–76 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed.2d 518 (1999). A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection.

Criteria for proof of residency for purposes of establishing eligibility for school-district placement is found at N.J.A.C. 6A:22-3.4(a):

> (a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:
>
> 1. Property tax bills; deeds; contracts of sale; leases; mortgages; signed letters from landlords; and other evidence of property ownership, tenancy, or residency;
>
> 2. Voter registrations; licenses; permits; financial account information; utility bills; delivery receipts; and other evidence of personal attachment to a particular location;

. . . .

4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location, or to support the student;

. . . .

6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others, as appropriate;

. . . .

8. Any other business record or document issued by a governmental entity.

(b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by an applicant.

(c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form or subset of documents without regard to other evidence presented.

In this matter, I **CONCLUDE** that the weight of the evidence, including the exhibits and testimony, indicates that L.M.D.-R. resided with his mother T.O. at 8904 R. Street, Philadelphia, PA, and not with the appellant at 11 P. Lane, Burlington Township, NJ. Despite the Custody and Parenting Agreement produced by T.O., A.B. was not the legal guardian of L.M.D.-R., nor was she the parent, as required by N.J.A.C. 6A:22-3.1(a)(1). The appellant provided no proof that she was supporting L.M.D.-R. gratis as required by N.J.S.A. 18A:38-1(b)(1). T.O., L.M.D.-R.'s mother, admitted that she lived in Pennsylvania and, indeed, she was observed driving L.M.D.-R. across the Burlington-Bristol Bridge from Pennsylvania to school in Burlington Township. Her vehicle was observed parked outside 8904 R. Street at various times. Finally, she and L.M.D.-R. were observed entering the vehicle and driving away from 8904 R. Street. On those days, L.M.D.-R. was present and on time for school.

With respect to tuition reimbursement, respondent has asked for reimbursement from the appellant for the period of February 13, 2013, to June 25, 2013, of $9,085.04 and for the period of September 9, 2013, to February 4, 2014, of $9,296.30. The appellant in this matter is A.B., L.M.D.-R.'s maternal grandmother. She shares custody, according to the agreement (R-9), with T.O., but she is not L.M.D.-R.'s guardian. N.J.S.A. 18A:38-1(b)(2) provides that "[i]f in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district." As a result, any assessment of tuition should be against T.O. and not the appellant, who is neither L.M.D.-R.'s parent nor his guardian. However, T.O. was not a party to this action or the counterclaim filed by respondent. I **CONCLUDE** that should respondent wish to pursue tuition reimbursement, separate action should be undertaken against T.O. for reimbursement.

ORDER

Based upon the foregoing, it is **ORDERED** that the determination of the Burlington Township Board of Education that L.M.D.-R. is not domiciled in the Burlington Township school district is **AFFIRMED**.

With respect to respondent's counterclaim for tuition reimbursement, this matter is **DISMISSED**, as T.O. is not a party to either the claim or respondent's counterclaim.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this

order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions.: A copy of any exceptions must be sent to the judge and to the other parties.

3/17/14
DATE

Linda M Kassekert
LINDA M. KASSEKERT, ALJ

Date Received at Agency: 3/17/14

Date Mailed to Parties: 3/18/14
/lam

LIST OF WITNESSES

For Appellant:

T.O.

A.B.

For Respondent:

Alfred Nagle, Attendance Officer, Burlington Township Board of Education

LIST OF EXHIBITS

For Appellant:

A-1 Affidavit of Temporary Residence of T.O., dated September 25, 2012

For Respondent:

R-1 Residency Investigation report

R-2 Black and white photographs taken October 16, 2013, 8904 R. Street, Philadelphia, PA

R-3 Color photographs taken October 16, and 24, and November 3, 2013, 8904 R. Street, Philadelphia, PA

R-4 Letter to T.O. from Dr. Christopher Manno, dated October 28, 2013

R-5 Burlington Township Schools Emergency Card

R-6 Children's Hospital of Philadelphia Regional Autism Center Team Evaluation, dated August 14, 2013

R-7 Children's Hospital of Philadelphia Department of Speech-Language Pathology report, dated August 21, 2013

R-8 Letter to Dr. Christopher Manno from T.O., dated October 30, 2013

R-9 Custody and Parenting Agreement between A.B. and T.O., dated November 19, 2013

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OAL DKT. NO. EDU 2080-14
AGENCY DKT. NO. 37-2/14

TYSHIEK WRIGHT,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner finds that the petitioner has demonstrated entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6, with respect to his claim that he was not afforded adequate due process prior to his long-term suspension.[1]

Pursuant to *N.J.A.C.* 6A:16-7.3(a)10, in each instance of a long-term suspension, the board of education is required to provide the student with a formal hearing within 30 days from the date of suspension, where the student is given the opportunity to present a defense to the charges. In this case, it is undisputed that the petitioner was not given a formal hearing by the Board in connection with his suspension, which stemmed from an incident on January 8, 2014. The regulations also require the Board – at the completion of a long-term suspension – to either reinstate the student, or continue the suspension. *N.J.S.A.* 18A:37-5;

[1] The Commissioner is in accord with the Administrative Law Judge's (ALJ) determination that petitioner has not established an entitlement to emergent relief under *Crowe v. DeGioia,* 90 *N.J.* 126 (1982) with respect to his claim that he should be immediately allowed to return to Atlantic City High School.

N.J.A.C. 6A:16-7.3(c). Pursuant to *N.J.A.C.* 6A:16-7.3(c), this determination must be made based on the following criteria:

i. The nature and severity of the offense;
ii. The district board of education removal decision;
iii. The results of any relevant testing, assessments or evaluations of the student; and
iv. The recommendation of the chief school administrator, principal or director of the alternate education program or home or other in-school or out-of-school instruction program in which the student has been placed. [*N.J.A.C.* 6A:16-7.3(c)1.i.-iv.]

Based on the circumstances in this case, the Commissioner finds that the Board must provide the petitioner with a due process hearing to determine whether his suspension was appropriate, and if so, whether the long-term suspension should continue or whether petitioner should return to the general education program.[2] The Board is reminded that it must also continue to follow the applicable regulatory provisions concerning the educational services that must be provided to the petitioner while he is on long-term suspension. *N.J.A.C.* 6A:16-7.3(a)9.

Accordingly, the recommended decision of the ALJ is modified for the reasons expressed herein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/02/14
Date of Mailing: 5/02/14

[2] In the Order on Emergent Relief, the ALJ instructed the Board to have a due process hearing concerning the petitioner's expulsion/suspension prior to April 16, 2014. It is not known if the Board did in fact conduct the hearing. If the Board has not yet done so, it is directed to provide the petitioner with a due process hearing as soon as possible but not later than May 9, 2014.

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 2080-14
AGENCY DKT. NO. 37-2/14

T.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,
Respondent.

Matthew Sykes, Esq., for petitioner (Lawyers Committee for Civil Rights Under Law)

Kim C. Belin, Esq., for respondent (Copper Levenson, attorneys)

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE

Petitioner filed an application for emergency relief with the Commissioner of Education seeking reinstatement to Atlantic City High School (ACHS). Petitioner was denied reinstatement to ACHS after being involved in two fights at other schools. Petitioner claims that he is being disciplined by being denied reinstatement to ACHS. Petitioner seeks emergent relief and placement at ACHS because he was denied procedural due process (i.e. a hearing). For the reasons discussed below, petitioner's request for emergent relief is **DENIED**. The district is ordered to provide petitioner with

a suspension/expulsion hearing, as well as make a finding and a placement determination fitting petitioner's educational needs.

FACTUAL BACKGROUND

T.W. is an eighteen-year-old high school senior. He resides with his mother, L.W. in Atlantic City 08401. T.W. is one of seven children. He purportedly works with his grandfather as a Boy Scout Leader three to four times a week. T.W. is a high school football player and plans to attend college after graduation. He also wants to continue pursuing his passion for football.

During his senior year at ACHS, T.W. discovered he did not have enough credits to graduate on time, *i.e.,* by June 2013. T.W. only needs three classes to graduate. In September 2013, T.W. enrolled in Atlantic County Alternative High School ("ACAHS") to take accelerated credit recovery classes and planned to graduate by January 2014. The ACAHS is not under the jurisdiction of the ACHS Board of Education. It is a county school.

On or around November 1, 2013, a fight occurred involving multiple students at ACAHS. T.W. was involved in the altercation. T.W. contends that he merely tried to pull one student off of another student, attempting to break up the fight. A nearby teacher believed that T.W. was participating in the riot and referred him to ACAHS's administrators. On November 2, 2013, the ACAHS suspended T.W. pending a disciplinary meeting scheduled for November 15, 2013.[1]

On November 15, 2013, Ms. W. and T.W. met with the superintendent of the county school, the school sheriff, and ACAHS's principal. The school sheriff explained that two teachers witnessed T.W.'s involvement in the riot. Petitioner contends the teachers were not present at this meeting. T.W. attempted to explain that he was not participating in the fight, but was trying to break up a fight between students.

[1] ACAHS notified T.W.'s mother, Ms. W., about the meeting via letter.

About a week later, T.W. received a letter stating that he would not be allowed to return to ACAHS and ultimately directed him to enroll in the Atlantic City School District. T.W. alleges the ACAHS guidance counselor advised him that he would be able to return to ACHS, Atlantic City's mainstream high school. Additionally, petitioner's mother contends that records were sent to Atlantic City School District directing the District to place T.W. back at ACHS.

Before Christmas break of 2013, T.W.'s grandfather took T.W. to enroll at ACHS. They were referred to Mr. Rivera, a guidance counselor at the school. After asking T.W. several questions, he stated he had to research whether T.W. could return to ACHS. The main issue, according to Mr. Rivera, was that T.W. was expelled from ACAHS. T.W. pointed out that he had never been removed from ACHS and voluntarily attended ACAHS to make up credits to graduate.

About a week later, Mr. Rivera called T.W. and left a voicemail, informing him that he was not able to return to ACHS and must attend Viking Academy, the Atlantic City School District's alternative education program.

Petitioner also asserts that an unknown ACHS employee called Ms. W. stating that ACHS does not accept fifth year seniors. T.W. would therefore not be allowed to return to ACHS.

On or about January 7, 2014, petitioner's mother and grandparents took him to enroll at Viking Academy, ACHS's alternative high school (for problem children). Petitioner's grandfather and T.W. aver that upon entering the school, students yelled out of the windows and heckled T.W., stating, "We've been waiting for you." Counsel for petitioner proffered that his client is in the middle of a "turf war" involving different neighborhood factions (Back Maryland v. Stanley Holmes). This is the underlying root of the conflicts resulting in school fights. Petitioner is being pursued by teenagers from other neighborhoods. Many of the teenagers are concentrated in the alternative schools making it more likely that petitioner will be confronted with conflict or fights if he is reinstated in any of the alternative schools. Petitioner argues that he did not have a history of fighting for the four years he attended ACHS. It was the alternative school

placement that precipitated the conflicts and fighting. Therefore, a placement at the Viking Academy (alternative school) was bound to result in more conflict.

The Viking Academy's Principal, Charles Wilson, and Guidance Counselor, Harvey Lambert, developed a plan for T.W. to make up his remaining credits and apply to college. According to petitioner, Principal Wilson noted that T.W.'s ACAHS records indicated that he should be enrolled at ACHS. Nevertheless, T.W. was forced to start school at Viking Academy on January 7, 2014.

On January 8, 2014, multiple Viking Academy students attacked T.W., seriously injuring his shoulder. Thereafter, Principal Wilson's secretary called petitioner's mother and informed her that Viking Academy was expelling T.W. To date, neither petitioner nor his mother has received anything in writing regarding T.W.'s removal from Viking Academy. Specifically, T.W.'s expulsion was not accompanied by any written notice or a hearing. This was undisputed by ACHS.

Petitioner summarized that he has received no instruction from November 15, 2013, to about mid February 2014. He was expelled from the ACAHS on or about November 15, 2013. He was returned to the Atlantic City school system (Viking Academy) on January 7, 2014, and expelled on January 8, 2014. He received no disciplinary hearing once he was expelled from the Viking Academy on January 8, 2014. Petitioner's home instruction was not initiated until mid February 2014, and it has been delayed, sporadic, or inconsistent.

T.W. is increasingly discouraged about graduating, but still wishes to finish high school and attend college.

EMERGENT RELIEF

Petitioner seeks emergent reinstatement to the mainstream high school setting (ACHS), pending a resolution of the procedural and substantive due process violations he contends were lacking during this saga. N.J.A.C. 6A:3-1.6(b) sets forth the standards governing emergent relief. The regulation provides in relevant part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b); N.J.A.C. 1:1-12.6]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

CONCLUSIONS

I **CONCLUDE** that petitioner will not suffer irreparable harm. Petitioner is a fifth year senior. He did not graduate in 2013. He decided, on his own, to go to the county (alternative) school to finish his high school education for the 2013-2014 school year. Therefore, he severed his ties with ACHS from this point forward. Petitioner placed himself in a school where there was purportedly concentration of students from an adverse neighborhood. A fight resulted and he was expelled. This did not involve any substantive or procedural violations by ACHS. And the county school had a hearing; albeit an informal one. If petitioner was dissatisfied with that hearing/decision he should have appealed back in November 2013.

Petitioner requested to be placed back in the ACHS school system. That request was granted, with the placement determination at the Viking Academy (an in district alternative school). The placement was reasonable considering that petitioner

was a fifth year senior and was expelled for fighting from the county school. The county school had a hearing and petitioner was considered to be an instigator of the fight, resulting in his expulsion.

Petitioner was involved in another fight on the very first day of his attendance when he was accepted back in the ACHS system (January 7, 2014). He was suspended or expelled on January 8, 2014. Home instruction was slowly implemented during mid February 2014. Petitioner blames the students from the other neighborhood for his suspension/expulsion in both instances. That may be true, but it has yet to be fully determined.

With this background, I **CONCLUDE** that petitioner will not suffer irreparable harm while he is receiving home instruction. The ACHS district has a duty and obligation to protect all of the students. Petitioner has been in two fights and adjudicated responsible by the county for one of the fights. These fights were described as riots with multiple combatants. ACHS is a large urban high school. The school management cannot put a student with a recent history of fighting back in the mainstream; unless it is assured that it will not result in similar conflicts. To do so would be an act of neglect and place the remaining student body and staff at risk.

Notwithstanding petitioner's history of fighting and suspension/expulsion, he is, as a matter of law entitled to free public high school education in Atlantic City. R.R. v. Board of Ed. of Shore Reg'l High Sch., 109 N.J. Super. 337, 346, 349 (Ch. Div. 1970). But the setting for delivery of the educational programs and services, under the circumstances presented herein, is best (initially) left to the judgment of professional educators and school management rather than the legal system.

ACHS claims that home instruction is the best placement and setting for services for someone who has as recent history of being involved in violent fights. I agree for short-term purposes, pending a hearing. N.J.S.A 18A:37-2 sets forth the causes for suspension, expulsion of pupils:

> Any pupil who is guilty of continued and willful

disobedience, or of open defiance of the authority of any teacher or person having authority over him, or of the habitual use of profanity or of obscene language, or who shall cut, deface or otherwise injure any school property, shall be liable to punishment and to suspension or expulsion from school.

Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to, any of the following:

a. Continued and willful disobedience;

b. Open defiance of the authority of any teacher or person, having authority over him;

c. Conduct of such character as to constitute a continuing danger to the physical well-being of other pupils;

d. Physical assault upon another pupil;

e. Taking, or attempting to take, personal property or money from another pupil, or from his presence, by means of force or fear;

f. Willfully causing, or attempting to cause, substantial damage to school property;

g. Participation in an unauthorized occupancy by any group of pupils or others of any part of any school or other building owned by any school district, and failure to leave such school or other facility promptly after having been directed to do so by the principal or other person then in charge of such building or facility;

h. Incitement which is intended to and does result in unauthorized occupation by any group of pupils or others of any part of a school or other facility owned by any school district;

i. Incitement which is intended to and does result in truancy by other pupils;

j. Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises; and

k. Harassment, intimidation, or bullying.

The breathe of the above statute reflects the legislature's intention of protecting all students and teachers from potential harm related to unruly students. Thus, home instruction accomplishes that goal.

I am mindful that ACHS failed to provide petitioner with a hearing within a reasonable period[2] after the January 7, 2014 altercation. To date no hearing has been held. No explanation was offered why. While this is a depravation of petitioner's rights, it remains premature to simply put petitioner back in the mainstream high school setting considering the background of this case and the aforementioned purpose of the suspension/expulsion legislation. It might put students and teaching staff members at risk. The rights of petitioner must be balanced against the danger of putting him back in school without a full investigation of the case.

I am ordering that petitioner be provided an expulsion/suspension hearing consistent with law. The hearing must include a detailed determination regarding petitioner's actions or involvement in the altercation at the Viking Academy, which services and/or programs are appropriate for petitioner based upon the findings made as a part of the hearing, and where the services or programs can be appropriately delivered. The hearing must be conducted on an expedited basis considering the delays that have already accrued in this case. The services, programs, and delivery location must be educationally appropriate for petitioner and be offered in a safe location. Petitioner must be granted compensatory educational services since he has been out of school since November 2013, with the goal of graduation by the end of the summer 2014. Should petitioner resume fighting or fail to cooperate with the district without good cause, the district may take whatever other action it deems appropriate.

Finally, T.W. made a good appearance during this hearing. T.W. and his mother were present. They were polite, indulgent and seemed genuinely interested in

[2] A reasonable period to hold a school board hearing has been described as not later than 21 days from the date of suspension or expulsion. R.R. v. Board of Ed. of Shore Reg'l High Sch., supra, 109 N.J. Super. at 350; see also, Dixon v Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961) certif. denied, 368 U.S. 930 (1961).

educational matters rather than a confrontation with the district. This is a good start or restart.

Since I have determined that petitioner will not suffer irreparable harm, the balance of the emergent criteria need not be addressed.

ORDER

Based upon the foregoing, petitioner's request for emergent relief is **DENIED**. It is further **ORDERED** that ACHS Board of Education shall provide petitioner with a hearing on an expedited basis as set forth above.

It is anticipated that the additional process and procedures described herein will resolve this matter in full. In the event they do not, it is **ORDERED** that this matter be set for plenary hearing on April 16, 2014, at 1:30 p.m. at the Office of Administrative Law (OAL) in Atlantic City, New Jersey. The ACHS Board of Education must schedule its disciplinary hearing and make its recommendations and findings with regard to petitioner prior to the OAL hearing.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

April 3, 2014
DATE

W. TODD MILLER, ALJ

/cad/lam

DOCUMENTS RELIED UPON

Petitioner's moving brief (2/10/14) and reply brief (3/12/14)

Respondent's opposition brief (3/4/14)

182-14

STATE BOARD OF EXAMINERS DKT. NO. 1011-245
AGENCY DKT NO. 11-12/13A

IN THE MATTER OF THE	:	
REVOCATION OF THE	:	COMMISSIONER OF EDUCATION
CERTIFICATES OF P.S. BY THE	:	DECISION
STATE BOARD OF EXAMINERS.	:	

Order of Revocation by the State Board of Examiners, November 1, 2013

For the Respondent-Appellant, Stephen J. Kaflowitz, Esq.

For the Petitioner-Respondent State Board of Examiners, Angela L. Velez, Deputy Attorney General (John J. Hoffman, Acting Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with the appellant, P.S.'s appeal of the State Board of Examiners' (Board) Order of November 1, 2013, revoking her Teacher of Music Certificate of Eligibility and Teacher of Music Certificate. On appeal the appellant does not challenge the Board's determination that she engaged in unbecoming conduct but instead that her certificates should not be revoked. The appellant argues that the Commissioner should reject the Board's decision revoking her certificates and impose the two year suspension of her certificates that was recommended by the Administrative Law Judge.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

After full consideration of the record and all submissions, the Commissioner finds that the record adequately supports the Board's determination that the appellant engaged in unbecoming conduct and that the revocation of the appellant's certificates was the appropriate penalty. There is nothing in the record to suggest that the Board's decision was arbitrary, capricious or unreasonable, and as a result the Commissioner finds no basis upon which to disturb the decision of the State Board of Examiners.

Accordingly the decision of the State Board of Examiners is affirmed for the reasons expressed therein.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/02/14
Date of Mailing: 5/02/14

*This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
P.S.[1]	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 1011-245

At its meeting of July 28, 2011, the State Board of Examiners (Board) reviewed information it had received from the Orange Township School District (Orange) regarding P.S. Orange reported that P.S. had resigned from her tenured position following allegations of unbecoming conduct involving a student. Specifically, Orange submitted a statement summarizing a video which had been taken of P.S. interacting with a student, M.N., in an inappropriate manner. M.N. was being held face down on the floor of the band room by other students while P.S. stood over him. M.N.'s pants were below his buttocks and his underwear was covering his buttocks. P.S. then proceeded to take a long metal band stick and inserted it in between M.N.'s buttocks through M.N.'s underwear. P.S. also used a twisting motion and left the stick there for approximately 30 seconds. At one point, while the stick was still inserted, P.S. patted and slapped M.N.'s buttocks while admonishing him. P.S. can also be heard on the video saying "I'm going to put it all the way in." During the course of the incident M.N. can be heard telling P.S. to stop. Orange also informed the Board that it had reported the incident to local law enforcement and the Division of Youth and Family Services (referred to herein as DCF for Department of Children and Families). P.S. currently holds a Teacher of Music Certificate of Eligibility, issued in October 2000 and a Teacher of Music certificate, issued in November 2001. After reviewing the above information and watching the video, at its September 22, 2011 meeting, the Board voted to issue an Order to Show Cause to P.S. as to why her certificates should not be revoked.

The Board sent P.S. the Order to Show Cause by regular and certified mail on October 3, 2011. The Order provided that P.S. must file an Answer within 30 days. P.S. responded on October 19, 2011. In her Answer, P.S. denied all of the allegations in the Order to Show Cause and stated that there was no just cause to revoke her certificates. (Answer, ¶¶ 1-5, 4). She also specifically denied "any and all

[1] As the record in this matter was sealed, the respondent will be referred to by initials.

allegations of physical abuse and taunting of M.N." (Answer, ¶ 4). In several Affirmative defenses, P.S. claimed that Orange was estopped from supplying information to the Board because Orange did not conduct an adequate investigation of the allegations; that the proceedings were barred by the doctrine of laches because the allegations were nearly two years old; that DCF had not completed its investigation; that P.S. had never been afforded the opportunity to conduct her own independent investigation; that the Board lacked just cause for the proceeding; that the allegations were vague; and that the information Orange provided was obtained through incorrect, misleading or incomplete allegations. (Affirmative Defenses, ¶¶ 1-7).

Since there were material facts in dispute, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. Upon a motion by DCF, on June 27, 2012 Administrative Law Judge (ALJ) Tahesha L. Way entered an order consolidating P.S.'s appeal of DCF's finding of abuse with the certification matter and declaring that DCF had the predominant interest in determining whether abuse had occurred. ALJ Way heard the matter on July 23, 2012, September 14, 2012, October 25, 2012, November 26, 2012 and March 22, 2013. The record closed on April 26, 2013, and the ALJ issued an Initial Decision on June 6, 2013. *Department of Children and Families v. P.S. and In the Matter of the Certificate of P.S.*, Dkt. Nos. HSV 4306-12 and EDE 15220-11 (Consolidated) (Initial Decision, June 6, 2013).

In that decision, ALJ Way found that in January 2010, an incident occurred in the Orange High band room. (Initial Decision, slip op. at 14). M.N., an eighteen year old student, "was held face down in jest, with his orange underpants showing, by several band members whom he occasionally wrestled." *Ibid.* While M.N. was in this position, P.S. placed a drumstick over M.N.'s underpants, at the top of his buttocks. *Ibid.* P.S. repeatedly moved the drumstick while M.N., "in an exaggerated fashion," told her to stop. *Id.* at 14-15. The ALJ also found that P.S. told M.N. that she would stick a drumstick into his buttocks the next time he smoked marijuana and moved her hand on top of that area and rested it there. *Id.* at 15. ALJ Way also determined that M.N. and the band members present during the incident "never felt threatened, harmed or in fear" and that M.N. was not injured. *Ibid.* The ALJ concluded that P.S.'s

action was not sexual in nature, nor was it perceived to be. *Ibid.* Rather, it was a "playful" disciplinary measure meant to address M.N.'s destructive behaviors in an attempt to deter him finally from drugs and crime. *Ibid.*

After assessing the evidence, ALJ Way concluded that the Board had proven that P.S. had engaged in conduct unbecoming a teacher.[2] *Id.* at 19. The ALJ determined that although the incident was not sexual in nature, P.S.'s decision to participate was "less than exemplary." *Ibid.* However, ALJ Way concluded that revocation of P.S.'s certificates was not warranted here because the incident included horseplay, was not initiated by P.S. and her physical contact with M.N. was not sexual in nature, but rather, a sincere attempt to deter him from drugs. *Ibid.* Those factors, combined with P.S.'s "stellar teaching career," led the ALJ to impose a two-year suspension of P.S.'s certificates. *Ibid.* Both P.S. and the Deputy Attorney General (DAG) representing the Board filed Exceptions to the Initial Decision.

In her Exceptions, P.S. argued that a one-year suspension would have been a more appropriate penalty.[3] (P.S. Exceptions, p. 4). She referenced a letter she had previously submitted seeking to resolve the case which detailed the contributions she had made to students over the length of her teaching career. (P.S. Correspondence, July 6, 2012). In that letter, she also noted that she did not seek to excuse her conduct and stated that "those actions are certainly worthy of the Commissioner's strong condemnation." (P.S. Correspondence, July 6, 2012, p. 2).

In her Exceptions, the DAG noted that the video recording of the incident, which was entered into evidence, clearly showed that while M.N. was being held down on the ground, P.S. "inserted a drumstick between his buttocks over his underwear, twisted the stick, slapped and stroked his buttocks and threatened to 'stick [the drumstick] all the way in'." (DAG Exceptions, p. 2). The DAG argued that P.S. escalated the incident and imposed excessive discipline on M.N. and that, as a result, her certificates should be revoked. (DAG Exceptions, pp. 3-8). The DAG further claimed that P.S.'s characterization

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[2] The ALJ reversed DCF's substantiation of sexual abuse because M.N. was eighteen at the time of the incident and beyond DCF's jurisdiction and because there was insufficient proof that V.L., a seventeen year old witness, was harmed or at risk of harm by P.S.'s actions. That portion of the Initial Decision was adopted by the Assistant Commissioner of DCF and is not at issue in this decision.

[3] The remainder of P.S.'s Exceptions focused on the DCF aspects of the case and will not be discussed here.

of the event as "horseplay" demonstrated that she lacked the proper judgment and self-restraint necessary to be entrusted with the care and custody of children. (DAG Exceptions, p. 10). The DAG also noted that "the Legislature has articulated that physical discipline by teachers is not permissible" and that the Board has "continuously revoked the teaching certificates of educational professionals who engage in physical discipline of their students." (DAG Exceptions, pp. 14, 16)(Citations omitted). According to the DAG, P.S. "violated both the letter and intent of the law prohibiting corporal punishment." (DAG Exceptions, p. 17). Furthermore, the DAG argued that P.S.'s lengthy teaching experience and position as a mentor to students in the band, especially M.N., made her actions all the more inexcusable. (DAG Exceptions, pp. 18-19). The DAG therefore concluded that P.S.'s certificates should be revoked. (DAG Exceptions, p. 20).

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of November 1, 2013, the Board reviewed the Initial Decision, and the Exceptions submitted by both parties. After full and fair consideration of the Decision and Exceptions, the Board voted to modify the Initial Decision as to the penalty imposed.

As noted above, the ALJ concluded that P.S. had engaged in horseplay with M.N. under the guise of discipline meant to dissuade him from further bad behavior. (Initial Decision, slip op. at 14-15). The DAG urges the Board to amend several of the ALJ's factual findings regarding the incident and to impose the most stringent penalty of revocation. The Board agrees with the DAG that revocation is warranted here but does not need to disturb the ALJ's factual findings in order to do so.

"Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, the Commissioner has long held that teachers serve as role models for their students. One viewing of the video of the incident acutely demonstrates P.S.'s failure to grasp what being a role model means. Furthermore, the ALJ's insistence that M.N. and the band members present never felt "threatened, harm or in fear" or that M.N was not humiliated or injured by P.S.'s actions is a gross distortion of the standard

of behavior required here. It also wrongfully serves to diminish the teacher's responsibility by linking her conduct to the student's reaction.

Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). There need not be a finding of horseplay or abuse of discipline here to know that P.S. crossed, not only a boundary that should exist between a teacher and student, but one of human decency as well. P.S. herself noted that her actions were certainly "worthy of the Commissioner's strong condemnation." The Board wholeheartedly agrees. Some actions are inexcusable and must be treated as such. P.S.'s actions alone, without more, warrant revocation. Moreover, her misguided attempt at "discipline" demands the harshest consequence. The Board believes that the only appropriate response to P.S.'s breach is the revocation of her certificates. The Board therefore modifies the Initial Decision as to penalty.

Accordingly, on November 1, 2013, the Board voted to modify the Initial Decision as to penalty and ordered to revoke P.S.'s certificates. On this 1st day of November 2013, the Board formally adopted its written decision to modify the Initial Decision in this matter, and it is therefore ORDERED that P.S.'s Teacher of Music Certificate of Eligibility and her Teacher of Music certificate be hereby revoked effective immediately. It is further ORDERED that P.S. return her certificates to the Secretary of the State Board of Examiners, Office of Licensure, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

Date of Mailing: 11/8/13

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

33 Washington Street
Newark, NJ 07102
(973) 648-6008

A copy of the administrative law judge's decision is enclosed.

This decision was mailed to the parties on JUN - 7 2013

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(CONSOLIDATED)

RECORD SEALED

DEPARTMENT OF CHILDREN AND FAMILIES,	OAL DKT. NO. HSV 4306-12
Petitioner,	AGENCY DKT. NO. AHU 12-0342
v.	
P.S.,	
Respondent.	
And	
IN THE MATTER OF THE CERTIFICATES OF P.S.	OAL DKT. NO. EDE 15220-11
	AGENCY DKT. NO. 1011-245

Christina Duclos, Deputy Attorney General, appearing for petitioner Department of Children and Families (Jeffrey S. Chiesa, Attorney General of New Jersey, attorney)

Angela L. Velez, Deputy Attorney General, appearing for petitioner State Board of Examiners (Jeffrey S. Chiesa, Attorney General of New Jersey, attorney)

Marcus J. Colicelli, Esq., **Robert Schwartz,** Esq., **Wolodymyr P. Tyschenko,** Esq., and **Adam Epstein,** Esq., appearing for respondent P.S. (Caruso Smith Edell Picini, attorneys)

Record Closed: April 26, 2013 Decided: June 6, 2013

BEFORE **TAHESHA L. WAY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

P.S. is challenging a February 28, 2011, substantiation by the Department of Children and Families (DCF), Institutional Abuse Investigation Unit (IAIU), in connection with an allegation that P.S. sexually abused students M.N. and V.L. on one occasion at Orange High School. Also in connection with this incident, the New Jersey Department of Education, State Board of Examiners, (Board) seeks to revoke or suspend P.S.'s teaching certificates on the basis that her conduct was unbecoming a teacher. On September 22, 2011, the Board issued an Order to Show Cause why P.S.'s teaching certificates should not be revoked. The Order to Show Cause was based upon an investigative report sent by the Township of Orange's superintendent of schools following P.S.'s resignation, in which it was reported that P.S. physically abused and taunted M.N. On or about October 28, 2011, P.S. filed an Answer to the Order to Show Cause denying any wrongdoing.

Accordingly, the Commissioner of Education and the DCF transmitted the matters to the Office of Administrative Law for determination as contested cases under OAL docket numbers EDE 15220-11 and HSV 4306-12, respectively. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On June 28, 2012, the cases were consolidated and I determined that the DCF has the predominant interest in the outcome of this proceeding. N.J.A.C. 1:1-17.3(a); N.J.A.C. 1:1-17.5(a). Hearings occurred on July 23, 2012, September 14, 2012, October 25, 2012, November 26, 2012, and March 22, 2013, and the record closed upon the receipt of post-hearing submissions.

FACTUAL DISCUSSION

Background

At the time of the incident, P.S. was a regular music teacher and band director at Orange High School (Orange High).[1] She is the holder of a Teacher of Music Certificate of Eligibility issued in October 2000, and a Teacher of Music Certificate issued in November 2001.

Orange High student M.N., who played the tuba, served as one of three band captains. An incident occurred in Orange High's band room during which M.N. was held face down on the floor by two band members in front of other band members. P.S. was handed a drumstick by a band member, she positioned it towards M.N.'s buttocks, then slapped and placed her hand on that area.

In September 2010, Ronald Lee, who served as the superintendent of Orange public schools since July 2009, became aware of this incident. A.O., a June 2010 graduate of Orange High who had served as a dance line captain for the marching band and was present at time of the incident, provided to him an undated CD containing video of the incident with M.N. and P.S. that had been recorded on a cell phone.[2] A.O. did not advise Lee about the contents on the CD, nor did she view it with him. Yet, A.O. represented that she was providing the video because she was tired of P.S. gossiping about her. After viewing the video, Lee immediately contacted the Orange School District's attorney, Melvin Randall, because P.S. appeared to be pushing an item between a student's buttocks, slapping him in that area, and making other students participate, which Lee felt were actions unbecoming a teacher. (P-2a; P-9.) On or about September 13, 2010, Lee advised P.S. that he had viewed the CD depicting her participating in what he felt was an unprofessional act. On Randall's advice, Lee told P.S. that she could either resign or the District would have to proceed with tenure

[1] P.S. commenced teaching at Orange High in 2004. Prior to this she had taught music in the Paterson elementary schools since September 2001.

[2] "Undated CD" will be used interchangeably with "video," as used at the hearing.

charges. P.S. resigned on September 14, 2010. (P-3; P-4.) In correspondence dated September 17, 2010, Lee reported the incident to the State Board of Examiners. (P-2.)

Upon the advice of another school board attorney, Perry Lattiboudere, Lee reported the incident to the Orange Police Department on September 14, 2010. On that same date, the DCF received a referral from Lee indicating that he had received a video showing P.S. "simulating sticking a stick" in M.N.'s rear. (P-5.) On September 15, 2010, DCF investigator Ongeri Aminga commenced an investigation and met with Lee and viewed the CD.[3] Aminga was provided a copy of the CD, Lee's report, and the names of individuals who may have been involved in the incident. (P-2a; P-9[4]) Aminga returned to the school several times and asked for random interviews of students, which Lee refused for privacy reasons. Aminga also asked for a list of names of band members, which the District supplied, although it took a while for the District to gather the names.

Thereafter, Aminga contacted the Essex County Prosecutor's Office (ECPO), which advised him to cease his investigation until given permission from them to continue. Once the authorization was granted, Aminga interviewed M.N. via telephone on October 15, 2010. M.N., who stated that the incident occurred in February 2010, advised that the video spoke for itself, with him and P.S. playing around. M.N. also specified that P.S. took care of him at one point in his life when he lived on the streets. He admitted that the act depicted on the video looked inappropriate, but he said that he did not want anything to happen to P.S. In her interview, P.S. confirmed her actions in the video, and advised that the incident occurred in January or February 2010. P.S. explained that she and M.N. were joking around, and that it was an act of discipline because M.N. had been returning to his old bad habits. (P-6.)

Aminga made unsuccessful attempts to interview A.O., and therefore could never verify with her the exact date of the incident or whether she filmed it. He was advised

[3] Aminga has been a senior investigator with the IAIU since 2004, overseeing investigations involving child abuse and neglect in institutional settings, like schools. He possesses a master's degree in criminal justice.

[4] It was represented that the report was revised for a grammatical change suggested by Randall. (P-9.)

by Detective Suarez of the ECPO that there would be no charges instituted against P.S., primarily because M.N. was adamantly against any charges. The DCF made requests for a copy of M.N.'s statement to the ECPO, but to no avail. (P-6.)

Nilsa Rodriguez, who has been a floater IAIU investigator since 2005 and holds a bachelor's degree in criminal justice, handled the investigation while Aminga was on leave. She interviewed two students, one of whom witnessed the incident. On December 29, 2011, student V.L., who was a former band member and a minor at the time of the incident, reported that the incident occurred in the Fall of 2010 after band class in front of about fifteen students, and that it lasted almost five minutes.[5] Rodriguez was of the belief that V.L. nervously recounted that M.N. was held down by two unnamed students, and P.S. pulled down M.N.'s pants, then stuck a drumstick on top of his underwear. V.L. also reported that she and P.S. got along well, and that the interaction between P.S. and M.N. was "out of line, but that P.S. was not out of line." (P-6.)

Ultimately, on February 28, 2012, a finding of substantiated child abuse was made against P.S. as to M.N. and V.L. (P-6.) In particular, it was found that sexual abuse/sexual penetration occurred, as P.S. inserted a drumstick over M.N.'s clothing and into his buttocks. Regarding V.L., the DCF investigation determined that sexual abuse/sexual exploitation occurred, as V.L. was seventeen and present at time of the incident, placing her at substantial risk of harm. (P-7; P-7a.)

In addition to the foregoing, testimony revealed that M.N. had serious behavioral problems in the years prior to the incident, including gang involvement, substance abuse and criminal activity. As a result, M.N. had been removed from his home on several occasions by his father. M.N. looked upon P.S. as a "mother figure," and P.S. allowed M.N. to stay with her for two weeks subsequent to the incident. While working at Orange High, P.S. had increased the band population from twelve to ninety students. She has been a music teacher for grades five through eight at Marion P. Thomas Charter School (MPTCS) in Newark since October 2010. Prior to and after this incident,

[5] V.L.'s birth date is referenced in the Investigation Summary. (P-6.)

P.S. has not been the subject of any school disciplinary action, nor has she been accused of any form of student abuse.

The preceding background statements are uncontroverted, and are therefore **FOUND AS FACTS** in this case.

Testimony

Ronald Lee

Lee averred that prior to the incident, P.S. had a good reputation. Lee further indicated that the video appeared to depict P.S. sticking a pronged item through M.N.'s underpants. (P-1.) Lee recognized that the adult performing the act was P.S. because of her voice, her 5'1" stature, and various students called her name. Lee recognized the face of the student held down, and validated that it was M.N. upon a review of the band membership list and the members' photos.

Lee believed P.S. was remorseful during their September 13, 2010, meeting. Although Lee was uncertain whether M.N. was eighteen at time of the incident, he reported the incident to the DCF because M.N. was a student under a teacher's care, and the teacher and student were involved in a shocking situation. Finally, Lee explained that tenure charges were never brought against P.S., due to her resignation.

Ongeri Aminga

Aminga believed the video showed sexual penetration by P.S. on M.N., because he saw two students holding M.N. down on the floor and P.S. pushing down M.N.'s pants while poking a drumstick between his buttocks. The incident went on for almost two minutes, with M.N. screaming for P.S. to stop. During her interview, Aminga believed that P.S. was a sincere mentor to M.N.

A.O.

A.O. was a dancer in the school's marching band from the spring of her sophomore year until approximately December 2009, when she voluntarily left the band. A.O. was selected as one of two dance line captains her senior year by P.S. and outgoing section leaders.[6]

A.O. could not specify whether the incident occurred during the fall of her junior year or her senior year.[7] Yet, she was certain that it occurred after Orange High's football team went to championships, the band members present at the time of the incident were section leaders, and P.S. appeared "irked" that day. A.O. testified that P.S. repeatedly stuck a snare drumstick into M.N.'s buttocks while band members held him down. (P-1.) The incident was video-recorded on A.O.'s cell phone, yet A.O. could not verify if she videotaped the incident. A.O. nonetheless averred that she viewed the video either the evening or morning after the incident occurred.

During the spring of 2010, A.O. decided to download the video from her cell phone onto her computer because she was purchasing a new phone, and she was uncertain if she would someday need to provide the video to the proper authorities. She added that around November 2010, she supplied Lee with the video because P.S. was giving her dirty looks when they encountered each other at school games, and P.S. referred to her as a "slut."

A.O. further explained that P.S. often disciplined band members, and the type of act that occurred during the incident with M.N. had occurred twice with other band members. Still, A.O. could not recall any details of those other incidents, like the identities of the other band members involved. A.O. was also unaware of the reason M.N. was being disciplined in this incident. While A.O. could not testify that the video shown at the hearing was an exact copy of what she had given to Lee, or if she was the girl pictured in the video wearing a slanted heart necklace, she acknowledged that the

[6] According to A.O., she reported to a dance coordinator and another adult. These two individuals then reported directly to P.S.

[7] A.O. was a junior in school year 2008–09, and a senior in school year 2009–10.

video accurately reflected the incident, including an identification of M.N., given his voice and dark clothes.[8]

Finally, A.O. said that she has known M.N. since grammar school. At Orange High, A.O. was also involved in the chorus. She explained that the band's football season went from September to December if the team made it to championships, and the parade practices began in January. A.O. had significant responsibilities as dance line captain, stating that the dance line members were akin to her own kids. Thus, A.O. was tremendously affected by P.S.'s decision to take away her dance line captain position because she was late for practice, despite the fact that she had provided notice to P.S. that she would be tardy. A.O. voluntarily left the band after they went to championships because she could no longer tolerate P.S. Moreover, A.O. stated that P.S. attempted to prevent A.O. from graduating by falsely accusing her of stealing a dance uniform that was subsequently located at a cleaning establishment that Orange High used.

M.N.

M.N. averred that the incident in question occurred around January 2010, and "with 700 percent certainty" he was eighteen at that time.[9] In support of his assurance of the timing of the incident, M.N. explained that he was forced out of his home the day after his eighteenth birthday. He then stayed with a friend and borrowed his friend's clothing, like the orange undershorts he was wearing underneath his pants at time of the incident. (P-1.) Regarding the incident, M.N. acknowledged that P.S. was standing over him, but he said that she never penetrated his derriere area with the drumstick, and he was exaggerating as he told her to stop. Moreover, even though his voice was raised during the incident, the actions were "horseplay," because there were occasions when he and the two band members who held him down wrestled. M.N. did not feel sexually or physically abused or threatened by P.S. or the band members who held him

[8] For record purposes, counsel for P.S. objected to the entry of the video into evidence positing that it was not a true and accurate representation of the incident. Yet, testimony from A.O., M.N., and P.S. confirmed the events depicted. Lee and Aminga also confirmed that that video shown at time of the hearing reflected the same content of events they originally viewed in September 2010.

[9] M.N.'s date of birth is also represented in the IAIU Investigation Summary. (P-6.)

down. Rather, the incident was also a form of discipline because he had let P.S. and the band down days earlier. Specifically, P.S. was absent for one of the football games, and M.N. therefore had been charged with supervision of the young band members on a bus. M.N., however, chose to smoke marijuana as he rode with his friends, while the band members looked on.

In addition, M.N. explained that the two primary band seasons included football in the fall and parade in the spring, but the band practices year-round. According to M.N. P.S. always had sound intentions for him, over the past seven years. He indicated that this type of incident never occurred with any other band member. Finally, during the incident, M.N. saw V.L. hand her cell phone to A.O., and A.O. filmed the incident.

John H. Gamble, Jr.

For the past three years, Gamble has served as the principal at MPTCS. He participated in the hiring of P.S. as a general music teacher for grades five through eight. However, P.S., who was recommended by an East Orange teacher, was not thoroughly vetted due to the school's immediate need for a music teacher. Gamble, therefore, learned of the reason P.S. left Orange High sometime during her first year at MPTCS.

According to Gamble, MPTCS's music program would suffer without P.S. MPTCS is the only New Jersey charter school with a marching band, which P.S. successfully created. P.S. also helped to develop the Performing Arts With Style (PAWS) program, which is an in-school and after-school program to enhance students' music skills. (R-2.)

P.S.

P.S. explained that Orange High band's calendar consists of the football season, from September through November, but it could extend through January should the team make the playoffs. The concert season occurs in the winter, parade starts in February, and they have band practice in the summer. P.S. communicated with the

band members' parents because of the rigorous practices until 10 p.m., and she taught the students concert etiquette. Moreover, the dance line was connected to the marching band, and it had a dance instructor who worked alongside P.S.

P.S. and her band members received many letters of commendation and appreciation from people such as Orange High supervisor of Visual and Performing Arts Peter S. Crosta, former Orange High principal Samuel H. Hazell, and former Orange assistant superintendent Constance L. Frazier. (R-3; R-4; R-6; R-7; R-8; R-9; R-10.) Additionally, P.S. was procedurally observed during her music class from 2006 through 2009 and was described as caring and as acting in loco parentis for her students. (R-11; R-12; R-13; R-14; R-15.) Yet, an orderly environment was recommended, and it was reported that the students check in with her prior to Crosta's arrival to her class. (R-12; R-13; R-15.)

P.S. and others selected A.O. as a dance line captain her junior year because of A.O.'s dance experience and leadership qualities. However, A.O. voluntarily relinquished this position during her senior year around December 2009, because she was busy with her senior recital. P.S. disputed that she had personal issues with A.O. To the contrary, it was A.O. who seemed to have issues. She often interrupted dance line practices, and attempted to organize a coup against the new dance line captain after leaving her captain position. A.O. was also late multiple times for practices, resulting in her having to do extra laps or push-ups. P.S. explained that she did not intentionally seek to hinder A.O. from graduating. P.S. served as a senior class advisor charged with the task of ensuring that students returned all school items or they would not graduate. A.O.'s $200.00 dance line costume was not marked returned, and P.S. mandatorily reported this to the principal.

In 2007, P.S. became acquainted with M.N. during his sophomore year in her general music class. M.N. initially was disrespectful towards P.S., until they developed a connection; both are of Jamaican descent, and P.S. easily understood M.N.'s accent and spoke Jamaican Patois. M.N. also respected P.S. because she was familiar with the strict Jamaican educational system, which views school as a privilege, requiring students to pass a certain test in third grade to continue in the school system.

Additionally, M.N. would always request P.S.'s attendance at his school discipline meetings because she could translate for M.N.'s father, who had a strong Jamaican accent. M.N.'s dad, who worked in P.S.'s neighborhood, would also discuss M.N.'s behavioral issues with P.S., and they agreed that band was a good activity for him.

Due to the foregoing, M.N. decided to join the band. However, M.N.'s father sent him to Jamaica midway through his sophomore year. M.N. contacted P.S. several times seeking her assistance to return home, and P.S. asked his father to give him a second chance. Yet, upon his return to New Jersey, which occurred almost a year thereafter, M.N.'s addiction to drugs like marijuana increased. After a second behavioral incident was brought to P.S.'s attention, she threatened to eject M.N. from the band because he was one of three captains, and charged with the responsibility of staying "clean." M.N. sincerely apologized, and P.S. kept him in the band, as she felt that kicking him out of band would have been a "nail in the coffin." However, M.N. continued to misbehave, and he was permanently evicted from his home during the cold weather. He stayed with friends, slept in a park, and was arrested for trespassing in an abandoned building.

P.S. testified that the male band members occasionally wrestled with each other, and that she would quickly halt it. In particular, on the date of the incident M.N. was caught by Orange High security smoking marijuana outside the school. A meeting was then held among the band officers, P.S. and M.N. M.N. tearfully apologized. After the membership decided to give M.N. another chance, they started to roughhouse with M.N. as a form of team building and to reflect that he was not getting excused without a reprimand. M.N. accepted it because he was in the wrong. At no time did P.S. instruct the male band members to hold down M.N. P.S. was encouraged to participate because the band members felt that M.N. had wronged her also.

P.S. felt the incident was a light-hearted attempt to work with M.N., which included laughter, so that M.N. would no longer slide behaviorally. P.S. admitted that she would have handled the situation differently if it were another student. She explained that M.N.'s underwear always showed because he wore his pants low. P.S. was adamant that she did not pull down his underwear, but acknowledged placing the drumstick on his lower back and the top of his buttocks, and threatening to stick the

drumstick into his buttocks for deterrence from future smoking. P.S. also represented that she then rested her hand around M.N.'s lower back area. She disputed telling Aminga that she poked M.N. in the buttocks with the drumstick. P.S. further expressed that the incident was not sexual in nature, no one was placed in danger or fear, and she did not notice any differences in her band members thereafter. In anything, her relationship with M.N. became better, with M.N. babysitting her son, and staying with her two weeks that spring at the request of her parents, who were acquainted with M.N.'s dad through their church.

Finally, P.S. believed that the incident occurred in the spring of 2010, because she recalled wearing a light coat. P.S. expressed that she would never harm any student, and would take back the incident if she could. She always assisted her students with their problems, and even helped them complete their college applications, because she knew the benefit of music scholarships. P.S. expressed that she was also devoted to her students, as is evidenced by the time that she left the hospital early when she had a blot clot in her leg so that she could be there for her students' production of "Fame."

Discussion

In this case, the crucial disputed facts concern the date of the incident and its' nature. In order to resolve the inconsistencies, the credibility of the witnesses must be determined. Credibility contemplates an overall assessment of the story of a witness in light of its rationality, internal consistency, and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963). The choice of rejecting the testimony of a witness, in whole or in part, rests with the trier and finder of the facts and must simply be a reasonable one. Renan Realty Corp. v. Cmty. Affairs Dep't, 182 N.J. Super. 415, 421 (App. Div. 1981).

While hearsay may be employed to corroborate competent proof, "in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it." Weston v. State, 60 N.J. 36, 51 (1972). Additionally, previous

statements made by a child relating to any allegations of abuse or neglect shall be admissible in evidence, provided, however, that no such statement, if uncorroborated, shall be sufficient to make a fact finding of abuse or neglect. N.J.S.A. 9:6-8.46. The most effective types of corroboration are eyewitness testimony, a confession or admissions by the accused, and medical or scientific testimony documenting abuse. N.J. Div. of Youth and Family Servs. v. Z.P.R., 351 N.J. Super. 427, 436 (App. Div. 2002).

Having examined the evidence and observed the demeanor of all witnesses, I credit the testimony on behalf of P.S. that the incident occurred in 2010 after M.N. had turned eighteen. Petitioners' evidence to the contrary was unpersuasive. For one, it is difficult to give deference to the testimony of A.O. when she could not confirm filming this remarkable incident. She was also unsure as to the school year during which it occurred, and none of petitioners' witnesses could sufficiently identify the date nor corroborate A.O.'s testimony with certainty. For example, V.L. who was also present at time of the incident reported that it may have occurred the Fall of 2010, which again is inconsistent with A.O.'s belief. A.O. also came across as biased and vengeful towards P.S. in explaining the reason she left her position as dance line captain, P.S.'s attempt to block her from graduating, and the gossip allegations. Even more, A.O. averred that this type of incident had occurred on other occasions. Yet, it is reasonable to expect that A.O. would be able to provide some specifics regarding those other incidents, but she could not. The petitioners' reliance upon the band football season and A.O.'s departure date from the band to establish that the incident occurred before M.N. turned eighteen is also untrustworthy, because A.O. testified that the football team went to championships, and there was believable testimony that A.O. returned for band practice after she had formally left. To the contrary, M.N., convincingly testified with "700 percent certainty" that he was eighteen at the time of the incident. This testimony was also supported via the specifics that M.N. provided concerning his living situation leading up to the incident. Finally, M.N. and P.S.'s initially and consistently reporting to Aminga that the incident occurred around January 2010, buttresses the plausibility that the incident transpired during that time period.

Next, P.S.'s assertion that she only placed the drumstick at M.N.'s lower back and the top of M.N.'s buttocks and then rested her hand was not fully credible. That is, it appears on the video that the drumstick was moving, as it made an indentation over M.N.'s underpants and between his buttocks, and subsequently her hand moves before rested on top of that area. Still, I must credit P.S.'s version of events concerning the nature of the incident. The video does not reflect P.S. pulling down M.N.'s pants, nor was this ever corroborated by petitioners' witnesses. The testimony on behalf of P.S. indicating that P.S. was not the initiator went unchallenged by petitioners' witnesses. Additionally, although M.N. thinks of P.S. as a caretaker, he nonetheless did not come across as partial, because he honestly explained that the incident occurred as a direct result of his negative behavior, and that he was exaggerating and was in no distress. Moreover, one must defer to M.N.'s convincing testimony that there was no penetration, because the video does not clearly reflect that the drumstick was inserted into M.N.'s anus, as M.N. was wearing underpants and there existed no credible testimony otherwise. Also, A.O.'s testimony that she witnessed the drumstick stuck in M.N.'s buttocks carries slight weight, given her uncertainty as to the precise location from which she viewed the incident. M.N. also did not express any fear of harm or danger as a result of the incident. The incident was uniformly described as an act of discipline of M.N. by those present. P.S. also meticulously explicated the circumstances leading to the incident, which included M.N.'s tearful apology to the band membership at the meeting and the male band members' decision to wrestle M.N. down to the ground, and the basis for her participation. Furthermore, Aminga even expressed his belief in the sincerity of P.S.'s mentor relationship to M.N., and Lee's report to the DCF noted that it appeared on the video that P.S. was "simulating sticking" the drumstick into M.N.'s buttocks.

Accordingly, I **FIND** the following to be the salient **FACTS** of this case. Around January 2010, an incident occurred in the Orange High band room after a meeting. Specifically, M.N., who was eighteen years old, was held face down in jest, with his orange underpants showing, by several male band members whom he occasionally wrestled. Also at that time, P.S. was encouraged by the band members to participate. P.S. placed a drumstick over M.N.'s underpants around the top of M.N.'s buttocks. P.S. then repeatedly moved the drumstick, while M.N. in an exaggerated fashion told her to

stop. P.S. also advised M.N. that she would stick a drumstick into his buttocks the next time M.N. smoked marijuana, and she moved her hand on top of that area then rested it. The incident occurred for several minutes, but M.N. and the band members present never felt threatened, harmed or in fear. M.N. also did not sustain any injury. P.S.'s aforementioned act also was not intended to be sexual in nature nor did the band members feel it was sexual. Rather, the circumstances surrounding the incident were that M.N. had continued to engage in destructive behaviors. P.S. and the band members believed that this solitary act of discipline, while playful, would finally deter M.N. from drugs and crime.

LEGAL DISCUSSION

DCF—Substantiation of Abuse

If it is determined that an allegation of child abuse or neglect has been substantiated, the name of the individual and any identifying information are entered into the Central Registry maintained by the DHS. See N.J.S.A. 9:6-8.11. The information contained in the Registry is confidential, but may be disclosed to various people for specified purposes. N.J.S.A. 9:6-8.10a; In re L.R., 321 N.J. Super. 444, 466 n.3 (App. Div. 1999); N.J. Div. of Youth and Family Servs. v. M.R., 314 N.J. Super. 390, 399–402 (App. Div. 1998); In re Allegations of Sexual Abuse at E. Park High Sch., 314 N.J. Super. 149, 156–59 (App. Div. 1998).

The regulations in effect at the time in issue provided that after an allegation of child abuse or neglect has been received, the child protective investigator shall evaluate the available information and determine whether abuse or neglect has occurred, and shall make a finding of either "substantiated" or "unfounded." N.J.A.C. 10:129-5.3(a).[10]

> "Substantiated" means a finding when the available information, as evaluated by the child protective investigator, indicates by a preponderance of the evidence that a child is an abused or neglected child as defined in N.J.A.C. 10:133-

[10] Former N.J.A.C. 10:129-5.3, Investigation findings, recodified to N.J.A.C. 10:129-7.3, effective February 6, 2012.

> 1.3 because the alleged child victim has been harmed or placed at risk of harm by a parent or guardian.
>
> . . . .
>
> "Unfounded" means a finding when:
>
> > i. There is not a preponderance of evidence that the alleged child victim was harmed or placed at substantial risk of harm; or
> >
> > ii. There is not a preponderance of evidence indicating that a parent or guardian and child were involved.
>
> [N.J.A.C. 10:129-1.3.]

"Parent or guardian" includes a teacher. Ibid. An "abused or neglected child" means a child less than eighteen years of age

> [w]hose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as the result of the failure of his or her parent or guardian to exercise a minimum degree of care . . . [i]n providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including the infliction of excessive corporal punishment; or by any other acts of a similarly serious nature requiring the aid of the court . . . .
>
> [N.J.A.C. 10:133-1.3.]

The DCF has the burden of proving substantiated abuse by the preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982). Preponderance is the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975). The evidence must be such as to lead a reasonably cautious mind to the given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958).

N.J.S.A. 9:6-8.84 defines sexual abuse as contact between a child and a parent or caretaker for the purpose of sexual stimulation of either that person or another person. It also includes sexual conduct including molestation, prostitution, other forms of sexual exploitation of children or incest, or sexual penetration and sexual contact as defined in N.J.S.A. 2C:14-1.

Sexual contact as defined by N.J.S.A. 2C:14-1(d) means an intentional touching by the victim or actor, either directly or through clothing, of the victim's or actor's intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor.

Based on the facts and applicable law, I **CONCLUDE** that the DCF has failed to meet its burden of proving that a substantiation of sexual abuse is warranted. Regarding M.N., the DCF alleges sexual penetration of M.N. by P.S. However, jurisdiction over M.N. does not exist, as the record established that M.N. was eighteen at the time of the incident. Yet even assuming *arguendo* that M.N.'s age was immaterial, it remains that there does not exist sufficient proof to establish that P.S.'s actions were for sexual purposes. There was no sound proof that P.S. contacted M.N. sexually, especially in M.N.'s anal area. M.N. did not incur any physical injury, nor did he feel harmed or threatened. Furthermore, the act was not performed for degradation or humiliation of M.N., as sufficient proof established that the incident included horseplay and also served as a means of deterrence. Regarding V.L., the DCF alleges sexual exploitation. While it is established that she was a minor at the time of the incident, it again remains that there exists no adequate proof to establish that V.L. or any of the other band members present felt threatened or in fear of harm because of P.S.'s actions, neither did they feel exposed to a sexual act. It cannot get overlooked that V.L. only described it generally as "out of line, but P.S. was not out of line."

Board—Unbecoming Conduct

The New Jersey Board of Examiners is empowered to revoke or suspend teaching certificates upon a finding of demonstrated inefficiency, incapacity, conduct

unbecoming a teacher or other just cause. N.J.A.C. 6A:9-17.5. The Board bears the burden of proving by a preponderance of the credible evidence that the certificate holder is guilty as charged. Atkinson v. Parsekian, 37 N.J. 143 (1962). It is axiomatic that teachers are "held to a high standard of conduct because of the influence they exercise over the students." State Bd. of Exam'rs v. Charlton, 96 N.J.A.R.2d (EDE) 18, 21. Teachers are inherently role models to young minds, and, given that relationship, they have a special responsibility to demonstrate "exemplary restraint and mature self-control." In re Tenure Hearing of Ostergren, 1966 S.L.D. 185, 186.

Inappropriate conduct between a teacher and students entrusted to the teacher's care has been found to be a sufficient basis for revocation of a teacher's certificate. See State Bd. of Examiners v. Terry Stocker, EDE 4669-02, Initial Decision, (February 10, 2004), adopted, State Bd. of Examiners (April 1, 2004) <http://njlaw.rutgers.edu/collections/oal/>, aff'd, State Bd. of Educ. (Sept. 1, 2004) <http://www.state.nj.us/education/legal/sboe/index.html>. (revoking Stoker's certificates where he had suggested to students that they "have some fun" duct-taping and dragging another student who consented); In re Certificate of Papadaniil, EDE 8821-00, Initial Decision (March 13, 2002), adopted, State Bd. of Exam'rs (May 9, 2002), <http://njlaw.rutgers.edu/collections/oal/> (teaching certificate revoked predicated on a teacher's sexual relationship with a student).

In other cases involving inappropriate interaction between a teacher and a student, the Board of Examiners has found that suspension of the teacher's certificate was the appropriate action under the circumstances. See In re Certificates of Chavez, EDE 11443-03, Final Decision, State Bd. of Educ. (April 4, 2007), <http://njlaw.rutgers.edu/collections/oal/> (suspending certificate for two years for unbecoming conduct where teacher engaged in inappropriate horseplay by putting ice down the blouse of a female student and making inappropriate comments to another student); In re Certificates of Younger, EDE 3111-03, Initial Decision (December 6, 2004), modified, State Bd. of Exam'rs (January 20, 2005), aff'd, State Bd. of Educ. (January 4, 2006), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, No. A-2800-05 (App. Div. November 15, 2006), <http://njlaw.rutgers.edu/collections/courts/> (suspending certificate for two years for conduct unbecoming a teacher where teacher exercised

poor judgment in allowing female students to remain in his hotel room for a substantial period of time, regardless of what behavior occurred, during a track meet while he was an assistant track coach).

Based on the law and applicable facts, I **CONCLUDE** that the Board has proven by the preponderance of the credible evidence that P.S.'s conduct was unbecoming a teacher. While it has been established that the incident was not sexual in nature, it remains that P.S.'s decision to participate was less than exemplary, as it was inappropriate conduct. That is, teachers must at all times demonstrate maturity, professionalism, and sound judgment. They must also refrain from playful acts, as befriending students is not their primary responsibility. They should further avoid participating in situations that may give the perception of violence and abuse. Furthermore, the decision of the ECPO to not proceed with any charges and the fact that this conduct occurred only once are of no consequence, as this determination is not predicated on these factors, but on the evidence, which reflects P.S.'s unsuitable conduct with her then band membership.

Regarding the appropriate sanction, although P.S.'s behavior falls short of that expected of a teacher, I **CONCLUDE** that revocation of P.S.'s teaching certificates is not warranted in this case. Similar to the incident in In re Certificates of Chavez , this incident included horseplay. Additionally, it is undisputed that P.S. did not initiate the incident. It has also been determined that the physical conduct of P.S. was not performed with any sexual intent but was a sincere attempt to deter M.N. from drugs. Moreover, P.S. has had a stellar teaching career, including a commitment to institute integral music programs, and has repeatedly sought to assist her students in furtherance of their achievements. Accordingly in light of these factors, I **CONCLUDE** that a more measured penalty for the unbecoming conduct shown in this incident should be a two-year suspension of P.S.'s certificates.

ORDER

It is **ORDERED** that the DCF's substantiated-abuse determination against P.S. is **REVERSED.**

It is further **ORDERED** that the revocation of P.S.'s teacher certificates is **REVERSED**, but that her teacher certificates be suspended for two years.

I hereby **FILE** this Initial Decision with the **ASSISTANT COMMISSIONER, OFFICE OF PERFORMANCE MANAGEMENT AND ACCOUNTABILITY**.

This recommended decision may be adopted, modified or rejected by the **ASSISTANT COMMISSIONER, OFFICE OF PERFORMANCE MANAGEMENT AND ACCOUNTABILITY,** who by law is authorized to make the final decision on all issues within the scope of his or her predominant interest. If the **ASSISTANT COMMISSIONER, OFFICE OF PERFORMANCE MANAGEMENT AND ACCOUNTABILITY,** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering his or her final decision, the **ASSISTANT COMMISSIONER, OFFICE OF PERFORMANCE MANAGEMENT AND ACCOUNTABILITY,** shall forward the record, including this recommended decision and his or her final decision, to the **STATE BOARD OF EXAMINERS,** which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

Upon transmitting the record, the **ASSISTANT COMMISSIONER, OFFICE OF PERFORMANCE MANAGEMENT AND ACCOUNTABILITY,** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **STATE BOARD OF EXAMINERS** within forty-five days of the predominant agency decision. If the **STATE BOARD OF EXAMINERS** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **ADMINISTRATIVE HEARINGS COORDINATOR, DEPARTMENT OF CHILDREN AND FAMILIES, 50 East State Street, 5th Floor, PO Box 717, Trenton, New Jersey 08625-0717**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 6, 2013
DATE

TAHESHA L. WAY, ALJ

Date Received at **Office of Performance Management and Accountability**:

Date Mailed to Parties: JUN – 7 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

APPENDIX

WITNESSES

Petitioner(s)

Ronald Lee

Ongeri Aminga

Nilsa Rodriguez

A.O.

Respondent

M.N.

John Gamble, Jr.

P.S.

EXHIBITS IN EVIDENCE

Petitioner(s)

P-1	CD of incident
P-2	Letter from Ronald Lee to the Office of Licensure and Credentials, September 17, 2010
P-2a	Revised Incident Report by Robert Lee, September 15, 2010
P-3	Letter from Ronald Lee accepting P.S.'s resignation, September 27, 2010
P-4	Resignation Letter by P.S. to Ronald Lee and Belinda Smiley
P-5	DCF Screening Summary, September 14, 2010
P-6	DCF Investigation Summary, September 14, 2010
P-7	DCF Findings Letter to P.S., February 28, 2012
P-7a	Notice of IAIU Findings Letter to Robert Lee, February 28, 2012
P-9	Incident Report by Robert Lee, September 15, 2010

Respondent

R-1	Affidavit of F.W., a former Orange High School student
R-2	John H. Gamble, Jr., letter of reference regarding P.S., June 20, 2012
R-3	Letter of Commendation from Peter S. Crosta, April 18, 2005
R-4	Letter of Commendation from Peter S. Crosta, May 9, 2005
R-5	Letter of Appreciation from Cherie M. Kacprowicz, June 15, 2005
R-6	Statement of Acknowledgement and Commendation from Samuel H. Hazell, October 31, 2005
R-7	Letter of Commendation from Peter S. Crosta, December 17, 2007
R-8	Letter of Congratulations from Peter S. Crosta, April 10, 2008
R-9	Letter of Congratulations from Peter S. Crosta, May 8, 2009
R-10	Letter of Commendation from Constance L. Frazier, May 11, 2009
R-11	Formal Observation of P.S. by Peter S. Crosta, June 13, 2006
R-12	Formal Observation of P.S. by Peter S. Crosta, April 5, 2007
R-13	Formal Observation of P.S. by Ursula S. Derios, June 13, 2008
R-14	Formal Observation of P.S. by Peter S. Crosta, December 11, 2008
R-15	Formal Observation of P.S. by Peter S. Crosta and Erica L. Stewart, May 13, 2009
R-16	Formal Observation of P.S. by Peter S. Crosta, May 12, 2010

CARUSO SMITH PICINI, P.C.
60 ROUTE 46 EAST
FAIRFIELD, NEW JERSEY 07004
973 667-6000
Fax 973 667-1200
Attorneys for Appellant P.S.

IN THE MATTER OF THE CERTIFICATES OF P.S.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
State Bd of Examiners Docket No. 1011-245

NOTICE OF APPEAL

CERTIFICATION OF SERVICE

I, Aashka Patel Chokshi, of full age, hereby certify as follows:

1. I am a legal assistant with the law firm of Caruso Smith Picini, PC. attorneys for P.S. in the within matter.

2. On December 11, 2013, I sent by hand delivery, facsimile and regular mail a sealed envelope, addressed as follows:

Via Fax – 609-943-5853 & Regular Mail
Angela L. Velez, DAG
Office of the Attorney General
Dept. of Law and Public Safety
Division of Law
25 Market Street, PO Box 112
Trenton, NJ 08625

Via Hand Delivery
State Board of Examiners
New Jersey Department of Education
100 River View Plaza
P.O. Box 500
Trenton, NJ 08625-0500

Via Hand Delivery
Attorney for State Board of Examiners
New Jersey Department of Education
100 River View Plaza
P.O. Box 500
Trenton, NJ 08625-0500

Said envelope containing a copy of P.S.'s Notice of Appeal, Order of Revocation under appeal, and the underlying OAL Initial Decision.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willingly false, I am subject to punishment.

By: A P Chokshi
AASHKA PATEL CHOKSHI

DATED: December 11, 2013

183-14

I.J., on behalf of minor child, Q.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her son, Q.J., was not eligible for a free public education in the Hamilton Township school district during the 2012-2013 and 2013-2014 school years. Petitioner contended that her son is domiciled in Hamilton with his father, D.B., at the home of A.D., D.B.'s cousin. The Board asserted that Q.J. has not resided at A.D.'s address since September 2012, and sought reimbursement of tuition for the period of his ineligible attendance.

The ALJ found that: based on the reports from the residency investigation and the evidence presented at hearing, custody of Q.J. was shared by his parents, I.J. and D.B.; Q.J. moves frequently between A.D.'s Hamilton address and his mother's Trenton address; he spends far more time in Trenton with I.J. than he does in Hamilton; I.J. retains financial responsibility for her son; after leaving in the morning from his mother's Trenton address, Q.J. attended school in Hamilton; A.D. has not assumed guardianship of Q.J., nor is she responsible for his support and maintenance; Q.J.'s father, D.B., has not been physically present in A.D.'s household since September 2012, when he was incarcerated; in the absence of D.B., I.J. retained care and custody of Q.J.; I.J. indicated that she intended to make her custody permanent by filing for a change in custody status in Superior Court in February 2014. The ALJ further found that, although Q.J. may have been domiciled at one time in Hamilton, he was no longer domiciled there as of September 2012, and must be considered as having been domiciled at the residence of his mother, I.J., in Trenton for purposes of school attendance for the 2012-2013 and 2013-2014 school years. Accordingly, the ALJ concluded that Q.J. was not entitled to a free public education in Hamilton schools, and respondent is entitled to reimbursement for tuition costs in the amount of $16,961.28, representing the amount due from September 5, 2012 through December 20, 2013.

Upon review, the Commissioner concurred with the ALJ's conclusion that the petitioner has failed to sustain her burden of proving that Q.J. was entitled to a free public education in Hamilton schools. Further, the Commissioner found that the Board is entitled to tuition reimbursement from petitioner for the entire period of Q.J.'s ineligible attendance, including the additional period from January 2, 2014 through March 5, 2014. Accordingly, the ALJ ordered petitioner to reimburse the Board in the amount of $19,619.76.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 5/02/14

OAL DKT. NO. EDU 12782-13
AGENCY DKT. NO. 193-8/13

I.J., on behalf of minor child, Q.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching his determination herein. The parties did not file reply exceptions.

Petitioner's exceptions essentially recast and reiterate her arguments advanced before the Administrative Law Judge (ALJ) below. As it is determined that these were considered and addressed by the ALJ in her decision, they will not be revisited here.

The Board urges the Commissioner to adopt the ALJ's conclusions that petitioner failed to carry her burden of establishing that Q.J. was entitled to a free public education in the Hamilton Township School District during the 2012-2013 and 2013-2014 school years, and that the Board is entitled to tuition reimbursement from petitioner for the period of Q.J.'s ineligible attendance. The Board requests, however, modification of the amount of petitioner's tuition reimbursement obligation. More specifically, the Board seeks an increase in the reimbursement amount from $16,961.28 to $19,619.76, the additional $2,658.48 representing tuition for Q.J.'s continued ineligible attendance from January 2, 2014 through March 5, 2014.

Upon full consideration, the Commissioner is compelled to concur with the ALJ's conclusion that petitioner has failed to sustain her burden of establishing that her child, Q.J., was entitled to a free public education in the Hamilton Township School District. Further, the Commissioner finds that the Board is entitled to tuition reimbursement from petitioner for the entire period of Q.J.'s ineligible attendance, including the additional period from January 2, 2014 through March 5, 2014. The Board is, therefore, entitled to tuition reimbursement from petitioner for Q.J.'s ineligible attendance in the total amount of $19,619.76, as follows:

- $12,204.00 for the 2012-2013 school year (180 days @ $67.80 per day)
- $7,415.76 for the 2013-2014 school year (106 days @ $69.96 per day)

Accordingly, the recommended decision of the OAL is adopted as modified above. Petitioner is directed to compensate the Board in accordance with this decision and the instant petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/02/14

Date of Mailing: 5/02/14

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 12782-13
AGENCY DKT. 193-8/13

I.J., ON BEHALF OF MINOR CHILD, Q.J.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

I.J., on behalf of Q.J., petitioner, pro se

Sanmathi Dev, Esq., for respondent (Capehart Scatchard, P.A., attorneys)

Record Closed: February 6, 2014 Decided: March 19, 2014

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioner, I.J., the mother of the minor child Q.J., appeals the determination of the Hamilton Township (Mercer County) Board of Education (district) that Q.J. did not reside within the district and that tuition reimbursement was required. The district alleges that the minor child Q.J. was not residing at the Hamilton Township address

provided by the petitioner and seeks repayment of tuition. At issue is whether Q.J. is entitled to be enrolled in the district for purposes of receiving a thorough and efficient public education free of charge pursuant to N.J.S.A. 18A:38-1.

PROCEDURAL HISTORY

On August 1, 2013, the district notified I.J., the mother of Q.J., that the child was ineligible to continue to attend school within the Hamilton Township school district and had been ineligible since September 5, 2012, and that the child was being dis-enrolled. The petitioner filed a timely notice of appeal on or about August 26, 2013. The district filed an answer on September 5, 2013. On September 6, 2013, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on January 2, 2014, and the record remained open until February 6, 2014, for the receipt of briefs from the parties.

FACTUAL DISCUSSION

Some of the facts are not in dispute: I.J. and D.B., the child's father, shared joint legal custody of Q.J., although the custody order did not specify the school district for the child. Q.J. lived with his father at the home of D.B.'s cousin, A.D., within the district.

Based upon an investigation in 2012, the district conducted a residency hearing in August of that year. After taking testimony from the parties, including I.J. and D.B., the district determined to permit Q.J. to continue to attend school within the district for the 2012–2013 school year under two conditions: one, that as there was no court order designating D.B.'s place of residence as the home school for the child, Q.J. must continue to reside within the district; and two, that D.B. advise the district where he was going to be when away from home for a significant period of time in the event he needed to be contacted.[1]

[1] D.B. stated that he was a longshoreman and that when required to do so for employment, he could spend up to a month at his job unloading cargo.

Approximately a year ago, D.B. went to jail, and was no longer residing at the home of A.D. The district contends that for the 2012–2013 school year, Q.J. resided in Trenton, and not within the district. It seeks tuition reimbursement of $16,961.28, representing tuition due from September 5, 2012. I.J. does not dispute the results of the surveillance, just that it is not dispositive of the child's actual domicile.

Testimony

Michael Celentana has been employed by the district as a residency investigator for five and a half years. He conducts surveillances, and prepares about fifty reports and testifies at approximately twenty hearings per year.

Celentana was familiar with Q.J., who was in the sixth grade at Reynolds School. Q.J. had previously attended the Greenwood Elementary School for fourth grade, and Kuser Elementary School for fifth.

Celentana conducted his first investigation in May 2011 and prepared a report and addendum. He noted that I.J. lived at B. Avenue in Trenton, and that D.B. lived at A.D.'s house on D. Street in the district. In the spring of 2013, Celentana conducted an additional residency investigation on different days of the week. He saw Q.J. exiting the B. Avenue premises thirteen times. When he watched the D. Street address on two occasions, he never saw Q.J. exit the premises. Six additional surveillances conducted by him in June showed I.J. dropping the child off at the school or at D. Street. Another investigator, Kevin Gaines, conducted investigations on November 13, 15, 20 and 26, 2013, which showed the child exiting the B. Avenue address and being driven away, which attendance at school confirmed. The investigators concluded that Q.J. spends most of his time in Trenton, and that he does not reside within the district.

Joseph Slavin is the director of administration at the district and is in charge of residency and attendance. He troubleshoots for all twenty-three schools in the district and appears at hearings when necessary. He supervises Celentana and Gaines. He attended the June 2013 hearing on Q.J.'s residency which determined that he was not eligible to be enrolled in the district.

Slavin noted that the per-diem rate for school year 2012–2013 was $67.80. So, for 180 days of school attendance for that school year calculated from September 5, 2012, the first date of ineligible attendance, the total due is $12,204. For the 2013–2014 school year, the per-diem rate is $69.96. For the period from September 4, 2013, to December 20, 2013, (sixty-eight days) the total due is $4,757.28.

I.J. is the mother of Q.J. D.B. is his father. I.J. and D.B. share joint legal custody of Q.J., with D.B. designated as parent of primary residence. It was anticipated that Q.J. would reside primarily with his father within the district, with very liberal parenting time for I.J., including weekends and summers. This was necessitated by D.B.'s employment as a longshoreman, which kept him away from home for some extended periods of time.

I.J. has owned and resided at the B. Avenue, Trenton, New Jersey, address since 1999. It is a house with three floors and four bedrooms. Q.J. has a bedroom and keeps some possessions at the residence. Q.J. has friends visit in the house, but no one stays over. I.J. has three other grown children. D.B. has lived with his cousin A.D. at the D. Street address for many years. It is a two-family house, and everyone who lives there is a cousin to D.B. and Q.J. A.D. does not have guardianship or custody of Q.J.

I.J. is employed as a medication and patient-care technician and works thirty-five hours per week. Q.J.'s pupil enrollment form was filled out by her on February 6, 2013. Q.J. is in the sixth grade at Reynolds School; he spent fifth grade at Kuser School and fourth grade at Greenwood, all within the district.

Q.J. has stayed overnight with I.J. on many occasions, sometimes more than three times per week, but it depends on their schedules. I.J.'s driver's license shows the B. Avenue address.

I.J. takes Q.J. as a dependent on her taxes because D.B. permitted her to do so, and because she supported Q.J. when he was with her. She has paid for his clothes

and school supplies, and has met with his teachers. Both she and D.B. are responsible to support the child financially. For health insurance, I.J. was able to get Q.J. covered under Medicaid since she was primarily responsible for his medical care, and D.B. had no health insurance for the child.

I.J. attended the prior residency hearing in August 2012. The district permitted Q.J. to continue to attend school within the district under two conditions: one, that as there was no court order designating the father's place of residence as the home school for the child, Q.J. must continue to reside within the district; and two, that D.B. advise the district where he was going to be when away from home for a significant period of time. This was acceptable to D.B. and to her. D.B. remained at the D. Street address until September 2012, when he was incarcerated.

I.J. did not dispute the results of the surveillances, but contended that the fact that the child spent much time with her did not mean that he was not domiciled within the district at the home of A.D. I.J. indicated that a custody hearing was scheduled in February 2014, at which time she expected to receive full custody of Q.J. without objection from D.B. She did not know the outcome of the criminal proceedings for D.B. and was trying to retain structure for Q.J. I.J. also said she had other witnesses, but she chose not to call them because she did not want to prolong this proceeding.

A.D. resides on D. Avenue in Hamilton, New Jersey. She and her son M.D. own the residence, which they purchased in 1999. It is a one-family house; she lives downstairs and he lives upstairs. The first floor has two bedrooms, one bathroom, a living room and a kitchen. The upstairs has two bedrooms. D.B. has lived with her family since he was fourteen years old and is like a brother to her. D.B. and Q.J. lived there, but D.B. stopped living there.

A.D. has been employed at a children's home for fifteen years as a supervisor. For the past ten years, she has worked from 2 p.m. to 10 p.m. Monday through Friday, and she also has a second job on the weekends.

Other persons occupying the residence include M.B., M.D., M., A., and R. M.D., M. and A. stayed upstairs. R. slept on the couch. M.B. and Q.J. stayed with her on the first floor.

During the 2012–2013 school year, Q.J. did sometimes stay over at I.J.'s house. Q.J. was not spending time with his father, but was living in Hamilton. Q.J. and M.B. attended an after-school program in Trenton. The bus picked them up for the after-school program on Mondays through Fridays. Q.J. attends the sixth grade at Reynolds School. When he was in fifth grade, his school was around the corner. He did not take a bus; he either walked to school or was dropped off by his mother.

Findings

I accept as fact the testimony of the parties with regard to the school attendance of Q.J. As far as his residence, Q.J. moves frequently between the Hamilton address and the Trenton address. He spends far more time in Trenton with I.J. than he does in Hamilton, spending most weeknights with his mother, who retains financial responsibility for him. Q.J. has a room there, entertains his friends there and keeps his guinea pig there. He attends school in Hamilton after leaving in the morning from the Trenton address. A.D. has not assumed the guardianship of Q.J., nor is she responsible for his support and maintenance. And D.B. has not been physically present in A.D.'s household since September 2012. In the absence of D.B., I.J. retained care and custody of Q.J. She intended to make that permanent by filing for the judicially recognized change in custody status in Superior Court in February.

LEGAL ANALYSIS AND CONCLUSIONS

Residency

The issue in this matter is whether Q.J. was entitled to a free education under N.J.S.A. 18A:38-1(a), which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd.,

1981 S.L.D. 1533, rev'd on other grounds sub nom. Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374–76 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed.2d 518 (1999). A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001).

N.J.A.C. 6A:22-3.1(a) provides that a student is considered eligible to attend a school district if he or she is domiciled within the school district. A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district. N.J.A.C. 6A:22-3.1(a)(1). The regulation further provides:

> i. When a student's parents or guardians are domiciled within different school districts and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the school district of the parent or guardian with whom the student lives for the majority of the school year. This subparagraph shall apply regardless of which parent has legal custody.
>
> ii. When a student's physical custody is shared on an equal-time, alternating week/month or other similar basis so the student is not living with one parent or guardian for a majority of the school year and there is no court order or written agreement between the parents designating the school district of attendance, the student's domicile is the present domicile of the parent or guardian with whom the

> student resided on the last school day prior to the October 16 preceding the application date.
>
> (1) When a student resided with both parents or guardians, or with neither parent or guardian, on the last school day prior to the preceding October 16, the student's domicile is that of the parent or guardian with whom the parents or guardians indicate the student will be residing on the last school day prior to the ensuing October 16. When the parents or guardians do not designate or cannot agree upon the student's likely residence as of that date, or if on that date the student is not residing with the parent or guardian previously indicated, the student shall attend school in the school district of domicile of the parent or guardian with whom the student actually lives as of the last school day prior to October 16.
>
> . . . .
>
> iii. When a student is living with a person other than a parent or guardian, nothing in this section is intended to limit the student's right to attend school in the parent or guardian's school district of domicile pursuant to this chapter.
>
> [N.J.A.C. 6A:22-3.1(a)(1).]

The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent/petitioner has the burden of proving domicile by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

Where a person has more than one residence, the following factors are useful in determining his domicile: the physical characteristics of each place, the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39–40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). "[A] choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of

proofs, supporting the actual existence of that domicile." In re Unanue, supra, 255 N.J. Super. at 374.

In this matter, an analysis must be applied to the residency and domicile of the child and each parent. It is clear that I.J. is a resident of Trenton, indeed, she did not dispute that. D.B. clearly was domiciled in Hamilton, and resided there until his incarceration. Whether he intended to return to Hamilton or to go elsewhere upon his release from incarceration was not demonstrated at the hearing. While D.B. may have shared joint legal custody of the child with I.J., she indicated that she had a court date in February at which she anticipated receiving full custody of Q.J. without objection from D.B. Q.J. spent most weekends with I.J., and indeed was not observed leaving the Hamilton address to attend school, although he was present in school on days that the observations of that address were made. While Q.J. may have spent time with A.D. and her family, clearly he did not reside in Hamilton on a full-time basis, nor could he be considered a domiciliary of Hamilton.

However, the analysis does not end there. N.J.A.C. 6A:22-3.2 provides:

> (a) A student is eligible to attend the school district pursuant to N.J.S.A. 18A:38-1.b if he or she is kept in the home of a person other than the student's parent or guardian, and the person is domiciled in the school district and is supporting the student without remuneration as if the student were his or her own child.
>
> 1. A student is not eligible to attend a school district pursuant to this provision unless:
>
> i. The student's parent or guardian has filed, together with documentation to support its validity, a sworn statement that he or she is not capable of supporting or providing care for the student due to family or economic hardship and the student is not residing with the other person solely for the purpose of receiving a free public education; and
>
> ii. The person keeping the student has filed, if so required by the district board of education:

> (1) A sworn statement that he or she is domiciled within the school district, is supporting the child without remuneration and intends to do so for a time longer than the school term, and will assume all personal obligations for the student pertaining to school requirements; and
>
> (2) A copy of his or her lease if a tenant, a sworn landlord's statement if residing as a tenant without written lease, or a mortgage or tax bill if an owner.

It is alleged by the petitioner that A.D. was a close relative of D.B. and Q.J., and that she treated them as members of her family. However, the testimony of A.D. indicated that she had not assumed the role of guardian for the child, nor did she support him financially. I.J. provided the child with his necessaries, including school supplies and clothing, and, in fact, obtained Medicaid for him so he would have medical insurance. Therefore, the provisions of N.J.A.C. 6A:22-3.2(a) do not apply to Q.J.

In 2012, the district imposed two conditions on D.B. and Q.J. for the child to be able to continue to attend school within the district. The first was that Q.J. remain domiciled within the district. While Q.J. may have spent time with A.D. and her family in Hamilton, he spent far more time with I.J. in Trenton. He stayed overnight with his mother and attended school from there, as the undisputed surveillances indicate. The second condition was that D.B. advise the district if he were away for a substantial period of time. As D.B. had indicated in his testimony to the district at the Board hearing in 2012, he might be away for up to a month at a time because of his employment. D.B.'s incarceration, which the petitioner indicated commenced in September 2012, must be considered a substantial absence from the Hamilton address, leaving Q.J. under the parental supervision of I.J., and not D.B. The two conditions imposed by the district were not met by Q.J. or D.B.

Accordingly, I **CONCLUDE** that although Q.J. may have been domiciled at one time in Hamilton, he was no longer domiciled there as of September 2012, and must be considered as having been domiciled at the residence of his mother, I.J., in Trenton for purposes of school attendance for the 2012–2013 and 2013–2014 school years. As he

did not meet any of the exceptions provided in the statute, he cannot be considered a domiciliary at A.D.'s residence in Hamilton.

Tuition Reimbursement

The Board asserts that it is entitled to be reimbursed for tuition for the period of Q.J.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a). Tuition shall be assessed as follows:

> If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.
>
> [N.J.S.A. 18A:38-1(b)(1).]

In this matter, the respondent testified that the per-diem rate for school year 2012–2013 was $67.80. So, for 180 days of school attendance for that school year calculated from September 5, 2012, the first date of ineligible attendance, the total due is $12,204. For the 2013–2014 school year, the per-diem rate was $69.96. For the period from September 4, 2013, to December 20, 2013, (sixty-eight days) the total due is $4,757.28.[2] The total for both years is $16,961.28, plus ongoing tuition.

Based upon the evidence and testimony presented in this matter, I **CONCLUDE** that the petitioner, I.J., failed to carry her burden of proof that her son, Q.J., is domiciled in the Township of Hamilton, thereby entitling him to a free public education in the district during the relevant time periods. I further **CONCLUDE** that the respondent is entitled to reimbursement from the petitioner for the costs of audited tuition in the

[2] Tuition reimbursement continues to run at the rate of $69.96 per day for each day of continued ineligible attendance.

amount of $16,961.28, representing the amount due from September 5, 2012, through December 20, 2013.

ORDER

It is hereby **ORDERED** that the respondent's determination that parents D.B. and I.J. are not domiciled in Hamilton Township, and that Q.J. is not under the guardianship of A.D., and Q.J. is neither resident nor domiciled in Hamilton Township, New Jersey, and was not so domiciled within its school district during the period of September 5, 2012, through December 20, 2013, is hereby **AFFIRMED**. It is further **ORDERED** that respondent is entitled to reimbursement from petitioner for the cost of audited tuition in the amount of $16,961.28, representing the period from September 5, 2012, through December 20, 2013.

It is, therefore, **ORDERED** that, without proof of current domicile and residency, Q.J. may be excluded from further attending the Hamilton Township public schools, at the discretion of the district.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 19, 2014
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: March 19, 2014

Date Mailed to Parties: 3/19/14

mel

WITNESSES

For petitioner:

I.J.

A.D.

For respondent:

Michael Celentana

Joseph Slavin

EXHIBITS

For petitioner:

None

For respondent:

R-1 Transcript of June 24, 2013, residency hearing and exhibits

R-2 Final Notice of Ineligibility dated August 1, 2013

R-3 Petition of Appeal dated August 26, 2013

R-4 Answer dated September 4, 2013 (without attachments)

R-5 Residency Investigation Addendum dated November 26, 2013

R-6 Calculation of Tuition Due as of December 20, 2013

R-7 Respondent's First Set of Interrogatories to petitioner dated November 1, 2013

R-8 Petitioner's Responses and Objections to First Set of Interrogatories dated November 21, 2013

R-9 (Withdrawn)

R-10 (Withdrawn)

R-11 (Withdrawn)

R-12 Transcript of August 21, 2012, residency hearing, Residency Investigation report dated June 4, 2012, and Addendum dated August 9, 2012

R-13 Pupil Enrollment Form and Student Emergency Medical Information Card for the 2013–2014 school year

R-14 Petitioner's Supplemental Responses and Objections to First Set of Interrogatories dated December 26, 2013

OAL DKT. NO. EDU 10165-10
AGENCY DKT. NO. 338-8/10

MILENA MAYA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed Settlement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the Agreement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/05/14

Date of Mailing: 5/06/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10165-10
AGENCY DKT. NO. 338-8/10

MILENA MAYA,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY
Respondent.

Gregory T. Syrek, Esq. for petitioner (Bucceri and Pincus, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: March 17, 2014 Decided: March 19, 2014

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 15, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Elizabeth Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated December 23, 2013.

2. I have been advised by counsel that the settlement was executed by the Board Secretary, Harold Kennedy, on behalf of the Board.

3. This matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 school year. These cases were filed in the fall of 2010 and were case managed together via regular case management conferences with counsel. The attached settlement is thus the culmination of years of discussion and negotiation, and is consistent with an agreed upon global approach to the resolution of these cases. This settlement fairly, reasonably, and efficiently resolves the claims raised in the petition and is in the best interest of the parties and the taxpayers of Elizabeth.

4. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 19, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 3-21-14

Mailed to Parties: MAR 21 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

MILENA MAYA , Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 10165-2010N Agency Ref. No. 338-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, Milena Maya ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned Milena Maya v. Elizabeth Board of Education , which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. EDU 10165-2010N, Agency Dkt. No. 338-8/10 (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $12,382.22, for the period from September 1, 2010 through February 22, 2011.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through February 22, 2011 was $0. Petitioner was employed as a classroom assistant during that time period.

3. As there are no unemployment benefits to be repaid, the gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $12,382.22.

4. The Parties agree that Petitioner was employed by the Board as a classroom assistant during the period from September 1, 2010 through February 22, 2011. Thus, the Final Gross Amount of back salary due to petitioner is $12,382.22. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Milena Maya."

5. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to February 22, 2011. In addition, Petitioner will receive full seniority for the period September 1, 2010 through February, 2011. This period shall also be treated as active employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick

leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

6. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board.

7. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

8. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

9. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

10. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

11. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

12. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education.

13. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR PETITIONER

Date: 1/9/14

Milena Maya

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 3/11/2014

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RECEIVED
2014 JAN 31 P 2:59
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education has discussed a resolution of the Office of Administrative Law matters listed below; and,

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement on file with the Board Secretary, provided that it is fully signed by all parties.

Susy Basilici	Agency Docket No. 639-11/10	OAL Docket No. EDU 13416-2010
Beth Ann Clayton	Agency Docket No. 324-11/11	OAL Docket No. EDU 12774-2012
Milena Maya	Agency Docket No. 338-08/10	OAL Docket No. EDU 10165-2010
Wilfredo Romero	Agency Docket No. 299-08/10	OAL Docket No. EDU 9657-2010
Debra Stallone	Agency Docket No. 331-08/10	OAL Docket No. EDU 10009-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD DECEMBER 23, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-83

187-14

YVETTE JOHNSON-DEEN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former employee of the Newark School District (District) – contended that she was terminated from her teaching position in violation of her tenure rights. The respondent asserted that the within appeal was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(i), and furthered claimed that petitioner had not been employed under tenure. Petitioner began employment with the District as a Teacher of the Handicapped in September 2001; it is not clear, however, whether she ever attained standard certification as a Teacher of the Handicapped. She was terminated by letter dated March 12, 2013, with an effective date of March 15, 2013. The within appeal was filed on August 14, 2013, but not perfected until August 27, 2013. The District asserted that the within appeal was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(i), and furthered claimed that petitioner had not been employed under tenure in its schools. Respondent filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts in dispute, and the matter is ripe for summary decision; petitioner filed her appeal pursuant to *N.J.A.C.* 6A:3-1.1 et seq., which establishes procedures for appeals before the Commissioner; the time for filing is clearly set forth at *N.J.A.C.* 6A:3-1.3(i), which provides that a petition of appeal before the Commissioner must be filed no later than the 90th day from the date of receipt of the notice of a final order or ruling; petitioner in the instant matter unequivocally learned that her employment was terminated on March 15, 2013 – her last day of work in the district; her appeal should have been filed at the latest within ninety days of March 15, 2013; there are no facts present in this matter that would warrant the relaxation of the 90 day rule. Accordingly, the ALJ concluded that petitioner's appeal should be dismissed as untimely.

Upon careful review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, and dismissed the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

May 5, 2014

OAL DKT. NO. EDU 13451-13
AGENCY DKT. NO. 185-8/13

YVETTE JOHNSON-DEEN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

Upon careful review of the record of this matter and the Initial Decision of the Office of Administrative Law,[1] the Commissioner concurs with the Administrative Law Judge that the petition was not filed in compliance with *N.J.A.C.* 6A:3-1.3(i).

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case and dismisses the petition.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/05/14

Date of Mailing: 5/06/14

[1] Neither party submitted exceptions to the Initial Decision.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 13451-13
AGENCY DKT. NO. 185-8/13

YVETTE JOHNSON-DEEN,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

Frederick Dunne, Jr., Esq., for petitioner (Dunne and Associates, attorneys)

Arsen Zartarian, Esq., for respondent

Record Closed: March 12, 2014 Decided: March 19, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Yvette Johnson-Deen, a former employee of the State-Operated School District of the City of Newark (the District), contends that she was terminated from her employment in violation of her tenure rights. The District replies that Johnson-Deen's petition has not been timely filed and that she did not hold her position of

employment with the District under tenure. Accordingly, the District asks that Johnson-Deen's claims be dismissed.

Johnson-Deen filed her appeal with the Commissioner of Education (the Commissioner) on August 14, 2013. Her submissions did not include a certificate of service; this omission was rectified upon re-filing on August 27, 2013. An answer was filed on behalf of the Board on September 16, 2013, and the matter transmitted to the Office of Administrative Law (OAL) as a contested case on September 17, 2013. The District filed a Motion for Summary Decision on December 12, 2013. Johnson-Deen opposed the motion via letter brief on February 25, 2014. The record closed upon receipt of the District's reply on March 12, 2014.

FINDINGS OF FACT

The salient facts are not in dispute and I **FIND**:

Johnson-Deen had been employed by the District as a Teacher of the Handicapped since September 2001, when, via letter dated March 12, 2013, the District terminated her services, effective March 15, 2013. The record is unclear whether, at the time of her termination, Johnson-Deen was working under an emergency certificate or under a certificate of eligibility; it is uncontroverted, however, that she had never attained standard certification as a Teacher of Handicapped. According to Johnson-Deen's attorney, she also holds a Certificate of Eligibility as a Teacher of the Handicapped. This additional certification is not reflected in the school district's data base. Counsel shared no documentary evidence that Johnson-Deen holds this certification.

The petition of appeal was not filed until August 14, 2013, close to five months after Johnson-Deen was actually terminated. According to Johnson-Deen's attorney, his client was confused by her termination because District evaluation forms had noted that she was serving under tenure. Copies of these documents do not accompany counsel's submission. Various inquiries were made on Johnson-Deen's behalf to both the Executive County Superintendent of Schools, and to counsel for the District.

Johnson-Deen appears to suggest that May 17, 2013, and/or May 21, 2013, letters from the District's counsel were her first indication that the District believed she was non-tenured. Counsel cites these letters as the final decision from which his client has now appealed. Copies of these letters do not accompany counsel's submission.[1]

ANALYSIS AND CONCLUSIONS OF LAW

The District seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242,

[1] Counsel's submission makes bald factual allegations about the mistreatment of his client while employed by the District; none are supported by certification and accordingly do not warrant further discussion here.

249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision, and that the District's motion should be granted.

Johnson-Deen has filed her petition pursuant to N.J.A.C. 6A:3-1.1 et seq., which establishes procedures for appeals before the Commissioner of Education. See N.J.S.A. 18A:6-9. The time for filing is clearly set forth at N.J.A.C. 6A:3-1.3(i), which provides that a petition of appeal before the Commissioner must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . . which is the subject of the requested contested case hearing." Johnson-Deen's appeal was filed well past the regulatory timeline, and should be dismissed.

The "notice of a final order, ruling or other action" of the Board contemplated by the rule has been defined as notice "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Kaprow v. Bd. of Educ. of Berkeley, 131 N.J. 572, 587 (1993). Johnson-Deen unequivocally learned that her employment was terminated on March 15, 2013, her last day of work in the district. Her challenge to her termination should have been filed at the latest within ninety days of March 15, 2013.

The ninety-day rule has been strictly applied by the Commissioner. See Kaprow, supra, 131 N.J. 572; Morris-Union Jointure Comm'n v. Bd. of Educ. of S. River, 92 N.J.A.R.2d (EDU) 453; Markulin v. Bd. of Educ. of Neptune, 92 N.J.A.R.2d (EDU) 406. The rationale for this requirement was articulated by the New Jersey Supreme Court in Kaprow, supra, 131 N.J. at 582, as follows:

> The [ninety-day] limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration . . . . The limitation period gives school districts the security of knowing that administrative decisions regarding the

> operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements.

While the Commissioner has the discretion to relax the rule, N.J.A.C. 6A:3-1.16, this extraordinary relief has been reserved only for those situations where a substantial constitutional issue is presented or where a matter of significant public interest is involved, beyond that of concern only to the parties. Portee v. Bd. of Educ. of Newark, 94 N.J.A.R.2d (EDU) 381, 384; Wise v. Trenton Bd. of Educ., EDU 160-00, Initial Decision (July 25, 2000), adopted, Comm'r (September 11, 2000), aff'd, St. Bd. (January 3, 2001), <http://njlaw.rutgers.edu/collections/oal/>. Johnson-Deen's claim has no import or significance beyond her personal employment relationship with the Board, thus making a relaxation of the rule unwarranted.

Johnson-Deen asserts that she was confused by the March 2013 termination of her employment because she thought she had tenure. Her attorney spent several months writing letters on her behalf at both the county and local level in efforts to rectify what she characterizes as a "mistake." But informal attempts to resolve a dispute do not serve to toll the statute of limitations. See Kaprow, supra, 131 N.J. at 588; see also Riley v Hunterdon Cent. Bd. of Educ., 173 N.J. Super. 109 (App. Div. 1980). A petition must be filed within ninety days of receipt of notice of Board action, and not within ninety days of "exhaustion of other avenues and mechanisms." Wise, supra, EDU 160-00, Initial Decision.

Accordingly, I **CONCLUDE** that Johnson-Deen's petition of appeal should be dismissed for failure to comply with the requirements of N.J.A.C. 6A:3-1.3(i). In light of my conclusion that the appeal was not timely filed, it is unnecessary to reach the substantive issue raised by the District's motion.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the petition of appeal be **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 19, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: March 19, 2014

Date Mailed to Parties: MAR 20 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

190-14

BERNARDS TOWNSHIP EDUCATION ASSOCIATION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE , TOWNSHIP OF BERNARDS, SOMERSET COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Education Association (Association) contended that the respondent Board violated *N.J.S.A.* 18A:26-2 when it authorized non-certificated coaches to provide physical education grades for student athletes involved in athletic team activities. The Association further asserted that the Board may not lawfully substitute team athletic endeavors for structured physical education classes. The Board filed a motion to dismiss, alleging that the within petition was untimely filed pursuant to *N.J.A.C.* 6A:3-1.3(i).

The ALJ found, *inter alia*, that: on December 20, 2010, the Board adopted its "Option II" policy, which permits high school students to meet their core curriculum and graduation requirements – including the physical education requirement – through alternative pathways; the "roll-out" of this policy began on September 6, 2011, the first day of the 2011-2012 school year; the instant petition was timely, as it was filed within 90 days of the "roll-out" of the policy; the current "Option II" for physical education directly incorporates the Core Curriculum Content Standards and thus harmonizes with State educational requirements and the authorization for this type of alternative program, with non-traditional personnel involved in assessing the progress of students. The ALJ concluded that the petitioner failed to establish that the Board's actions in implementing the "Option II" for physical education, and its use of grading information received from non-physical education certificated coaches as the essential source of grades for students participating in "Option II," violated the law. Accordingly, the ALJ dismissed the petition.

Upon full consideration, the Commissioner concurred with the ALJ that the petitioner's appeal was timely filed under *N.J.A.C.* 6A:3-1.3(i), and that the Board's Option II policy for physical education does not violate *N.J.S.A.* 18A:26-2. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

May 5, 2014

OAL DKT. NO. EDU 507-12
AGENCY DKT. NO. 351-12/11

BERNARDS TOWNSHIP EDUCATION ASSOCIATION, PETITIONER, V. BOARD OF EDUCATION OF THE , TOWNSHIP OF BERNARDS, SOMERSET COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the petitioner's appeal was timely filed under *N.J.A.C.* 6A:3-1.3(i). The Commissioner is also in accord with the ALJ's determination that the Board's Option II policy for physical education does not violate *N.J.S.A.* 18A:26-2. Accordingly, the recommended decision of the ALJ is adopted for the reasons expressed therein.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/05/14
Date of Mailing: 5/06/14

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 507-12
AGENCY DKT. NO. 351-12/11

BERNARDS TOWNSHIP EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,
Respondent.

Keith Waldman, Esq., for petitioner (Selikoff and Cohen, attorneys)

Rita F. Barone, Esq., for respondent (Purcell, Mulcahy, O'Neill and Hawkins, attorneys)

Record Closed: February 6, 2014 Decided: March 21, 2014

BEFORE **JEFF S. MASIN**, ALJ:

This contested case arises from a dispute in which the Bernards Township Education Association (Association) contends that the Board of Education of Bernards Township (Board) violated applicable law by authorizing non-certificated individuals to issue grades and allowed a policy to exist which violated the core curriculum content standards. More specifically, the issue involves non-certificated coaches who are purportedly being permitted to issue physical education grades, and the allowance of an

exemption from physical education for students who are participating in team athletic endeavors. This allegedly is occurring under the auspices of what is referred to as Option II, a process authorized by N.J.A.C. 6A:8-5.1(a)(2), which offers an alternative means of satisfying graduation requirements, but which, in the Association's view, has been improperly utilized by the Board. The Association filed a petition with the Commissioner of Education on December 2, 2011, challenging the Board's action. The Board replied on January 11, 2012, contending that it had properly applied Option II, and also challenging the timeliness of the Association's petition, which it claims was filed in violation of the so-called 90-Day Rule, incorporated in N.J.A.C. 6A:3-1.3(i). The Commissioner of Education transferred the matter for hearing before the Office of Administrative Law on January 11, 2012, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -23. Following preliminary matters, including a substitution of counsel for the Board and pre-hearing conferences, a Case Management Order was issued on May 3, 2012. The Board filed a Motion to Dismiss the Petition. As there were matters of fact regarding notice issues that had to be resolved in order to determine the timeliness of the petition, it was determined that these matters were to be considered along with the questions concerning the application of Option II. Hearings were held on April 19, May 13, and July 19, 2013. Transcripts were ordered and briefs were filed and the last of these was received on February 6, 2014, at which time the record closed.

This decision will address both the timeliness of the petition as well as the merits of the Association's allegations. As it is necessary to consider facts existing both before and after the adoption of the Policy in order to understand the precise nature of the complaint as well as the timeliness of the petition, these facts will be explored and the impact of Option II considered before arriving at a conclusion as to the petition's compliance with the 90-Day Rule.

Option II and the Board's Policy

Option II is a procedure for the satisfaction of graduation requirements through alternative means, and the general authority for such alternatives is set forth in N.J.A.C. 6A:8-5.1, which provides

(a) For a State-endorsed diploma, district boards of education shall develop, adopt, and implement local graduation requirements that prepare students for success in post-secondary degree programs, careers, and civic life in the 21st century, and that include the following:

1. Participation in a local program of study of not fewer than 120 credits in courses
designed to meet all of the CCCS, including, but not limited to, the following credits

. . .

2. The 120-credit requirement set forth in (a)1 above may be met in whole or in part through program completion of a range of experiences that enable students to pursue a variety of individualized learning opportunities, as follows:

i. District boards of education shall establish a process to approve individualized student learning opportunities that meet or exceed the CCCS.

(1) Individualized student learning opportunities in all CCCS areas include, but are not limited to, the following:

(A) Independent study;

(B) Online learning;

(C) Study abroad programs;

(D) Student exchange programs; and

(E) Structured learning experiences, including, but not limited to, work-based programs, internships, apprenticeships, and service learning experiences.

(2) Individualized student learning opportunities based upon specific instructional objectives aimed at meeting or exceeding the CCCS shall:

(A) Be based on student interest and career goals as reflected in the Personalized Student Learning Plans;

(B) Include demonstration of student competency;

(C) Be certified for completion based on the district process adopted according to (a)2ii below; and

(D) Be on file in the school district and subject to review by the

> Commissioner or his or her designee.
>
> (3) Group programs based upon specific instructional objectives aimed at meeting or exceeding the CCCS shall be permitted under this section and shall be approved in the same manner as other approved courses.[1]

On December 20, 2010, the Bernards Township Board of Education adopted a Policy regarding high school graduation, denominated as M5460.[2] This Policy addresses curriculum requirements for graduation from the District's high school. It includes a provision that provides that the requirement of 120 credits necessary to qualify for graduation may be met "in whole or in part through the use of Option II." The purpose of Option II is described in the Policy.

> To provide educational experiences that are meaningful and relevant, and that provide pupils with opportunities to explore and achieve at high levels. In order to maximize pupil achievement and meet diverse pathways for learning, Option II permits pupils to employ alternative learning experiences that are stimulating and intellectually challenging, and enable pupils to fulfill or exceed the expectations set forth in the Core Curriculum Content Standards.

The Policy specifically provides that it may be employed to provide a "physical education exemption." An Option II Review Committee is required to grant prior approval of Option II alternatives that students wish to utilize. The Principal is designated as having primary responsibility and authority for the implementation of the Option II program and is to oversee all aspects of that program.

The Association's Allegations

The Association premises its attack upon the Board's action on N.J.S.A. 18A:26-2.

> No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer,

[1] Option II has been an authorized vehicle for meeting health, safety and physical education requirements since 2000. See Gagliardi Memorandum, dated October 16, 2001, R-9, authored by then Commissioner Vito Gagliardi.

[2] The Policy had a first reading at the Board's meeting on November 22, 2010, and the minutes indicate that there was discussion of the Policy at that time, including the physical education portion, although there is no specific indication that grading or assessment by non-certificated persons was discussed.

> 'direct' or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law.

In accord with this statute, N.J.S.A. 6A:9-5.1 reads

> (a) Pursuant to N.J.S.A. 18A:26-2, any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate.

The Association contends that coaches presently providing grades for students utilizing Option II do not possess the required certifications and therefore they cannot be authorized to perform functions that by law are to be provided only by properly certificated individuals.

Evidence

The Board of Education adopted its policy permitting high school students to meet their core curriculum and graduation requirements, including the physical education requirement, through alternative pathways, on December 20, 2010. Lori Thompson and Denise Policastro, officers in the Teacher's Association at the time of the adoption of Option II by the District, each testified that there was no discussion at the December 10 meeting concerning Option II. The Policy was available on a table and a question was asked as to whether anyone had any question about it. There was no discussion about, or any reference to, anything about non-certificated coaches giving grades. Each witness also noted that the fact that this would be occurring was not mentioned by any administrator until September 2011. Ms. Thompson, then a middle school teacher, only learned of the "roll out" of the Policy in her role with the Association, as the Policy was not effective for the middle school. Thompson recalled that members of the Association first came to her and to Ms. Policastro with concerns about non-properly certificated individuals issuing pass/fail grades "in the beginning of the school year of 2011," singling out Kim Clark and Kathy Lime as members of the physical education department who spoke with she and Policastro. Specifically, these two advised that they had been told that coaches could give grades to students who were part of Option II. Some physical education teachers were also coaches and they

became aware that they would be issuing grades to students that were on their teams. Thompson also noted that several PowerPoint presentations were presented to school personnel regarding Option II, including one that she saw on February 28, 2012, in which there was no mention of the non-certificated persons grading or passing students in Option II. Thompson asserted that this lack of any mention of this physical education-related element of non-certificated persons grading or passing students occurred despite the presence in notes shown to Thompson from a PowerPoint demonstration of February 4, 2011, which she did not attend, a presentation for "upper classman registration," the notes for which included the following comment,

> The good news is that coaches no longer have to have their teaching certification to qualify for this. So if you have a coach outside of school and put in time outside of school for a sport, you can apply.

Ms. Thompson agreed that she would not have been invited to this PowerPoint presentation as she did not teach in the high school and that she did not know what was said at this presentation.

The witness explained that when the Board wanted to provide the Association with formal notice of something, it generally contacted either she or Ms. Policastro. If other officers of the Association were the recipients of such formal notice, they would contact the co-presidents "right away." None did in connection with any formal notice regarding this physical education impact of Option II. Once the Association was aware of the issue, its representatives discussed the matter with Superintendent Dr. Goger and Mr. Siet, "just trying to get more information about it and to argue our point of non-certificated staff or employees of the District issuing grades." These discussions took place "throughout the school year," starting "when it was first rolled out in September 2011."

Ms. Thompson was shown a copy of an e-mail, dated March 4, 2011, from Rich Shello, Director of Athletics, which was sent to several persons, including Kathy Lime, who Thompson acknowledged was an Association building representative. Mr. Shello called attention to a "cost savings measure," in which the District is "looking to mandate that all student-athletes be placed in study hall for 2 marking periods of Physical

Education for each sport that they participate in." Shello noted that he would be meeting with the superintendent and other administration members "to attempt to dissuade them from this monumental change." He noted that if this change occurs, other districts are likely to follow suit. Ms. Thompson acknowledged that she saw this e-mail, but could not recall exactly when she did. She understood that the "cost savings" referred to a situation that might result in the loss of some members of the physical education department, which was the substance of the Option II changes. She denied that this e-mail prompted any discussions about the certification issue. In regard to this concern, Ms. Thompson was unable to say whether it was the fact that for years prior to the adoption of M5460 and its Option II element, persons with substitute certifications, or with other non-physical education certifications, such as language arts, were already giving grades under Option II, which counsel for the Board asserted had been operative since 2000, apparently in a form then known as "Alternate Physical Education" or "Alternate PE".[3] However, she knew that from that time, and under that program, "to an extent", students could engage in interscholastic athletics and substitute that participation for PE credit. She knew that a certificated science teacher might be the basketball coach, but she was not aware whether that person was giving physical education grades to members of the team.

Kimberly Clark, a health and physical education teacher employed in the district since 2007, at Ridge High School, is a coach of field hockey and freshmen basketball. She previously served as an assistant coach of track and field and girl's lacrosse. She is a member of the Association, but is neither on its board nor is she or has she been a building representative. Ms. Clark is familiar with Option II, at least as it applies to physical education. She was aware that Option II was offered for at least as long as she has been in the district. She believed that the policy changed in school year 2011-2012. Before that time, student athletes were permitted to receive credit for physical education class if involved in a sport and if they had less than three study halls in a week. They were permitted to exempt out of physical education for one marking period, generally coinciding with the sports season that they were involved in. As the pre-2011-

[3] Testimony indicated that the Alternate Physical Education program replaced an earlier physical education exemption program after that term, "exemption", was no longer deemed appropriate. This change was presented to the Board in December 2000. The County Superintendent approved this new program.

2012 program operated, Clark was unaware that any non-properly certificated person was permitted to "give a grade." She explained that physical education teachers were provided with a list of students exempt from physical education under the policy, and "we were instructed to institute a pass or fail grade as physical education teachers for those students under the instruction of our physical education supervisor." Clark, herself a certificated health and physical education teacher, "issued the grade." Clark and her fellow properly-certificated colleagues "actually input the pass or fail grade." In order to fully understand how this process operated in the pre-2011-2012 period, I asked Ms. Clark whether, for a football player exempt from physical education class during football season, she was "told, give him a pass."

> The Witness: A P.
> The Court: Give him a P.
> The Witness: Put a P.
> The Court: · So it wasn't as if you were analyzing anything to determine whether he got that P. It was a direction you were given to give him a P from your supervisor, correct?
> The Witness: Correct.

Clark later noted that in the time before 2011-2012, she placed the grades that she was directed to enter by Mr. Shello, and she did not perform any assessment as to the compliance with core curriculum content standards. Instead, "I was directed by my supervisor who did the assessment." However, despite this assertion, Clark had no personal knowledge as to whether anyone had actually looked at the core standards in regard to these grades.

Ms. Clark described the value of the alternative program for physical education prior to 2011-2012. It permitted students to participate in a wide range of activities including, but by no means limited to, the "more traditional sports." Many of these could be "lifelong activities."

Ms. Clark discussed the changes to the Option II program for physical education as she perceived them after the start of the 2011-2012 school year. Rather than having to request an exemption as before, students were now automatically taken out of physical education. The approval process that required documentation of less than three study halls a week was eliminated. This resulted in a "huge number of athletes"

being exempted, with the number of exempted students growing from, she believed, 117 prior to the change, to between 500 and 600 students after the change. After the change, some of the students had five study halls a week. The exemption out of physical education classes resulted in some students having two, even in one case she was aware, of three study halls in one day. Study halls were therefore overcrowded, class size was also affected, due to the loss of two physical education teachers at the high school when the change occurred. Also, coaches now give the grades, and they may or not be physical education certificated.

Ms. Clark described a "variety of rubrics and a variety of assessments" that she utilizes to determine whether students are meeting core curriculum standards. However, in connection with the students whom she coaches, Clark was originally provided with a rubric, the "Option II Physical Education Rubric", that simply asked whether her student-athletes were meeting core curriculum standards during her field hockey season. She noted those who had and those who had not. She signed her name to the form, submitted it, and was then disciplined. More specifically, in a letter dated November 29, 2011, then Superintendent Goger advised Clark that although each of the students she had marked as not having met the core curriculum standards had "ostensibly" spent "an average of 15 hours per week in strenuous physical activity that included" a list of characteristics, she had failed them, thereby "unreasonably and arbitrarily imped[ing] each of these students' ability to graduate. The District will not permit you to make a point at the expense of our students." She was advised that Mr. Howlett, the principal of Ridge High School, was directed to alter the grades from failing to passing for each student that Ms. Clark had failed, so long as they had met the attendance requirement. Her conduct was deemed unbecoming and subject to discussion at a future Board meeting. However, after the Association met with the superintendent, another letter was issued in which Dr. Goger advised Ms. Clark that it had been determined that the rubric used for that marking period had not been clear, there had been a lack of sufficient direction by "administration" as to the evaluation under the assigned rubric, and that Clark had not been provided guidance on how the rubric was to be utilized. The rubric had therefore been revised and "now directs the employee to determine which of the Cumulative Progress Indicators are applicable to the coach/advisor's activity and to certify if the student has made progress towards

meeting those applicable indicators during the season of participation." Clark was directed to complete this new rubric for each member of the field hockey team who utilized Option II.

Ms. Clark acknowledged receiving Mr. Shello's e-mail in March 2011. As an attachment to that e-mail, Shello provided a four-page document, the first two pages entitled "Option II Physical Education", and the last two entitled, "Educational Rationale To Avoid Mandating Option II Changes In Health and Physical Education." Asked if in this document, "or elsewhere", Shello told the recipients that non- PE-certificated instructors would be assessing Option II performance and issuing grades, Clark answered that, "we knew that the coaches were going to have to issue the grade, so essentially, yes." But "all the specifics on how Option II was going to be run" was unknown until the fall of 2011, when "we found out that coaches were actually going to be filling out the rubrics giving the grades, yes." The third bullet of the "Educational Rationale" sent by Shello in March 2011, had actually noted that "[M]any coaches are not Physical Educators or certificated teachers for that matter. Their practices and games are not designed to meet the NJCCCS and many do not know how to assess student achievement in this area."

Ms. Policastro, a mathematics teacher in the District since 1998, currently assigned to Ridge High School, testified that in the discussions held with Superintendent Goger over the months following the roll-out in September 2011, Goger always emphasized the new policy as a cost-saving process, rather than providing any educational/pedagogical rationale for the policy. When they would discuss with Goger the quality of the PE program since the inception of the Option II program, she would listen but then "eventually she would just cut us off and say, 'It was a cost-saving program. We needed to do this to save money. And it is what it is.'"

Ms. Policastro was questioned as to her understanding of the process for grading in the prior alternative PE program. She contended that "the coaches did not assess. The athletic director [Shello] directed the PE teachers a certain grade, pass or fail. . . . The coaches did not have a rubric. The coaches never gave input." The PE teacher then input the grade. However, the witness, not herself a PE teacher and not

identified as having been a coach herself, identified the source for her understanding of this pre-2011-2012 process as her discussions with coaches and PE teachers after the grievance was filed. She then stated that she had discussed this with Kim Clark and "more or less every person in the department . . . ." Yet she acknowledged that Clark had herself testified that she had no personal knowledge of whether or not coaches were assessing the students. Kathy Lime, a senior member of the PE department, but not a coach, was another person Policastro spoke with. Lime told her coaches did not assess, but she did not tell Policastro where she had obtained that information. Tim Mooney, a track and field and cross-country coach, did tell her that coaches did not assess. Lime did not speak to Mr. Shello. She then denied knowledge as to whether Shello filled out any rubric or performed any assessment of the students in regard to their meeting on the core curriculum standards. "I don't know if Mr. Shello assessed them using any rubric that currently existed or how he then told the teacher to put this grade in." She also understood that the coaches did not even provide feedback to Shello as to whether the student had attended practices and games. Asked how it was then that Shello knew whether or not they even attended, she responded, "that's a good question." Eventually, at the end of her testimony, the witness acknowledged that Shello would direct PE teachers to input grades and that she did not have knowledge of the information upon which Shello would act to decide what grade to tell the teacher to enter. However, pressed further, she said that the "collective coaches" she had spoken to, some of whom where members of the PE department, had advised her that [I]f the name appeared on a roster, they passed. She did not know if any other assessment was made concerning these students other than that her name appeared on the roster.

Policastro also acknowledged that during the period prior to 2011-2012, students could take college course work on-line, and receive credit for it. The instruction was not provided by District employees and the grade conferred was determined by someone not an employee of the District.

Francis T. Howlett, Jr., Principal of Ridge High School, testified as to his knowledge of the District's alternate learning programs since 1999, when he started his employment in the District. Alternate PE existed at that time, and there were "administrative nightmares" associated with the timing of seasons and reentry into PE

as "individual sports" seasons ended at different times throughout the school year. In addition to this program, students also could take off-site or limited on-line courses or college courses. Now, under the Option II, students can take on-line courses but there is no requirement that the on-line instructor be certified, the same as there is no certification requirement for the instructors who provide college course instruction for which students may obtain credit. Asked if the college professors or instructors hold New Jersey certifications, Howlett responded that he could not say, and "We did not really care."

Mr. Howlett described the changes that were made from the previously existing alternate program when the Board adopted the Option II program in December 2011 and later implemented that program. In regard to what he termed Option II extracurricular, which affects students participating on school-sponsored sports teams, the exemption from PE classes was expanded from one to two marking periods. Also, prior to the adoption of Option II, off-site instructors, who were dealing with that part of Option II that permitted students to receive credit for activities that were off-site from the school, i.e. club soccer teams, equestrian, and the like, had to have a substitute certification [not a PE certification], but that requirement was dropped when Option II was adopted. Further, a rubric was introduced in order to permit the District to understand whether the students were satisfying the core content curriculum standards. The off-site coaches would fill out the rubric and the grade is then entered by either the principal or his designee. On-site coaches would similarly fill out and sign the rubric and the grade would be entered by one of the assistant principals, or her secretary. However, the determination as to whether a student passes or fails is made by the coach or the off-site instructor in an academic course, not the principal or other District employee who actually enters the grade.

Howlett acknowledged that there had been budgetary issues regarding physical education and "some other issues." The budget had failed, the State cut some funding and there were unforeseen expenses. Howlett was directed by Dr. Goger to find "creative ways to reduce force without affecting program." There were about eight staff members affected by a reduction in force, but he was unsure how many there were District-wide. However, beyond the budget issue, the idea behind offering Option II is to

offer students a wide variety of avenues to engage in activities that the school itself cannot offer, academic or otherwise.

Mr. Howlett identified R-7, a portion of the high school's Program of Studies, produced by the Guidance Department for the school year 2004-2005. The description therein of the Alternate Physical Education Program, includes the following statement referring to students who participate in an interscholastic sport, "They will be graded by the athletic coach on a pass/fail basis according to the requirements of the core content standards curriculum." Although Howlett was not then involved in the high school, and could not vouch for the accuracy of the description in regard to what actually occurred at that time, he asserted that there had been no change in the manner in which PE teachers assess students as to the core curriculum requirements under the previous Alternate PE program or under Option II. The student comes to class and is graded on participation. He did not believe that any rubric was involved "as far as the one that we used for the core content curriculum standards for off-site and extracurricular." Queried about testimony from a PE instructor that she did assess using the content standards, Howlett explained that he did not think this was a uniform practice throughout the department.

Howlett explained the criteria used by him to determine whether a student utilizing Option II would pass physical education. For off-site activities, he would look at the number of hours, the activities that were involved, which were sometimes self-explanatory, or, if necessary he would ask the coach to submit a clearer explanation of the activities. In addition, the student must have satisfied the 150-minute statutory requirement and "the coach supervisor was willing to sign off at the end that the student had completed the course or their activity." For on-site activities, if the student made the team, the coach would fill out the rubric saying that they did so and then "they would give it a grade of pass." In neither case did he mention the core curriculum standards. He "considered it," but "it's very difficult to be there to make sure it's going to happen . . . it's hard to communicate even with today's - - what we do in our physical education classes. I don't know that we go ahead and articulate which of the core content curriculum standards are being met either."

Jillian Shadis is now Supervisor of Guidance and in July 2012 was the head counselor at Ridge High. She was involved in providing students with information concerning Option II, along with other members of the Guidance Department, two of whom were Association building representatives. In connection with the PowerPoint presentation, she noted that the notes were meant for the counselors and were not in the published version of the presentation for students. The presentation did address the differences between the old and the new programs and policies regarding alternate educational opportunities. Off-site and alternate PE were now handled under Option II.

Ms. Shadis sent the "Option II-Physical Education Rubric" to off-site coaches to fill out, but was not involved in its creation. She did not know who distributed the rubric to on-site coaches. Shadis actually entered the pass/fail grades in 2011-2012, although Mr. Howlett is now performing that task. In order to enter the grade, Shadis had to assure that the second page of the rubric was signed and that the coach had not checked the section stating, "Indicate if the student has not made progress toward meeting the progress indicators."

Richard Shello confirmed that in the prior Alternate PE program, no assessment was made by either he or any physical education teacher concerning a student who was participating in a sport and who the coach noted as being listed on the team's roster. As long as the coach so indicated, Shello entered the grade on the school records and that grade was reported as a part of the student's regular report card. No rubric was utilized and no assessment was made as to whether that student, in engaging in that particular activity, was meeting the core content curriculum standards. Under the Option II Program now in effect, a rubric is used, and there is now no longer a limit in the number of study halls, as there had been in the earlier program. As for the assessment of the core standards, Shello described the rubric as "just a listing of the core standards," which "just puts a disclaimer question to the coach to sign that student A has made progress towards completion or mastering or whatever it says of the standards as listed . . . ." The coach makes this assessment, and Shello agreed that if the coach did this, no further assessment was made. The difference between the prior program and the Option II program for on- and off-site activities is the use, under Option II, of the rubric. The end result, that is, the person making the assessment of whether

the student passes or does not, remains with the coach. He agreed to my question, "in either case, you and the teacher are then effectively administerially entering the pass on the report card."

Sean Siet testified that to his knowledge, persons holding substitute certification and serving as coaches have no specific training in the core curriculum content standards that they are called upon to assess.

Discussion

It is important to first recognize what is and what is not at issue in this administrative action before the Commissioner of Education. To do so we must look first to the petition filed by the Association. It notes that on September 6, 2011, presumably the first day of the 2011-2012 school year, the district "unilaterally decided to allow the substitution of team athletic endeavors for structured Physical Education. . . ." The reference to a unilateral decision may signal some idea that the Board of Education could not adopt such a policy without negotiation with the Association, but the issue of whether there was a legal requirement to do so is not before the Commissioner or the OAL, and if that is a matter for the Public-Employee Relations Commission, so be it. The petition then notes the authorization by the District for "non-certificated coaches to provide Physical Education grades for students involved in athletic team endeavors", cites N.J.S.A. 18A:26-2's requirements for a "valid and appropriate teaching certificate, asserts that Health and Physical Education teachers must possess a certificate of eligibility, a certificate of eligibility with advance standing or a standards certificate with a Health and physical education endorsement, contends that the law is such that a district "may not lawfully substitute team athletic endeavors for structured Physical Education classes," and concludes that the Board is therefore illegally conducting its Physical Education program as it fails to conform with the Education laws and regulations. The Association requests that the Commissioner declare the Board's action of using not properly certificated persons as coaches who teach Physical Education or issue grades for that course to be illegal and to direct the Board to utilize services of duly-certificated teachers for the provision of Physical Education instruction.

In the course of this hearing, it has been noted that as a result of the implementation of the Option II provision, there has been a significant increase in the number of students who have utilized this process, resulting in a decline in those receiving their Physical Education instruction in the traditional classes, and there has been a reduction in force that eliminated two Physical Education positions. The question in this case is whether the Board's policy meets the requirements of State statute and regulations. If it does, that it may have led to a reduced need for staff is not a reason to find the Policy in violation of those very laws that permit it. Similarly, if the use of non-certificated persons or of those persons certificated in areas other than Physical Education is found legal, that the implementation of that Policy may have led to larger study halls or resulted in other issues regarding the implementation of the lawful policy is not the subject of this petition.

The Association relies upon N.J.S.A. 18A:26-2 as the foundation of its contention that the Option II Policy utilized by the Board is illegal.

> No teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law.

In accord with this statute, N.J.S.A. 6A:9-5.1 reads

> (a) Pursuant to N.J.S.A. 18A:26-2, any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate.

Additionally, the Association points to the requirements of N.J.A.C. 6A:9-3.1, which provides eleven professional standards for teachers, including four specific ones, Standards One, Four, Five and Ten, which it asserts "non-PE-certificated coaches are not capable of obtaining."

In its brief, the Association contends that under the Board's previously effective process, Alternate PE, student-athletes who were permitted to participate in sports endeavors for one marking period received grades for PE for that period from a member of the administration, who would "determine the grade" and direct a certificated PE teacher to enter the grade as a "P" or an "F". "**Coaches** did not enter grades for student athletes." Indeed, in its reply brief, the Association again offers that the Board's claim that students had previously been provided grades by coaches is not accurate, as it points out that even if Ms. Clark was providing grades that were posted on the direction of an administrator, Mr. Shello, she was a certificated PE teacher and therefore she could "provide grades without issue." But this characterization of the evidence is simplistic at best and the argument appears to emphasize form over substance, for in fact, it was the case that all the certificated teacher did was post the grade, not determine it. Clark was not exercising any teaching skill or engaging in any educational assessment of the students whose grades she posted. With due respect, she was merely an instrument to place in the record the grade determined by the coach, a pass/fail decided on factors, such as they were, that Clark did not herself assess. In fact, as the evidence clearly demonstrates, while the physical entry of the grade was made by a certificated physical education teacher at the express direction of the athletic director, Richard Shello, it would be quite inaccurate to suggest that even Shello "determined" the grade. He testified without contradiction that so long as the coach indicated that the student was on the roster of the team, Shello merely entered the grade on the school records and that grade was reported as a part of the student's regular report card. No rubric was utilized by Shello and no assessment was made by him. He took the word of the coach as to the student being on the roster, and that was effectively all that he did. He then directed the ministerial act to be performed by a certificated physical education teacher, who also undertook no assessment. The athletic director did not "determine" the grade, for he did not examine whether the rostered student met any performance standards. The grade was pre-determined, for if the student was on the roster, Shello mandated a "P" be entered. If the coach reported the student was not on the roster, Shello mandated an "F." All that he "determined" was not to examine any further. The process involved no individualized assessment or consideration regarding any such student's performance or achievement by either

Shello, Clark or any other person except the coach, whatever the coach's status might be in regard to any certification at all.

The Association contends that with the adoption of Option II as it affects physical education, a "significant change" occurred in the way PE was run from the past practice. It is undoubtedly true that the elimination of the limit on study halls and the increase in seasons during which a student might utilize Option II for physical education did substantially change the number of students participating in the program, resulting in increased numbers of students in study halls and a reduction in students in physical education classes. This apparently led to a reduction in the staffing of physical education positions, no doubt a significant result for the riffed individuals and, incidentally, for the Association. But the petition attacks the practice of having non-PE-certificated persons grade students. And as to that issue, the evidence is that the rubric, as first introduced and later changed after Ms. Clark pointed out concerns about the original version, is provided to coaches, apparently whether they be PE-certificated or not, and the coaches are to assess the students' progress in relation to the list of core content standards, sign the form, possibly indicate a lack of progress, and return it to Principal Howlett. While Howlett did apparently apply a general criteria for off-site activities of the number of hours and the nature of the activities involved in the particular sport or endeavor, the key element as to the grade of each student was the coach's sign-off that the student "had completed the course or their activity." For on-site activities, if the student made the team, the coach would fill out the rubric saying that they did so and then "they would give it a grade of pass." Once again, as in the case of the pre-Option II program, it is the coach who essentially determines the grade. The use of the rubric, if conscientiously applied by the coach, allows that individual to better assess the student's progress, but the fact is that Howlett effectively allowed the coach to determine the grade, and he merely received it and had it entered by his assistant. It would be a stretch to say that what Howlett does involves any "significant change" from what Shello did. That said, the use of the rubric is, however, a "substantial change." And that fact is important in assessing the timeliness of the petition.

90-Day Rule

The Board contends that the petition should be dismissed because it was filed more than ninety days after the action by the District Board of Education about which the petitioner complains. N.J.A.C. 6A:3-1.3(i).

> Appellant shall file a Petition no later than the 90th day from the date of receipt of the notice of final order, ruling or other action by the District Board of Education, individual party, or agency, which is the subject of the requested contested case hearing. . . . ."

This provision has been strictly enforced by the Commissioner of Education and the Courts have time and again supported the Commissioner's adherence to the rule, with limited exceptions that deal with matters of constitutional import or great public concern. Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572 (1992); Riley v. Hunterdon Central High School Board of Education, 173 N.J. Super. 109 (App. Div. 1980). If the provision is properly invoked in this case, the matter must be dismissed without a ruling on the merits of the petitioner's concerns.

The two key questions in any consideration of the 90-day rule are, first, what is the specific focus of the petition, that is, what is it that the petition claims is the wrong that must be corrected, and, second, when did the ninety days permitted for filing the petition begin to run. Here, the Board adopted the Policy incorporating Option II on December 20, 2010. The petition was filed on December 2, 2011, a date that is clearly well outside the ninety-day period following on the formal adoption of the policy. The "roll-out" of the Policy began on September 6, 2011, the first day of the 2011-2012 school year. The filing date of December 2, 2011, was within ninety days of this event.

As previously noted, the Association specifically complains about what it asserts is the Policy's authorization for "non-certificated coaches [to] provide Physical Education grades for student athletes involved in athletic team endeavors", a purported violation of N.J.S.A. 18A:26-2, and an assertion that the District "may not lawfully substitute team athletic endeavors for structured Physical Education classes."

In part, the Board contends that the Association and its members knew full well even before the adoption of the Option II Policy in December 2010, that non-PE certificated personnel were already providing grades, in a pass/fail manner, for students who were partaking of the previous Alternate Physical Education program. While the introduction of Option II may have increased student participation in the alternate means of fulfilling the physical education requirement, may have resulted in increased numbers in study hall, may have even led to a reduction in force of physical education teachers, there was no change in the fact that grades were provided for students by coaches. The entry of the grades for these students prior to 2011-2012 by Mr. Shello or by Ms. Clark was no different than the entry of grades by Mr. Howlett after Option II became effective. In each case the entry was of a grade that was, for all intents and purposes, determined by the coach. As such, the very thing complained about, the authorization by the District for "non-certificated coaches" to issue grades, was a situation that existed for years before the petition was filed and, as such, a petition challenging the validity of that practice is decidedly out of time.

It is apparent from the record that in fact non-PE certificated coaches were providing grades before December 2010. What appears to have changed under the Option II Program as adopted in that month and then implemented in September 2011, was the use of a rubric that purports to incorporate in the process by which these coaches will grade the student a measuring tool or guide; a rubric that is geared, so it is claimed, to the Core Content Curriculum Standards. Prior to at least September 2011, the record does not support that the process by which these coaches determined grades included such a rubric. The use of the rubric, and the idea that these non-PE certificated coaches would be using it to assess the student's progress and achievement, constituted a new element in the grading process, one that more directly tied the assessment by the coaches to the core standards Whatever the legalities of the prior practice, that is, the process for grading utilized under the Alternate Physical Education Program, the focus of the petition is, and must be, on the existing situation in the District as of the time of its filing. The evidence appears to be that the rubric was first utilized in the first marking period of the 2011-2012 school year. There is no reference to the rubric in the Policy itself, as adopted in December 2010. Thus, the petitioner claims, by the time the Option II Policy was actually initiated, persons without

the imprimatur of a PE certification were expected by the District to grade students in accord with the Core Curriculum Content Standards applicable to physical education. I **CONCLUDE** that, while the Board may be correct that this practice violated no law and that the persons who were engaging in this grading were not employees, nevertheless, to the extent that the petition challenges the propriety of grading by persons not PE-certificated who are to do that grading in accord with the core curriculum and to use the current rubric as a violation of the statutory structure, it is timely. The Motion to Dismiss is **DENIED**.

Does the District's Option II Policy for Physical Education
Violate the Law?

In its defense of the current Policy, the Board relies upon what it believes to be the implicit allowance for non-physical education certificated persons to "confer credit." In his memorandum of October 16, 2001, addressing Option II, then Commissioner Gagliardi noted that where a local school district decided to permit program compliance through such non-traditional routes as Option II allowed,

> a mechanism must be put in place to ensure that the instructional objectives and Core Curriculum Content Standards are being met. This should be clearly documented and included as part of the student's records. Building principals may want to develop a reporting form or checklist pertinent to the type of alternative activity so that the student's attendance, participation, and achievement can be clearly documented.

The Board argues that it has done precisely what this language provides for. The rubric, as now modified in light of Ms. Clark's concerns, is the "reporting form or checklist." It addresses the "Core Curriculum Content Standards" and thereby, the student's "achievement." Both the form and Howlett's consideration of the number of hours and the attendance issue address the memo's concern about "attendance" and "participation." The memo makes no claim that only PE-certificated teachers may review the checklist or reporting form and document therewith the student's "attendance, participation and achievement." The need for the building principal to be involved in developing the form and, as practiced in Bernards Township, receiving it and adding to it his checking about hours and the nature of the activity, suggests that it

is understood that in these allowable alternative forums for creditable educational experiences, the persons that might be assessing the student might not be traditional teachers or possess the precise certification that applies to physical education. And, the Board adds, the concept that non-PE certificated personnel could be involved in the process and in grading students for credit is reinforced by the June 14, 2004, guidance document, entitled "High School Graduation Requirements and Option Two", issued by then Assistant Commissioner Richard C. Ten Eyck and copied to then Commissioner William L. Librera. This document notes, in the "Introduction", that "Option Two serves as an alternative to traditional high school courses and provides in-depth experiences that may be provided by school district personnel or instructors not employed by the school district."

The Board dismisses the petitioner's reliance on N.J.S.A. 18A:26-2, as that statute addresses persons "employed in the public schools." To the extent that Option II contemplates instruction by persons "not employed by the school district", as the Ten Eyck document, and the entire concept of Option II presupposes, the statute simply does not apply. As for coaches actually in the District's employ, if they are certificated, the Board can surely employ them.

The Association argues that the guidance documents issued by the former Commissioner and the former Assistant Commissioner are not law, and cannot override the dictates of the legislation such as N.J.S.A. 18A:26-2. In this regard, the Association is correct. However, as these documents represent the thinking of the Department of Education's then highest level administrators about the meaning and implementation of Option II, the information contained in these documents is of substantial import. While the current Commissioner is free, within the confines of the applicable statute and regulations, to disagree with his predecessor Commissioner and other personnel, current or former, of the Department, and the deference concepts mentioned in the Board's brief, citing Krupp v. Board of Educ. of Union County Regional High School, 278 N.J. Super. 31 (App. Div. 1994), apply to reviewing appellate level courts and not to the agency head in a subsequent contested case or to the judges of the Office of Administrative Law, who sit on contested cases in the place of agency heads and are thus not acting in an appellate role but in the same capacity as the Commissioner,

nevertheless, due consideration is surely warranted for this information and it is not lightly to be dismissed.

Based upon the evidence, it is clear enough that the introduction of Option II into the educational landscape, as early as the start of the century, and as later adopted by this District, has created an alternative path for the acquisition of educational experience for students. In the sense that it authorizes instruction by persons without the traditional employment and certification requirements, it is no doubt a disturbing element to the status quo. The Board's use of the Alternate Physical Education program, prior to 2011-2012, involved elements of Option II, but as now implemented, the current Option II for physical education directly incorporates the Core Curriculum Content Standards. This use of the Standards harmonizes both the general educational policy that has now mandated that these Standards serve as a foundation of the State's educational system and the authorization for this sort of alternative program with non-traditional personnel involved in assessing the progress of students. While there may be implementation issues that will arise, and while it may be that the Districts utilizing Option II, in Physical Education as well as in other areas not at issue in this case, must not only provide the checklists and reporting mechanisms to these on- and off-site coaches and instructors but must also provide them with some sort of training or information as to the meaning and the use of the Standards and the reporting mechanisms, I **CONCLUDE** that the petitioner has failed to establish that the Board's decision to adopt Option II for physical education and its use of grading information received from non-PE certificated coaches as the essential source of the grades entered for students participating in Option II, violates the law. The petition is therefore **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and

unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 21, 2014
DATE

JEFF S. MASIN, ALJ

Date Received at Agency: 3-21-14

Date Mailed to Parties: 3-21-14

WITNESSES:

For petitioner:

Francis Howlett, Jr.
Jillian Shadis
Richard Shello

For respondent:

Lori Thompson
Kimberly Clark
Richard Shello
Denise Policastro
Sean Siet

EXHIBITS:

Joint Exhibits:

J-3 Bernards Township Board of Education Minutes, December 20, 2010
J-4 Policy M5460; High School Graduation adopted on December 20, 2010
J-33 Upperclassmen Registration for 2011-2012

For petitioner:

P-1 Agreement, Bernards Township Board of Education and Bernards Township Education Association, July 1 2010 to June 30, 2013
P-2 Identification Only
P-3 Option II, Physical Education

P-4 E-mail from Richard Shello, dated March 4, 2011

P-5 E-mail from Richard Shello, dated February 5, 2013

P-6 Letter from Valerie A. Goger, Superintendent, to Kimberly Clark, dated November 29, 2011

P-7 Letter from Valerie A. Goger, Superintendent, to Kimberly Clark, dated December 20, 2011

P-8 PowerPoint Presentation, February 28, 2012

P-12 Performance Responsibilities of a Teaching Staff Member, adopted April 28, 1997

For respondent:

R-2 Draft of policy M5460, dated September 13, 2010

R-3 Marked as J-3

R-4 Marked as J-4

R-5 New Jersey Department of Education's "Multiple and Diverse Paths to Student Success: A Guide to the Use of Option Two"

R-6 Identification Only

R-7 Guidance Department Ridge High School, Program of Studies, 2004-2005, Physical Health and Auto Safety

R-8 Memo from Richard C. Ten Eyck to Chief School Administrators, Re: High School Graudation and Option Two, dated June 14, 2004

R-9 Memo from Vito A. Gagliardi, Sr., to Chief School Administrators, Re: Graduation Requirements, Option II, dated October 16, 2001

R-10 Minutes from November 27, 2000 Board meeting

R-11 Minutes from December 18, 2000 Board meeting

R-12 Identification Only

R-13 PowerPoint presentation to students on scheduling, dated February 4, 2011

R-14 Identification Only

R-15 Identification Only

R-16 PowerPoint presentation from Educere, an on-line course provider

R-17 Letter from Sean Siet to parents and students, dated March 16, 2012

R-18 Option II Packet posted on Ride High School Guidance website in or around January 2011

R-19 Identification Only

R-20 Program of Studies title "Alternative Credit Pathways" posted on school website on or around January 2011

R-21 Identification Only

R-22 Ridge High School Option II Interscholastic Participation Form for the 2011-12 school year

R-23 Identification Only

R-24 Off-Site PE Program Form for 2012-2013 school year (discontinued)

R-25 Identification Only

R-26 Identification Only

R-27 Identification Only

R-28 Identification Only

R-29 E-mail from Sean Siet to Jillian Shadis, dated November 11, 201

R-30 Identification Only

R-31 State of New Jersey, Department of Education, Curriculum and Instruction: Comprehensive Health and Physical Education

R-32 Identification Only

R-33 Marked as J-33

R-34 Identification Only

R-35 Board Minutes from November 22, 2010

R-36 Ridge High School Guidance Department Senior Option Evaluation Form

R-37 Board Policy 3125, Employment of Certificated Staff

R-38 Job Description "Athletic Coach"

R-39 Marked as P-12

R-40 Option II, Physical Education Rubric

R-41 through R-52 Identification Only

191-14L

191-14

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

.IS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Acting Commissioner

May 5, 2014

Daniel Smith, Board Secretary
Hamilton Township Board of Education
1876 Dr. Dennis Foreman Drive
Mays Landing, New Jersey 08330

Peggy Capone, *pro se*
[redacted]
Mays Landing, New Jersey 08330

Eric Aiken, *pro se*
[redacted]
Mays Landing, New Jersey 08330

Dear Parties:

I have reviewed the papers filed in connection with the Petition for Declaratory Ruling in the matter captioned *Board of Education of the Township of Hamilton, Atlantic County v. Peggy Capone and Eric Aiken,* Agency Dkt. No. 91-2/14. Therein, the petitioning Board seeks a declaration as to which respondent was duly elected as Vice President of the Board of Education. Please be advised that I have determined not to consider this matter as one for declaratory ruling, pursuant to my discretionary authority under *N.J.A.C.* 6A:3-2.1(a). I find, instead, that this matter should proceed as a Petition of Appeal.

Accordingly, this matter will be transmitted to the Office of Administrative Law for hearing consistent with *N.J.A.C.* 6A:3-1.1 *et seq.*

Sincerely,

David C. Hespe
Acting Commissioner of Education

DCH/MKD/JLC
County Superintendent

192-14

OAL DKT. NO. EDU 14732-13
AGENCY DKT. NO. 220-9/13

A.M.T. on behalf of minor child J.S.T.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	
RESPONDENT.	:	

The record and the Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that, although a Board resolution approving the settlement agreement referred to in the Initial Decision is annexed to the Initial Decision, the settlement agreement itself is neither annexed to the Initial Decision nor included within the file sent from the OAL to the Commissioner. The Commissioner consequently cannot approve the settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL. If the parties are unwilling or unable to produce an executed settlement agreement, the matter shall proceed to hearing.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/06/14

Date of Mailing: 5/07/14

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 14732-13

AGENCY DKT. NO. 14732-13

A.M.T. O/B/O MINOR CHILD

J.S.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

BUNEA REGIONAL SCHOOL DISTRICT,

ATLANTIC COUNTY,

Respondent.

A.M.T, parent, pro se

Richard A. Asselta, Esq., for respondent (Capizola, Pancari, Lapham & Fralinger, attorneys)

Record Closed: March 11, 2014 Decided: March 18, 2014

BEFORE **DAMON G. TYNER**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 11, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I have reviewed the record and the terms of the settlements and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties, as well as the Board Resolution approving the settlement.

2. The settlements fully dispose of all issues in controversy and are consistent with the law.

I **CONCLUDE** that these agreements meet the requirements of N.J.A.C. 1:1-19.1 and that the settlements should be approved. I approve the settlements and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

3/18/14
DATE

DAMON G. TYNER, ALJ

Date Received at Agency: 3/20/14

Date Mailed to Parties: 3/20/14

lam/jb

RESOLUTION

WHEREAS, there is an action with claims pending between the BUENA REGIONAL SCHOOL DISTRICT (the "District"), and A.M.T., on behalf of minor child, J.S.T. before the Commissioner of Education and/or the Office of Administrative Law, namely OAL Docket No. EDU-14732-2013S and Agency Reference No. 220-9/13; and

WHEREAS, the parties desire to fully and finally settle and resolve any and all actions of any kind between them, including the above referenced matter; and

WHEREAS, the parties have executed a Settlement Agreement and have set forth a Settlement Agreement on the record before the Office of Administrative Law which fully and finally settles and resolves any and all actions of any kind between them, including the above referenced matters; and

WHEREAS, the Settlement Agreement provides, in part, that the District shall turn over to Petitioner, J.S.T.'s disciplinary file concerning the incident stemming from February 21, 2013 and J.S.T.'s subsequent suspension and in consideration A.M.T. agrees not to waive J.S.T.'s confidentiality and terms of the settlement; and

WHEREAS, the Buena Regional Board of Education (the "Board"), is a body corporate and politic of the State of New Jersey, charged with the statutory responsibilities of the management and administration of the District in Atlantic County, New Jersey, who has the statutory authority to enter into the Settlement Agreement; and

WHEREAS, an executive session meeting of the Board was held on Tuesday, March 4, 2014 at 6:00 p.m. at 125 Weymouth Road, Buena, New Jersey, where the Board reviewed and considered the Settlement Agreement; and

WHEREAS, during open session, the Board determined by a recorded vote of a majority of the entire membership of the Board with 10 members voting in favor, 0 members voting against, and 0 members abstaining, to approve the Settlement Agreement; and

WHEREAS, the Board specifically recognizes and acknowledges that the settlement is contingent upon approval by the Commission of Education as required by and consistent with all New Jersey Statutes and Administrative Codes; and

NOW, BE IT RESOLVED, that the Board hereby accepts the Settlement Agreement which will fully and finally settle and resolve any and all actions of any kind between the parties, including the above referenced matter, as more fully set forth in the Settlement Agreement.

ADOPTED this 4th day of March, 2014.

Witnessed or Attested to by:

Jann Cohen, Bus. Adm./Board Sect.

BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT

By: _____

Debra Bell, President

CAPIZOLA PANCARI LAPHAM & FRALINGER

A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Michael D. Capizola
Vincent J. Pancari*
Barbara R. Lapham
Michael P. Fralinger
Robert Pancari
Richard A. Asselta

*Certified Civil & Criminal Trial Attorney

100 N. Main Road
Vineland, NJ 08360-8244

Telephone: 856-692-6900
856-691-1600
Facsimile: 856-692-7802

March 5, 2014

Hon. Damon Tyner, A.L.J.
NJ Office of Administrative Law
1601 Atlantic Ave., Suite 601
Atlantic City, NJ 08401

Re: A.M.T., on behalf of minor child, J.S.T. v. Buena Regional School District, OAL, Atlantic County

RECEIVED
2014 MAR 11 A 8:57
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Dear Judge Tyner:

Enclosed please find the original Resolution by the Buena Regional Board of Education approving the settlement which was reached between the parties. If there are any questions or concerns regarding the enclosed, please do not hesitate to contact me.

Once again, I wish to thank the Court for facilitating this settlement.

Respectfully yours,

Richard A. Asselta
RAA/ld-dm

Enc.

cc: Arbret Michelle Thomas ***Via CM/rrr & Regular Mail***

193-14

OAL DKT. NO. EDU 09289-13
AGENCY DKT. NO. 121-6/13

D.W., on behalf of minor child, S.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/07/14

Date of Mailing: 5/07/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09289-13
AGENCY DKT. NO. 121-6/13

D.W. ON BEHALF OF S.C.,
Petitioner,
v.
TOWNSHIP OF ORANGE
BOARD OF EDUCATION, ESSEX COUNTY
Respondent.

Michael D. Driscoll, Esq. for petitioner (Law Office of Michael D. Driscoll, attorney)

Melvin C. Randall Esq., for respondent (Love and Randall, attorneys)

Record Closed: March 25, 2014 Decided: March 25, 2014

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 3, 2013 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Township of Orange Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated March 11, 2014.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 25, 2014
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 3-27-14

Mailed to Parties:

MAR 27 2014
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/rr

WHEREAS THE MATTER UNDER AGENCY DOCKET NO. 121-6/13 IS SCHEDULED FOR TRIAL ON MARCH 11, 2014 BEFORE THE HONORABLE ELLEN BASS AND,

WHEREAS THE PETITIONER IN THIS CASE IS DELORES A. WHEAT ON BEHALF OF S.C. AND,

WHEREAS THE RESPONDENT IN THIS CASE IS THE ORANGE BOARD of EDUCATION AND,

WHEREAS THE PETITIONER AND THE RESPONDENT ARE DESIROUS OF CONCLUDING THE CONTROVERSY HEREIN BY WAY OF MUTUAL AGREEMENT.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

- ALL PRIOR DISCIPLINARY RECORDS of S.C WILL BE MAINTAINED IN THE STUDENT SPECIAL EDUCATION RECORD FILE / INDIVIDUAL EDUCATION PLAN RATHER THAN IN THE STUDENT MANAGEMENT SYSTEM

- A NOTATION WILL BE MADE IN THE STUDENT MANAGEMENT SYSTEM THAT ALL PRIOR DISCIPLINARY RECORDS of ANY OF S.C. WILL BE MAINTAINED IN THE STUDENT SPECIAL EDUCATION RECORD FILE / INDIVIDUAL EDUCATION PLAN (I.E.P)

Deborah G. Wheat
MS WHEAT

03/11/14
DATE

Shelby Hays
FOR THIS BOARD

3/11/14
DATE

JAW THIS AGREEMENT SHALL NOT CONSTITUTE PRECEDENT AND OR A POLICY OR PRACTICE FOR THE RESPONDENT

ORANGE BOARD OF EDUCATION PUBLIC SCHOOL DISTRICT

Administrative Office
451 Lincoln Avenue, Orange, New Jersey 07050

RECEIVED
2014 MAR 24 P 1:47
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MARCH 11, 2014

G14-014

RESOLUTION TO ACCEPT THE SETTLEMENT AGREEMENT BETWEEN THE ORANGE BOARD OF EDUCATION AND THE LEGAL GUARDIAN OF STUDENT S.C.

WHEREAS, Petitioner, Guardian Ad Litem of S.C. filed a Petition of Appeal bearing Docket No.: 121-6/13; and,

WHEREAS, S.C. is a student enrolled in the Orange Public Schools; and,

WHEREAS, the matter in controversy herein was settled by and between the Petitioner and the Respondent each having affixed their signature to a **MUTUAL AGREEMENT** executed on the 11th day of March 2014.

NOW, THEREFORE, BE IT RESOLVED, that the Orange Board of Education hereby approves the terms and conditions of the **MUTUAL AGREEMENT** identified herein.

BE IT FURHTER RESOLVED THAT, based upon the terms and conditions of the **MUTUAL AGREEMENT** between parties, the matter in controversy is hereby settled. The **MUTUAL AGREEMENT** shall not constitute precedent, policy and/or practice for Respondent.

Attested to by: _____
School Business Administrator/
Board Secretary

ROLL CALL CHECKLIST	YEA	NAY
Lateefah Carr	abt	
Marion Graves-Jackson S	✓	
Emily Jukes	✓	
Franklyn Ore	✓	
Daniela Small-Bailey	✓	
Arthur J. Griffa School Board Vice-President M	✓	
Patricia Arthur School Board President	✓	

WHEREAS THE MATTER UNDER AGENCY DOCKET NO. 121-6/13 IS SCHEDULED FOR TRIAL ON MARCH 11, 2014 BEFORE THE HONORABLE ELLEN BASS AND,

WHEREAS THE PETITIONER IN THIS CASE IS DELORES A. WHEAT ON BEHALF OF S.C. AND,

WHEREAS THE RESPONDENT IN THIS CASE IS THE ORANGE BOARD of EDUCATION AND,

WHEREAS THE PETITIONER AND THE RESPONDENT ARE DESIROUS OF CONCLUDING THE CONTROVERSY HEREIN BY WAY OF MUTUAL AGREEMENT.

NOW THEREFORE THE PARTIES AGREE AS FOLLOWS:

Delores A. Wheat
MS WHEAT

03/11/14
DATE

Shelley Haupt
FOR THE BOARD

3/11/14
DATE

THIS AGREEMENT SHALL NOT CONSTITUTE PRECEDENT AND OR A POLICY OR PRACTICE FOR THE RESPONDENT

195-14M

195-14

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Acting Commissioner

May 12, 2014

Arnold Robinson, Esq.
Robinson Andujar Robinson, LLC
2057 Wheaton Avenue
P.O. Box 788
Millville, New Jersey 08332

Lauren Cooley Jensen, DAG
New Jersey Department of Law and Public Safety
Division of Law
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625

Re: *Pinelands Learning Center, Inc. v. New Jersey Department of Education, Division of Administration and Finance. Agency Dkt. No.220-8/12.*

Dear Counsel,

I have reviewed the materials filed in connection with the petitioner's Motion for Reconsideration of the Acting Commissioner's March 24, 2014 decision (March 2014 decision), in which the Acting Commissioner found that the Department's decision – disallowing the salary and fringe benefits of Ms. Bowles between September 1, 2006 and April 30, 2007 in the calculation of the petitioner's tuition rate for the 2006-2007 school year – was not arbitrary, capricious or unreasonable. The salary of Ms. Bowles was not included in the calculation of the tuition rate because she did not hold the requisite certificate between September 1, 2006 and April 30, 2007.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)2, a motion for reconsideration shall be considered based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;

iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or

iv. reversal of a prior judgment on which the present matter is based.

Upon review and consideration of the parties' submissions, I find that the petitioner has failed to satisfy any of the requisites for granting such relief specified in *N.J.A.C.* 6A:3-1.15(b)2. The petitioner suggests that since Ms. Bowles received a Teacher of the Handicapped Certificate after the March 2014 decision with an issue date of September 2005, there is newly discovered evidence that requires reconsideration. The information that the petitioner submitted, however, is not likely to alter the outcome in this matter because it remains undisputed that when the 2006-2007 school year started, Ms. Bowles did not hold a certificate. The regulations expressly require approved private schools to ensure that the teachers hold the proper certificate. *N.J.A.C.* 6A:23A-18.4(a)22. Moreover, for purposes of calculating the tuition rate that the approved private schools may charge, the regulations also explicitly state that the salary of professionals who are not certified but are functioning in a position requiring certification are non-allowable costs. *N.J.A.C.* 6A:23A-18.5(a)6.

Accordingly, the Motion for Reconsideration is hereby DENIED.[1]

Sincerely,

David C. Hespe
Acting Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

Via Regular Mail

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

196-14

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK, PASSAIC COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

The Hawthorne Board of Education (Hawthorne), appealed the determination of the Interim Executive County Superintendent of Schools for Passaic County (IECS) that it is the school district responsible for the cost of educating A.A., the son of N.A., who allegedly became homeless prior to enrolling in the Prospect Park School District between January 2013 and April 2013. During that period, A.A. attended the Benway School – an out-of-district placement – in accordance with his Individualized Education Plan. N.A. had been domiciled in Hawthorne prior to moving temporarily to her parent's home in Prospect Park in 2013; NA and her children subsequently moved to Florida. Hawthorne contended that N.A.'s family was not homeless pursuant to *N.J.A.C.* 6A:17-2.3, since the family was not forced out of its Hawthorne residence, and N.A. did not leave Hawthorne – nor reside with N.A.'s parents in Prospect Park – out of necessity.

The ALJ found that: *N.J.A.C.* 6A:17-2.3 provides, in pertinent part, that a child is homeless when he or she resides temporarily out of necessity in the residence of relatives because the family lacks a regular or permanent residence of its own; in the instant case – based on competent evidence presented at the OAL hearing – N.A. was not forced out of her Hawthorne apartment and there is nothing to suggest that her temporary relocation to her parents' home in Prospect Park was out of necessity; rather, N.A. voluntarily left her apartment to move back to Prospect Park as part of the process of moving to Florida, which occurred a few months later; thus, no crisis of immediacy displaced N.A.'s family, and the family's circumstances are clearly distinguishable from cases where a family becomes transient due to an emergency. The ALJ concluded that: no immediate circumstances, financial or otherwise, compelled N.A. to vacate her Hawthorne residence; Hawthorne sustained its burden of proving its allegations by a preponderance of the evidence; and the determination of the IECS that Hawthorne was N.A.'s last district of residence and therefore responsible for A.A.'s tuition was not reasonable. Accordingly, the ALJ reversed the IECS's determination and ordered that Prospect Park holds the responsibility for payment of A.A.'s educational program at the Benway School for the period from January 2013 to May 2013, in the amount of $21,441.75.

Upon consideration, the Commissioner adopted the Initial Decision as the final decision in this matter, but noted that he disagreed with the ALJ's characterization of the IECS's determination as "unreasonable"; rather, the IECS's decision was more than reasonable in light of the evidence available to him at the time. Prospect Park was ordered to pay the costs of A.A.'s educational program in the amount of $21,441.75.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 5/12/14

OAL DKT. NO. EDU 16270-13
AGENCY DKT. NO. 247-10/13

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK, PASSAIC COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and petitioner's reply exceptions, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in making his determination herein.

This matter arises out of a dispute between the Hawthorne Board of Education and the Prospect Park Board of Education concerning which board is responsible for educating the children of N.A. In a letter dated July 15, 2013, Scott E. Rixford, Interim Executive County Superintendent (IECS) of Schools for Passaic County, determined that 1) N.A.'s family was homeless, 2) Hawthorne was the district in which N.A. last resided prior to becoming homeless, and 3) Hawthorne is responsible for the cost of educating N.A.'s son, A.A.,[1] in his placement at the Benway School from January 9, 2013 and April 19, 2013.

[1] N.A. had two children enrolled in Prospect Park during the period in question. However, Prospect Park did not seek tuition for the other child.

Following a plenary hearing in the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) recommended reversing the IECS's determination, finding that N.A. and her family were not homeless within the meaning of *N.J.A.C.* 6A:17-2.3 when they temporarily resided in Prospect Park with N.A.'s mother. The ALJ specifically found a lack of competent evidence to support a finding that the move was made out of necessity. Rather, the ALJ found it "more plausible" that N.A. and her family voluntarily left their apartment in Hawthorne to move back with N.A.'s mother in Prospect Park as part of the process of moving to Florida, as expressed to N.A.'s landlord in December 2012 and as actually executed a few months later. Accordingly, the ALJ determined that Prospect Park is responsible for payment of A.A.'s educational program at the Benway School from January 2013 to May 2013.

On exception, Prospect Park argues that the clear language of *N.J.S.A.* 18A:7B-12 dictates a finding that the A. family was homeless during their temporary residence in Prospect Park, since – upon vacating the Hawthorne apartment – the A. family no longer had a "fixed, regular and adequate residence." Prospect Park contends that the reason for the A. family's departure from Hawthorne is irrelevant, as "there is no statutory or regulatory standard for determining that homelessness itself is the result of 'necessity.'" Prospect Park further contends that the short period of time the A. family resided with N.A.'s mother is indicative of a "homeless situation."

In reply, Hawthorne requests that the Commissioner adopt the Initial Decision as his own, and order Prospect Park to pay the costs associated with educating the A. children while the family resided in Prospect Park. Hawthorne asserts that the ALJ correctly concluded that the A. family was not homeless during their temporary stay in Prospect Park, since there was no evidence presented to establish that the A. family moved in with N.A.'s mother "out of necessity." Furthermore, Hawthorne avers that the temporary living situation in Prospect Park did not deprive the A. family of a fixed, regular, and adequate residence, thus precluding a finding of homelessness.

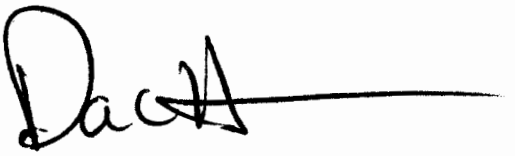
Upon full consideration, the Commissioner concurs with the ALJ's determination that the A. family was not homeless within the meaning of *N.J.S.A.* 18A:7B-12c and *N.J.A.C.* 6A:17-2.3. The Commissioner explicitly rejects respondents' assertion that the impetus for the A. family's departure from the Hawthorne apartment is immaterial. To the contrary, the Commissioner finds that an inquiry into the circumstances surrounding the A. family's move is essential to the homelessness determination.

A "homeless child" is one who lacks a fixed, regular and adequate residence. *N.J.A.C.* 6A:17-2.2. Not every child residing temporarily with a relative is "homeless." Rather, pursuant to *N.J.A.C.* 6A:17-2.3(a)3, such a child is homeless when he or she resides in "[t]he residence of relatives or friends with whom the homeless child is temporarily residing out of necessity because the family lacks a regular or permanent residence of its own." An examination of the conditions that precipitated the family's relocation is critical to ascertaining whether the living arrangement arose "out of necessity," and whether the family is without access to a "regular or permanent residence of its own."

In the instant matter, the ALJ specifically found that the A. family was not forced out of their Hawthorne apartment, that N.A. was up to date on her rent, and that there was no evidence that she was unable to pay rent going forward. The ALJ further found that N.A. voluntarily abandoned her Hawthorne home and temporarily relocated the A. family to her parent's home in Prospect Park as part of fulfilling her plan to move to Florida. The Commissioner finds that these facts do not support a determination that the A. family relocated out of necessity. Rather, the A. family had access to a fixed, regular and adequate residence, i.e., the Hawthorne apartment, but willfully and voluntarily chose to abandon it in favor of a stay with N.A.'s parents. As aptly recognized by the ALJ, "[t]his situation is not that of a homeless family." (Initial Decision at 8)

Accordingly, the Initial Decision is adopted as the final decision in the matter, and the determination of the Interim Executive County Superintendent of Schools for Passaic County[2] is hereby reversed. Prospect Park is ordered to pay the costs associated with A.A.'s educational program at the Benway School, for the period from January 2013 to May 2013, in the amount of $21,441.75.

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/12/14

Date of Mailing: 5/13/14

[2] Although the Commissioner concurs with the ALJ's determination that the IECS's decision must be reversed, the Commissioner disagrees with the ALJ's characterization of the determination as "unreasonable." Indeed, the Commissioner finds the IECS's decision was more than reasonable in light of the evidence available to him at the time the decision was made. This does not, however, end the inquiry. The IECS did not have the benefit of the testimony of N.A.'s landlord, which was adduced for the first time at hearing. That subsequently received evidence alters the propriety of the IECS's decision. It is for this reason that the IECS's otherwise reasonable decision cannot stand.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 16270-13
AGENCY DKT. NO. 247-10/13

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK, PASSAIC COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondents.

Rodney T. Hara, Esq., for petitioner, Board of Education of the Borough of Hawthorne (Fogarty & Hara, attorneys)

Jeffrey R. Merlino, Esq., for respondent Board of Education of the Borough of Prospect Park (Lindabury, McCormick, Estabrook & Cooper, attorneys)

Lauren A. Jensen, Deputy Attorney General, for the Department of Education (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: March 14, 2014 Decided: March 26, 2014

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

The Hawthorne Board of Education (Hawthorne) appeals the determination of the Passaic County Executive Superintendent of Schools (Department) that it had the responsibility for payment of the educational programs for the children of N.A. who were enrolled in the Prospect Park School District (Prospect Park) because Hawthorne was the last district of residence when the family allegedly became homeless. N.J.A.C. 6A:17-2.3 requires that a district board of education shall determine that a child is homeless if he resides in the residence of relatives temporarily out of necessity because the family lacks a regular or permanent residence of its own. Hawthorne contends that N.A.'s family was not homeless because it was not forced out its Hawthorne residence and did not leave or reside with N.A.'s parents out of necessity. The issue is whether Hawthorne is responsible for the tuition for N.A.'s child at the Benway School for the period in 2014 while the A. family was living with N.A.'s parents in Prospect Park.[1]

PROCEDURAL HISTORY

Hawthorne filed its Verified Petition with the Commissioner of Education on October 11, 2013, after which Prospect Park filed an Answer on November 1, 2013, and the Department filed an Answer on November 4, 2013. Upon the receipt of the Answers, the Director of the Bureau of Controversies and Disputes referred the matter to the Office of Administrative Law (OAL) on November 12, 2013, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I denied Prospect Park's Motion for Summary Decision on February 19, 2014. I held a plenary hearing on February 26, 2014, and closed the record on March 14, 2014, after the receipt of closing briefs that the parties requested to file.

[1] N.A.'s other child, F.A., attended kindergarten in Prospect Park during the period in question. Prospect Park did not seek payment of tuition from Hawthorne in connection with this attendance.

FINDINGS OF FACT

Preliminarily, I **FIND** the following stipulated **FACTS**: N.A. registered her child A.A. in the Hawthorne Public School District in or about late April/early May 2012. On or about January 9, 2013, N.A. registered A.A. in Prospect Park. In or about April 2013, N.A. withdrew A.A. from Prospect Park and advised that A.A. would be attending school in Auburnlee, Florida. At all relevant times, A.A. attended the Benway School, an out-of-district placement, in accordance with his Individualized Education Plan (IEP). Tuition for A.A. to attend the Benway School from January 2013 to May, 2013, was $285.89 per day for a total of $21,441.75.

As a result of a dispute between Hawthorne and Prospect Park as to which District would be responsible for the Benway School tuition for A.A. after January 9, 2013, Interim Executive County Superintendent of Schools for Passaic County Scott Rixford issued a July 15, 2013, decision. The Superintendent referenced a handwritten statement that N.A. had submitted to administrators in Prospect Park that said, "the reason for moving here [her parents' house in Prospect Park] is because of being forced out of our house by our land lord [sic]." He also referenced a handwritten statement from D.A. that said, "my daughter [N.A.] and her three children are living here with me at [address], Prospect Park." The Executive Superintendent also referenced a telephone call his office had received from Hawthorne Residency Officer Peter Van Der Velde advising that he had interviewed the A. family's Hawthorne landlord, who stated that the family was not evicted or asked to leave the residence. The Executive Superintendent also indicated that someone from the Department's Homeless Children and Youth Program had spoken with N.A. by telephone in July 2013, where N.A. re-affirmed that, when she moved to Prospect Park, she was homeless and moved in temporarily with her mother. Based on this information, the Executive Superintendent determined that Hawthorne was the last district of residence when the A. family became homeless and was, therefore, responsible for payment of the educational programs for the A. children.

Neither the Department nor Prospect Park produced either N.A. or her mother to testify. There was no evidence to elaborate upon or explain what N.A. meant in her hearsay written statement that she was forced out of her home by her landlord.

Based on the credible testimony of Luis J. Pinos, I make the following additional **FINDINGS OF FACT**: Pinos owns a two-family house in Hawthorne, where he resides on the second floor. He rented the first-floor apartment to N.A. and entered into a six-month lease with her from March 2012 to August 2012. The rental arrangement continued thereafter on a month-to-month basis. The lease provided that the landlord reserved the right of re-entry through a court eviction proceeding if the tenant violated any of the terms of the lease. Pinos never filed or pursued eviction proceedings against N.A. nor did he otherwise ever ask or direct her to vacate the premises. N.A. continued to pay her monthly rent for and after August 2012. N.A. lived in the apartment with her two children and her boyfriend. A baby was born during her stay at the Hawthorne apartment. In December 2012, N.A.'s boyfriend knocked on Pinos's door and informed him that the family was leaving at the end of December to move to Florida. They indeed moved out after the third week of December, abandoning their furniture. N.A. had paid the rent through December and was, at all times, up to date with the rent. Pinos never told N.A. or her boyfriend that they had to leave the apartment. Only after N.A. vacated the apartment, Pinos discovered some damage that he had to repair using N.A.'s security deposit.

Former Hawthorne Superintendent Robert P. Mooney testified that, after learning from Attendance Officer Van Der Velde of Pinos's claim that he never forced N.A. out of her Hawthorne apartment, he met with N.A. on February 14, 2013, because of Prospect Park's claim that she was homeless. N.A. told him that, at the insistence of someone in the Prospect Park administration, she had written the statement about being forced out when she enrolled her children in Prospect Park in January 2013. She also told Mooney that she was not forced out of her Hawthorne home and was not homeless but was living temporarily with her parents in Hawthorne.

Prospect Park Principal Catherine D'Arrigo testified that she was present on January 13, 2013, when N.A. came in regarding her children. She was familiar with the A. family as the children had been living with N.A. at her parents' Prospect Park home before she took an apartment in Hawthorne. She recalled N.A. using the word "homeless" but did not get into the issue of eviction. N.A. instead stated that she was

no longer living in Hawthorne and had moved in with her mother temporarily. D'Arrigo did not recall N.A. using the term "forced out."

I accepted through D'Arrigo, subject to the residuum rule, the written hearsay statement N.A. submitted to Prospect Park (R-P.P.-1) to the effect that she was forced out of her home by her landlord, even though D'Arrigo was not present when the statement was written. On the same basis, I accepted a written hearsay statement from N.A.'s mother stating that, "my daughter [N.A.] and her 3 children are living with me at . . . Avenue, Prospect Park, NJ 07508." Judicial rules of evidence do not apply to administrative agency proceedings, except for rules of privileges or where required by law. N.J.R.E. 101(a)(3); DeBartolomeis v. Bd. of Review, 341 N.J. Super. 80, 82 (App. Div. 2001); N.J.S.A. 52:14B-10(a) and N.J.A.C. 1:1-15.1(c). Hearsay is admissible subject to the "residuum rule," which mandates that the administrative decision cannot be predicated on hearsay alone. Weston v. State, 60 N.J. 36 (1972).

> [A] fact finding or legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it.
>
> [Id. at 51.]

The Uniform Administrative Procedure Rules governing administrative agency proceedings codify this doctrine by requiring that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(c).

In assessing hearsay evidence, it should be accorded "whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability." N.J.A.C. 1:1-15.5(a).

There is no competent evidence for N.A.'s hearsay statement to corroborate that she was forced out of her apartment by her landlord. Additionally, the statement is too bald to lead to a finding that there was a necessity for N.A. to leave the Hawthorne apartment. There is no evidence of an eviction proceeding as required by the lease. There is no competent evidence to contradict the credible testimony of Pinos, who had no basis to fabricate the statement and would not have profited by untruthful testimony. Interim Executive County Superintendent of Schools for Passaic County Scott Rixford did not have the benefit of Pinos's competent evidence when he issued his July 15, 2013, decision. Accordingly, I make the critical **FINDINGS of FACT** that N.A. was not forced out of her Hawthorne apartment by her landlord; she was up to date with her rent; the landlord did not compel her to leave because of damage to the apartment, since he did not discover the damage until after she had vacated the apartment; there was no eviction proceeding as required by the lease; there was no statement to N.A. or her boyfriend by the landlord compelling them to leave; and there is no evidence that N.A. was unable to pay the rent. In short, there is no competent evidence that N.A. vacated the Hawthorne apartment and temporarily relocated with her parents in Prospect Park out of necessity. It is more plausible that N.A. voluntarily left the apartment to move back with her mother as part of the process of moving to Florida as expressed to Pinos by the boyfriend in December 2012 and as actually executed a few months later.

LEGAL ANALYSIS AND CONCLUSIONS

Petitioner Hawthorne bears the burden of proving its allegations by a preponderance of the competent, relevant and credible evidence. N.J.A.C. 4A:2-1.4(c); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550 (1982). The evidence must be such as to lead a reasonably cautious mind to a given conclusion. Bornstein v. Metro. Bottling Co., 26 N.J. 263 (1958). Therefore, the tribunal must "decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of truth." Jackson v. Del., L. and W. R.R., 111 N.J.L. 487, 490 (E. & A. 1933). For reasonable probability to exist, the evidence must be such as to

"generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). Preponderance may also be described as the greater weight of credible evidence in the case, not necessarily dependent on the number of witnesses, but having the greater convincing power. State v. Lewis, 67 N.J. 47 (1975).

I **CONCLUDE** that Hawthorne has, indeed, sustained its burden.

The district of residence for a homeless child shall be responsible for the education of that child. N.J.S.A. 18A:7B-12.1. The district of residence for children whose parent temporarily moves from one district to another as the result of being homeless shall be the district in which the parent last resided prior to becoming homeless. N.J.S.A. 18A-7B-12 (c). A "homeless child" is one who lacks a fixed, regular and adequate residence. N.J.A.C. 6A:17-2.2. The regulations further provide in pertinent part that a district board of education shall determine that a child is homeless when he or she resides temporarily out of necessity in the residence of relatives because the family lacks a regular or permanent residence of its own. N.J.A.C. 6A:17-2.3(a)(3). Although the children were, indeed, living with their grandparents along with their mother for what eventually turned out to be a temporary period, I **CONCLUDE** that it was not out of necessity within the meaning of the regulation but rather by the willful and voluntary act of their mother as part of fulfilling her plan to move to Florida. Simply put, the family was not forced out of its Hawthorne residence. When N.A. voluntarily abandoned her Hawthorne home, she moved back into her parent's Prospect Park home where she and the children had resided permanently and where the children had been enrolled in school before moving to Hawthorne. Her parents' home was fixed, regular, and adequate in January 2013 as it had been before May 2012. There is no evidence that the residence of N.A.'s parents was temporary out of necessity. This is different from where a stay is necessarily temporary because, for example, a lease forbids occupancy by people not on the lease or where the host has conditioned a stay as temporary. The only evidence is that N.A., and not circumstances beyond her control, dictated the extent to which her return to her mother's residence was temporary until her plan to move to Florida came to fruition. The mother's hearsay statement

certainly does not change this calculus. Her January 2013 letter stated that her daughter and three children were living with her. Her statement had no conditions or qualifications. There is no evidence that the family was a victim of an abrupt change of circumstances. There was no crisis of immediacy. This situation is not that of a homeless family. See, e.g., J.G. and D.G. v. Bd. of Educ. of Point Pleasant, EDU 4688-10, Initial Decision (September 23, 2010), adopted, Comm'r (December 27, 2010), http://njlaw.rutgers.edu/collections/oal/>. The family's circumstances here are clearly distinguishable from cases where a family becomes transient due to an emergency. See, e.g., S.J. o/b/o V.J. v. Bd. of Educ. of S. Orange-Maplewood, EDU 5656-07, Initial Decision (January 22, 2008), adopted, Comm'r (March 3, 2008), http://njlaw.rutgers.edu/collections/oal/> (family evicted from apartment and then drifted around while living in a beauty salon, with a friend, and with child's grandmother in an attic); A.B. v. W. Orange Bd. of Educ., EDU13330-09, Initial Decision (January 25, 2010), adopted, Comm'r (April 13, 2010), http://njlaw.rutgers.edu/collections/oal/> (single mother evicted after losing full-time job and thereafter alternated between apartments of several friends).

Finally, K.N. o/b/o A.N. v. Board of Education of the Mainland Regional School District, EDU 6079-11, Initial Decision (August 5, 2011), adopted, Comm'r (September 19, 2011), http://njlaw.rutgers.edu/collections/oal/>, cited by the Department of Education is inapposite regarding the issue of homelessness. Although K.N. was never evicted from two rentals she occupied at various times, findings were made that she " . . . vacated two leased properties due to [a] lack of income." She then stayed variously with her sister and her mother out of necessity because she could not afford to maintain her own apartment. There is not such showing of necessity in the instant matter or that certain circumstances, financial or otherwise, compelled N.A. to vacate the Hawthorne property.

The determination of the Passaic County Executive Superintendent was unreasonable in that it was not based on any competent evidence unlike the above findings. Hawthorne has proved its contention by competent and credible evidence.

ORDER

I **ORDER** that Hawthorne's Petition be **AFFIRMED** and that the determination of the Passaic County Executive Superintendent of Schools be **REVERSED**.

I further **ORDER** that Prospect Park has the responsibility for payment of the educational program of A.A. at the Benway School for the period from January 2013 to May 2013 in the amount of $21,441.75.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 26, 2014 Jesse H. Strauss

DATE **JESSE H. STRAUSS**, ALJ

Date Received at Agency: 3/26/14

Date Mailed to Parties:

id

APPENDIX

LIST OF WITNESSES

For Petitioner, Hawthorne:

Luis J. Pinos

Peter W. Van Der Velde

Robert P. Mooney

For Respondent, Prospect Park:

Catherine D'Arrigo

For Respondent, Department of Education:

None

LIST OF EXHIBITS IN EVIDENCE

Joint Exhibits:

J-A Prospect Park Student Transfer Card for A.A., April 18, 2012

J-B Prospect Park Registration Form for A.A., January 1, 2013

J-C Prospect Park Student Transfer Card for A.A., April 19, 2013

J-D A.A. Individualized Education Plan, November 20, 2012

J-E Tuition Contract between Prospect Park and Benway School and letter from Benway, January 7, 2013

J-F Letter, Rixford to Mortimer, July 15, 2013

For Petitioner, Hawthorne:

P-1 Lease between N.A. and Pinos, March 1, 2012

P-2 Memorandum, Van Der Velde to Mortimer, September 30, 2013

P-3 Letter, Mooney to N.A., February 5, 2013

For Respondent, Prospect Park:

R-P.P.-1 Handwritten statements from D.A. and N.A., January 2013

For Respondent, Department of Education:

None

BOARD OF EDUCATION OF THE BOROUGH OF HAWTHORNE, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF PROSPECT PARK, PASSAIC COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

The Hawthorne Board of Education (Hawthorne), appealed the determination of the Interim Executive County Superintendent of Schools for Passaic County (IECS) that it is the school district responsible for the cost of educating A.A., the son of N.A., who allegedly became homeless prior to enrolling in the Prospect Park School District between January 2013 and April 2013. During that period, A.A. attended the Benway School – an out-of-district placement – in accordance with his Individualized Education Plan. N.A. had been domiciled in Hawthorne prior to temporarily moving to her parent's home in Prospect Park in 2013. Hawthorne contended that N.A.'s family was not homeless pursuant to *N.J.A.C.* 6A:17-2.3, since the family was not forced out of its Hawthorne residence, and did not leave Hawthorne – nor reside with N.A.'s parents in Prospect Park – out of necessity.

The ALJ found that: *N.J.A.C.* 6A:17-2.3 provides, in pertinent part, that a child is homeless when he or she resides temporarily out of necessity in the residence of relatives because the family lacks a regular or permanent residence of its own; in the instant case – based on competent evidence presented at the OAL hearing – N.A. was not forced out of her Hawthorne apartment and there is nothing to suggest that her temporary relocation to her parents' home in Prospect Park was out of necessity; rather, N.A. voluntarily left her apartment to move back to Prospect Park as part of the process of moving to Florida, which occurred a few months later; thus, no crisis of immediacy displaced N.A.'s family, and the family's circumstances are clearly distinguishable from cases where a family becomes transient due to an emergency. The ALJ concluded that: no immediate circumstances, financial or otherwise, compelled N.A. to vacate her Hawthorne residence; Hawthorne sustained its burden of proving its allegations by a preponderance of the evidence; and the determination of the IECS that Hawthorne was N.A.'s last district of residence and therefore responsible for A.A.'s tuition was not reasonable. Accordingly, the ALJ reversed the IECS's determination and ordered that Prospect Park holds the responsibility for payment of A.A.'s educational program at the Benway School for the period from January 2013 to May 2013, in the amount of $21, 441.75.

Upon consideration, the Commissioner adopted the Initial Decision as the final decision in this matter, noting that he disagreed with the ALJ's characterization of the IECS's determination as "unreasonable"; in fact, the IECS's decision was more than reasonable in light of the evidence available to him at the time. Prospect Park was ordered to pay the costs of A.A.'s educational program in the amount of $21,441.75.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

AGENCY DKT. NO. 60-3/14

LEARNING CENTER FOR EXCEPTIONAL CHILDREN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

The Learning Center for Exceptional Children (LCEC) has moved for a stay of the Department of Education's (Department) February 14, 2014 decision denying petitioner's "Request to Establish a Special Education Program or Service" in a facility on Scoles Avenue in Clifton. The Request was submitted after LCEC lost its lease for premises in Garfield, where it had been offering special education services. LCEC's plan was to provide similar services in the Scoles Avenue building. After review of the stay application, as well as the opposition to same by the Department, the motion is denied.

The purpose of issuing stays is to preserve the *status quo* in situations where declining to do so would irreparably harm litigants who are likely to succeed on the merits of their claims. *See, e.g. University of Texas et al. v. Camenisch,* 451 *U.S.* 390, 395 (1981). To succeed on a motion for a stay pending appeal, a party must make a showing on essentially the same standards that are employed where a litigant seeks emergent relief prior to a Commissioner decision, *i.e.,* the standards set forth in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982). More specifically, 1) injunctive relief should not issue except when necessary to prevent irreparable harm,

2) temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled, 3) the proponent of the stay must make a preliminary showing of a reasonable probability of ultimate success on the merits, **and** 4) the relative hardship to the parties in granting or denying the stay should favor the proponent of it. *Id.* at 132-34. All four standards must be met.

As to the first standard, petitioner writes that:

> [b]eyond the procedural impracticalities of substantially modifying its program in the middle of a school year to ensure that no special and regular education students are ever in the same classroom, such a change to the School's model would threaten the School's continued existence. That is, LCEC would be rendered unable to implement its program for at least half of its students, which would likely lead to the withdrawal of students from LCEC and subject the School to liability. The School cannot sustain the loss of half of its revenue, nor the cost of legal battles for failure to implement students' IEPs as written. [Emphasis added]

Petitioner's reference to regular and special education students flows from the fact that petitioner's Scoles Street building houses both LCEC special education students and children enrolled in Today's Learning Center (TLC), a private school for general education students.

In considering petitioner's argument that it cannot operate its program without combining the students from both 'schools,' the Commissioner notes that the only specific reason given for this contention – besides the inconvenience of changing its organizational model in the middle of the school year – is that separation of the two groups of students would violate LCEC student IEPs, some of which allegedly require integration into general education classes.[1] According to petitioner, the consequence of the alleged IEP violations would be the departure of special education students from LCEC's programs. Unfortunately, the record does

[1] Although petitioner states on page 4 of its brief that "some of LCEC's students have IEPs which require . . . mainstreaming" [emphasis added], petitioner argues on page 6 of its brief that half of its student base, *i.e.*, all of its LCEC students, will disenroll if the Department's ruling is allowed to stand.

not disclose what is or is not in the IEPs of the students in question. Thus, petitioner's argument is speculative and cannot be the basis for a finding of irreparable harm.

Petitioner's arguments concerning the second *Crowe* standard, *i.e.*, the existence of a well-settled legal right underlying its claim, rely on its contention that – by challenging its integration of LCEC special education students with TLC regular education private school pupils – respondent is undermining one of the undisputed principles of the Individuals with Disabilities Education Act (IDEA) and *N.J.A.C.* 6A:14-4.2(a)(1), *i.e.*, that students with disabilities should receive an appropriate public education in the least possible restrictive environment. This principle, in petitioner's view, justifies its "mainstreaming" of LCEC students. However, petitioner confuses the aspirational aspect of the IDEA with the actual laws and regulations which were put in place to implement its goals.

The petitioner has pointed to no provision of the IDEA which mandates that all special education students must be mainstreamed. The question of whether to mainstream is driven by the student's needs. Those needs are analyzed by a child study team and an IEP is formulated for each special education student, which IEP may or may not include the element of mainstreaming. Petitioner has offered no evidence that the IEPs which were fashioned for the LCEC students mandate mainstreaming. Indeed, as will be discussed *infra,* a school district's decision to send a student to an out-of-district special education program suggests that a determination has been made that mainstreaming, which may be accomplished in the home district, is not the appropriate option for the student. In sum, the Commissioner is not persuaded by petitioner's arguments concerning the second *Crowe* standard.

As regards the third *Crowe* standard, petitioner claims that it has a reasonable probability of success on the merits of this controversy because the Department acted arbitrarily,

capriciously and unreasonably. The actions which petitioner identifies as being arbitrary, capricious or unreasonable are 1) directing petitioner to complete the set of forms which are required from applicants who wish to establish new programs, 2) imposing conditions upon petitioner which had not been required in the past, 3) directing petitioner to provide assurance that non-public students from TLC were not in the same classes as public school students enrolled in LCEC and 4) when petitioner did not provide such assurance, disapproving a program which had allegedly been approved in the past.

Petitioner's first two allegations of arbitrariness by respondent warrant little discussion. Notwithstanding how petitioner wished to characterize its application, and regardless of what type of forms it was asked to fill out in the past, the facts in the record suggest that petitioner was endeavoring to move a special education program in which several public school students were enrolled to a facility which housed other programs. Or, as respondent states in its brief, petitioner's desire to consolidate programs at the Scoles Avenue building constituted an expansion of the Scoles Avenue program and, pursuant to *N.J.A.C.* 6A:14-7.3 (a)(3), required an application for approval of a new private school for students with disabilities. The record does not clearly specify whether an identical consolidation had been knowingly approved by respondent prior to LCEC's proposed move to Scoles Avenue. However, the proposed move for the 2013-2014 school year created the potential for a different program paradigm, and the Commissioner sees no capriciousness in respondent's direction to petitioner to provide the kind of information needed for program evaluation.

The third and fourth allegations of unreasonableness relate to a site visit to the Scoles Avenue building on September 9, 2013. On that date, a representative of the Department – Linda Chavez – found that regular education students from TLC had been placed in the LCEC

classes for students with disabilities. The Department maintains that such mixed placement is contrary to *N.J.A.C.* 6A:14-4.7, which requires that:

> A special class program shall serve students who have similar intensive educational, behavioral and other needs related to their disabilities in accordance with their individualized education programs. Placement in a special class program shall occur when the IEP team determines that the nature and severity of the student's disability is such that no other school-based program will meet the student's needs.
> *N.J.A.C.* 6A:14-4.7(a). [Emphasis added]

In other words, a district sends a student to a self-contained, out-of-district program when it has been determined that the student needs to be in class with other students with similar intensive educational, behavioral and other needs. As stated above, it cannot, therefore, be assumed that such a student's IEP will call for integration into general education classes, which could presumably be achieved in the home district. And, as mentioned above, the record contains no evidence that IEPs calling for mainstreaming existed among the LCEC students who were placed in classes with TLC students.[2]

N.J.A.C. 6A: 14-4.7(a) also imposes other requirements which cannot be assumed to be satisfied by private school regular education programs. A special class program teacher must hold a State certification as a teacher of students with disabilities, teacher of the blind or partially sighted, or teacher of the deaf or hard of hearing. *N.J.A.C.* 6A:14-4.7(a)(1). The age range in special education classrooms may not exceed three years for elementary education and four years for secondary education, *N.J.A.C.* 6A:14-4.7(a)(2), and classes are subject to size restrictions and, in some cases, mandatory aides. *N.J.A.C.* 6A:14-4.7(e). The Department is within its rights to request information to determine whether the relocation of the LCEC special

[2] The Commissioner also cannot fail to observe that the integration of private school general education students into classes comprised of students whose educations are funded by public special education monies creates the need for detailed accounting, which is – in turn – dependent upon the kinds of information which respondent demanded from petitioner.

education program to a facility shared with a general education private school would comply with all of the above specifications. In light of the foregoing, the Commissioner finds nothing arbitrary, capricious or unreasonable about the Department's above-described requests for applications and information, nor its disapproval of LCEC when these requested items were not forthcoming. Consequently petitioner does not satisfy the *Crowe* requirement that an applicant for a stay be likely to prevail on the merits of its claim.[3]

Finally petitioner urges that the balance of equities weighs in its favor. It asserts that denial of a stay of the Department's disapproval of its special education program will not only put that program at risk but also threaten its operations as a whole. This, petitioner contends, will deny students "the unique program and resources the school provides," and force districts to violate students' IEPs. (Petitioner's Brief at 9-10) Petitioner argues that the Department, by way of contrast, will suffer no harm from a stay.

At the outset, the Commissioner reminds petitioner that it is not the Department itself that is the party in interest when weighing the equities in this case. Rather, it is the population of students in New Jersey whose education the Department is charged with overseeing. The Department has determined that practices employed by petitioner violate regulations which have been put in place to protect the interests of students with particular intensive educational or behavioral needs. And it is well settled that an Agency's interpretation of its regulations deserves deference. *See, e.g., Merin v. Maglaki*, 126 *N.J.* 430, 436-37 (1992) ("We give substantial deference to the interpretation of the agency charged with enforcing an act. The agency's interpretation will prevail provided it is not plainly unreasonable.")

---

[3] The Commissioner notes that respondent's disapproval of petitioner's program – memorialized in a February 14, 2014 letter, a copy of which is annexed as Exhibit T to the certification of Linda Chavez – is based both upon the insertion of TLC students into the special education classes for public school students and the dual employment of Liz Yeager. Neither party has addressed the latter ground for disapproval, and the record does not indicate whether that issue has been resolved.

By way of contrast, petitioner has offered no evidence that the disapproval of its program and the transfer of students to a different school will violate the affected students' IEPs or inconvenience the sending school districts. The Commissioner accepts that denial of a stay may create problems for petitioner's operations, but the interests of the Department of Education and the children it serves trump petitioner's business conditions. Also relevant to a balancing of the equities are petitioner's interactions with respondent. The record indicates that petitioner was resistant to providing the Department with requested information, and that this resulted in a prolonged application process and the institution of a program at the LCEC's Scoles Avenue location which had not received the required approval from the Department.

In sum, application to this controversy of the stay standards articulated in *Crowe v. DeGioia, supra,* and adopted in the Department's regulations as *N.J.A.C.* 6A:3-1.6(b), leads to the conclusion that grounds for the extraordinary relief of a stay are not present in this case. Accordingly, petitioner's application for a stay of the Department's disapproval of its Scoles Avenue program is denied.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/12/14

Date of Mailing: 5/13/14

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

198-14

198-14LM

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Acting Commissioner

May 12, 2014

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Montague, New Jersey 07827

J[redacted] O[redacted], *pro se*
[redacted]
Montague, New Jersey 07827

Cherie L. Adams, Esq.
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Re: *Marianne Ofenloch and J.L.O., on behalf of minor children, A.M.O, B.R.O., and J.W.O. v. Board of Education of the Township of Montague, Sussex County*, OAL Dkt. No. EDU 15193-13, Agency Dkt. No. 262-10/13

Dear Parties:

I have reviewed the submissions filed in connection with respondent's request for Interlocutory Review of the appended April 14, 2014 Order of Administrative Law Judge (ALJ) Tahesha L. Way, denying its motion for summary decision in the matter entitled *Marianne Ofenloch and J.L.O., on behalf of minor children, A.M.O, B.R.O., and J.W.O. v. Board of Education of the Township of Montague, Sussex County*, OAL Dkt. No. EDU 15193-13, Agency Dkt. No. 262-10/13. Upon my review of the Order and the filings in connection with this interlocutory review request, I have determined to set aside the ALJ's denial of summary decision in favor of respondent for the reasons set forth below.

In this matter, petitioners challenge the termination of the send-receive relationship for pupils in grades 9 through 12 between the respondent Board and the Port Jervis Board of Education, located in New York State. The long-standing relationship with Port Jervis

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had been permitted by the Commissioner of Education pursuant to *N.J.S.A.* 18A:38-10, which provides:

> Any board of education of a district may arrange for the attendance of any or all of the pupils of the district in the public school or schools of an adjacent school district outside the state, if it shall determine that it is advisable so to do in order to secure better school facilities for the pupils or for reasons of economy or other good cause and that it is inadvisable for said pupils to attend public schools in another school district within the state because of the distance to be traveled, the topography of the intervening country, the condition of the roads or the likelihood of unusual hazardous traveling conditions during certain seasons of the year, and if the commissioner shall concur in the determination of the board and give his consent thereto, but the commissioner may withdraw such consent upon reasonable notice whenever the reason or reasons for giving his consent shall cease to exist.

On June 18, 2013, the Board submitted to the Commissioner a request seeking withdrawal of his consent for the out-of-state attendance of its pupils in 9th through 12th grade at the public schools of Port Jervis, New York. Therein, the Board indicated that the reasons that originally formed the basis for his consent no longer exist. In that regard, the Board averred that road and travel conditions have improved in the years since the Commissioner first consented to the out-of-state placement. The Board further indicated an intention to enter into a new send-receive relationship with the High Point Regional School District for the attendance of its 9th through 12th grade students.

By letter dated June 24, 2013, following his review of the information submitted, the Commissioner determined to grant respondent's request and withdraw consent for the out-of-state attendance of the Board's 9th through 12th grade students. The decision was specifically based upon the Commissioner's conclusion, pursuant to *N.J.S.A.* 18A:38-10, that the reasons for the initial consent cease to exist. Further, the Commissioner authorized the Board to enter into the contemplated send-receive relationship with the High Point Regional School District.

Subsequently, in accordance with the Commissioner's June 24, 2013 decision, the Board entered into a new send-receive agreement with High Point Regional for the education of Montague's 9th through 12th grade pupils.

On the surface, the instant petition appears to be a challenge to the Board's actions in seeking termination of the agreement with Port Jervis and entering the new agreement with High Point Regional. However, upon closer inspection, it is clear that petitioners are actually appealing the Commissioner's June 24, 2013 decision. To that end, petitioners contest the Commissioner's conclusion that the reasons justifying the initial consent for out-of-state placement with Port Jervis now cease to exist. More specifically, petitioners argue that, contrary to the Commissioner's conclusion, there has been no appreciable intervening change in the

distance to be traveled, conditions of the roads, or likelihood of unusual hazardous traveling conditions. Moreover, by way of relief, petitioners seek, *inter alia*:

- Cancellation of the sending-receiving agreement between the Board and High Point Regional;
- A requirement that the Board enter into negotiations with Port Jervis;
- A requirement that the Board enter into negotiations with Kittatinny Regional High School;
- A requirement that the Board conduct a feasibility study;
- A requirement that the Board make a presentation of factual findings through an open public meeting and provide opportunity for public comment on any proposed contract; and,
- A prohibition on the Board's entry into any contract with any school district that will not or cannot accept Montague's 7th and 8th grade pupils until the Board completes factfinding and allows for public comment.

As aptly observed by the Board, the requested relief would effectively reverse the Commissioner's June 24, 2013 decision. Thus, the petition of appeal is, in substance, an appeal of that decision.

Recognizing the true nature of the controversy, the Board filed a motion to dismiss the petition for lack of jurisdiction, as an improper appeal of the Commissioner's June 24, 2013 decision in the wrong forum.[1] In that regard, the Board argued that petitioners cannot appeal the Commissioner's determination to the Commissioner himself. Rather, petitioners are required to pursue their challenge to the Commissioner's decision in the Appellate Division of the Superior Court, pursuant to *N.J.S.A.* 18A: 6-9.1.

In denying respondent's motion, the ALJ concluded that the June 24, 2013 letter did not constitute final agency action. The ALJ's conclusion is erroneous.

An agency action does not become final until all avenues of internal administrative review have been exhausted. *Bouie v. N.J. Dept. of Cmty. Affairs*, 407 *N.J. Super.* 518, 527 (App. Div. 2009). In addition, the administrative determination must be final as to all parties and all issues. *In re Donohue*, 329 *N.J. Super.* 488, 494-95 (App. Div. 2000). Both of these conditions are satisfied here. As the agency head, the Commissioner himself is the final avenue for administrative review. The Commissioner cannot conduct an appellate-like review of his own prior determination. Thus, administrative remedies have been exhausted. Furthermore, there is nothing in the Commissioner's decision that supports a finding that it was subject to further review or consideration. To the contrary, the Commissioner definitively concluded that "the reasons for the initial consent now cease to exist," and decisively determined to withdraw his consent to the out-of-state placement. Whether the Commissioner's decision in that regard was arbitrary, capricious or unreasonable is a matter for the Appellate Division.

[1] In the alternative, respondent argued that the petition of appeal was time-barred. In light of his decision on the jurisdictional issue, the Commissioner finds it unnecessary to reach the issue of timeliness.

Accordingly, the April 14, 2014 Order of the ALJ is hereby set aside and the petition of appeal is dismissed for lack of jurisdiction.[2] [3]

Sincerely,

David C. Hespe
Acting Commissioner

c: Honorable Tahesha L. Way, ALJ
Deputy Clerk, OAL
Via Facsimile and Regular Mail

[2] No further proceedings at the OAL are necessary; therefore, the Clerk of the Office of Administrative Law is hereby requested to return the file pursuant to *N.J.A.C.* 1:1-3.3.

[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 .(*N.J.S.A.* 18A:6-9.1)

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 15193-13

AGENCY DKT. NO. 262-10/3

MARIANNE OFENLOCH, J.L.O., AND B.O. ON BEHALF OF A.M.O, B.R.O. AND J.W.O.,

Petitioners,

v.

TOWNSHIP OF MONTAGUE BOARD OF EDUCATION, SUSSEX COUNTY,

Respondent.

Marianne Ofenloch and J.L.O., for petitioners, pro se

Erin M. Callahan, Esq., for respondents (Adams Gutierrez & Lattiboudere, LLC, attorneys)

BEFORE **TAHESHA L. WAY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The petitioners are challenging the decision of the Township of Montague Board of Education ("District" or "Board of Education") to enter into a send-receive agreement with High Point and terminate the existing send-receive agreement with Port Jervis.

A petition was filed with the Commissioner of Education on October 22, 2013. The Board answered, and the matter was transmitted to the Office of Administrative Law (OAL), where on October 23, 2013, it was filed as a contested case. Thereafter the District requested the filing of a motion for summary decision, pursuant to N.J.A.C. 1:1-12.5. A briefing schedule was established, and oral argument was held on March 17, 2014.

FINDINGS OF FACT

Upon a review of the parties' submissions, I **FIND** that the following are the pertinent **FACTS**.

Presently, the only educational facilities and programs located within the District are from pre-kindergarten to the sixth grade. As such, the District entered into a send-receive agreement with the town of Port Jervis, situated in Orange County, New York, for the education of the District's seventh- through twelfth-grade students ("Port Jervis Agreement").

Commencing around March 4, 2013, the District sought guidance from the New Jersey Commissioner of Education ("Commissioner") as to the procedure for terminating the Port Jervis Agreement. Around March 22, 2013, the interim executive County superintendent for the District, Rosalie S. Lamonte, Ph.D., advised the Board "to submit a request to the Commissioner that consent for the attendance at an out-of-State district be withdrawn," and indicated that there was no requirement to conduct a feasibility study. On June 18, 2013, the District forwarded correspondence seeking the Commissioner's approval to terminate the Port Jervis Agreement and to enter into a send-receive agreement with the High Point Regional School District, located in New Jersey ("High Point Agreement"). On June 24, 2013, the Commissioner approved this request ("Commissioner's Letter"). On June 26, 2013, a Board of Education meeting occurred with petitioners Ofenloch and J.L.O. present. On July 24, 2013, the Board of Education voted to approve the High Point Agreement. Around August 13, 2013, the High Point Agreement was formalized. On October 22, 2013, the petitioners filed the

within petition contesting the termination of the Port Jervis Agreement and the decision to enter into the High Point Agreement.

ANALYSIS AND CONCLUSIONS OF LAW

The District seeks relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The regulation mirrors the summary judgment Court Rule, R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'Fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Ibid. (quoting Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214).

Aside from the foregoing, N.J.S.A. 18A:38-10, which governs a board of education in arranging for the attendance of students in an out-of-state school district, reads in pertinent part:

> Any board of education of a district may arrange for the attendance of any or all of the pupils of the district in the public school or schools of an adjacent school district outside of the state, if it shall determine that it is advisable so to do in order to secure better school facilities for the pupils or for reasons of economy or other good cause and that it is inadvisable for said pupils to attend public schools in another school district within the state because of the distance to be traveled, the topography of the intervening country, the condition of the roads or the likelihood of unusual hazardous traveling conditions during certain seasons of the year, and if the commissioner shall concur in the determination of the board and give his consent thereto, but the commissioner may withdraw such consent upon reasonable notice whenever the reason or reasons for giving his consent shall cease to exist.

N.J.S.A. 18A:38-13 addresses termination of a send-receive relationship.

Additionally, N.J.A.C. 6A:3-1.1(a) "sets forth the rules of procedure established by the Department of Education for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws in accordance with N.J.S.A. 18A:6-9." If the Commissioner receives an application for summary decision, he or she "may decide the motion directly or transmit it to the OAL for disposition." N.J.A.C. 6A:3-1.12(a). If a matter has already been transmitted to the OAL, applications for summary decision are to be made with the administrative law judge. N.J.A.C. 6A:3-1.12(b).

N.J.A.C. 6A:3-1.14 outlines the Commissioner's dispute-resolution powers:

> (a) Every determination of a controversy or dispute arising under the school law . . . shall be made by the Commissioner. Every such determination shall be embodied in a written decision which shall set forth findings of fact,

> conclusions of law and an appropriate order pursuant to applicable rules of the OAL.
>
> (b) Any determination or decision of the Commissioner is appealable to the Appellate Division of the Superior Court as provided by law . . . .

N.J.A.C. 6A:3-1.15 permits a party to either make a motion for stay of a Commissioner's decision (pending appeal) within 45 days of filing of the Commissioner's decision or make a motion for reconsideration or clarification of the Commissioner's decision within 10 days of the filing of the Commissioner's decision. N.J.A.C. 6A:3-1.15(a), (b).

N.J.A.C. 6A:3-1.3(i) addresses the time for filing an appeal from a notice of a final order:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

"The key to deciding the timeliness question is obviously determining when the cause of action did accrue. A cause of action accrues and the 90-day period begins only after receipt of notice by petitioner of the action concerning which the hearing is requested." Morris-Union Jointure Comm'n v. BOE of South River, Middlesex County., 92 N.J.A.R.2d (EDU) 453, 454. In Morris-Union Jointure Commission, a "letter unequivocally reiterating [the respondent's] position that it would not accept responsibility for the services [executed by the petitioner] . . . [was] sufficient to have reasonably placed the petitioner on notice as of that date." 92 N.J.A.R.2d (EDU) at 455. In the context of a religious challenge to a mandatory school dress code, the 90-day period has been found to begin on the date when the petitioners learned that the policy had been adopted by the BOE. Coles v. Bayonne Bd. of Educ., EDU 10535-06, Initial Decision (November 2, 2006), <http://njlaw.rutgers.edu/collections/oal/>, adopted,

Comm'r (December 8, 2006), adopted, St. Bd. (April 4, 2007), <http://www.nj.gov/education/legal/>. Notice, even if "unofficial and informal," can be considered adequate if as a result it becomes clear to the petitioner that final action has been taken by a board. See Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 588 (1993).

The rule can be relaxed in certain cases. Pursuant to N.J.A.C. 6A:3-1.16,

> [w]here such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

In Brunetti v. New Milford, 68 N.J. 576, 578 (1975), the New Jersey Supreme Court observed that these aforementioned time-bar rules can get relaxed for the following: "(1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification."

In support of its position, the District contends that the petitioners did not timely file the within petition for several reasons. First, the District considers the Commissioner's letter the final action or decision. Regarding adequate notice thereof, it is argued that this letter was discussed at the time of the June 26, 2013, Board of Education meeting; Ofenloch and J.L.O. addressed the issue during the public portion of the meeting; and the Board of Education's secretary, John Waycie, certified that the Commissioner's letter was articulated as a "transition." Additionally, the District asserts that the Commissioner's letter was posted online immediately after this meeting. Hence, the October 22, 2013, petition is time-barred because its filing did not occur within the legal guidelines of a motion for reconsideration or appeal to the Appellate Division. Furthermore, the District's default argument is that the October 22, 2013, petition is time-barred under the 90-day rule because the petitioners were privy to the discussions concerning the District's intent to terminate the Port Jervis Agreement since January 2013.

The petitioners argue that the petition was timely filed. For one, the Commissioner's letter should not be considered the final action. Rather, the statute of limitations should commence on July 24, 2013, the date the Board of Education formally approved the termination of the Port Jervis Agreement and entry into the High Point Agreement. It is also asserted that at the time of the June 26, 2013, Board of Education meeting, the Commissioner's letter was not read, and was solely expressed as a stage in an ongoing process. Moreover, the Commissioner's letter was only made available to the public on July 23, 2013. Finally, the petitioners dispute that they were reasonably placed on notice around January 2013, especially given the District's prior history of casually mentioning entering into send-receive agreements with districts other than High Point.

Based on the record and the law, I **CONCLUDE** that summary decision is not appropriate at this time. The underlying issue is the identification of the "final action or decision" concerning the aforementioned send-receive arrangements. While due deference is afforded to the Commissioner as the legal authority to give approval of these arrangements, I **CONCLUDE** that the Commissioner's letter cannot be considered a "decision" in the context of the statute because a "decision" encompasses factual findings and conclusions of law. Even more, the Commissioner's letter cannot be deemed a final order, ruling or other action by the Board of Education, as it does not fit into the language of N.J.A.C. 6A:3-1.3. Rather, it would appear that the Board of Education's July 24, 2013, confirming vote to execute a new send-receive agreement is the final action, because even with the Commissioner's approval, the Board could have decided not to proceed with this plan.

Yet, even if the Commissioner's letter is the final action, I still **CONCLUDE** that this matter is not ripe for summary decision, as there are significant material facts in dispute regarding adequate notice to the petitioners that a final action would be or had been taken. Essentially, there are genuine discrepancies as to the nature of the discussion that occurred at the time of the June 26, 2013, Board of Education meeting. The meeting's minutes are cursory, merely indicating that the Commissioner's letter was reviewed and that an advisory meeting on July 17, 2013, would occur. Next, the

District's representation that the Commissioner's letter was posted online immediately after this meeting does not bear any weight without any corroborative proof. Furthermore, the record does not contain adequate proof that the District conducted discussions of the Port Jervis Agreement termination from which a reasonable person would discern that the action would eventually occur.

ORDER

It is hereby **ORDERED** that the respondent's motion for summary decision is **DENIED**.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

April 14, 2014
DATE

TAHESHA L. WAY, ALJ

/rr

DOCUMENT SUBMISSIONS

For Petitioners

Petitioners' opposition to respondent's motion for summary decision, November 20, 2013

Petitioners' response to respondent's reply, February 3, 2014

For Respondent

Respondent's motion for summary decision, together with Waycie certification, November 8, 2013

Respondent's reply to petitioners' opposition, January 13, 2014

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State of New Jersey
DEPARTMENT OF EDUCATION
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CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Acting Commissioner

May 9, 2014

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Dear Parties:

Upon review of the papers filed in the matter entitled, *Renaissance Regional Leadership Charter School, Lorna Hassel, and C.M., on behalf of minor children, D.M. and M.M. v. New Jersey State Department of Education and Evo Popoff,* Agency Dkt. No. 100-4/14, I have determined, for the reasons set forth below, to grant the Department's Motion to Dismiss the Petition of Appeal for lack of jurisdiction, pursuant to *N.J.A.C.* 6A:3-1.10.

This matter was initiated by way of Petition of Appeal and Motion for Emergent Relief, filed on April 17, 2014. Therein, petitioner contests the March 5, 2014 denial of its application for charter renewal. Petitioner alleges that the decision was inappropriately issued by respondent Popoff, rather than the Commissioner, and that the decision was arbitrary, capricious, and unreasonable.

In lieu of an Answer, respondents filed a Motion to Dismiss, along with a supporting certification, exhibits, and a letter brief. Therein, respondents emphasize that the decision at issue was made by respondent Popoff, an Assistant Commissioner acting under authority properly delegated to him by then-Commissioner Christopher Cerf. To that end, respondent Popoff certifies that he is an Assistant Commissioner, and that – on March 5, 2014 – then-Commissioner Cerf designated Popoff to act on his behalf in all matters relating to the 2013-2014 charter renewal cycle. Respondent Popoff further certifies that, in making the decision on petitioner's application for charter renewal, he was acting in the stead of then-Commissioner Cerf. Respondents maintain that Popoff's determination is, therefore, a final

which was granted by the Administrative Law Judge (ALJ), and also opposed petitioner's application for emergent relief.

In the Initial Decision, the ALJ determined that, pursuant to *N.J.S.A.* 18A:36A-4 and *N.J.A.C.* 6A:11-2.5, the exclusive forum for appeal of the Department's determination on a charter renewal application is the Appellate Division of the Superior Court. On this basis, the ALJ further determined that the OAL lacked jurisdiction to review Popoff's decision and that the petition of appeal and request for emergent relief must, therefore, be dismissed.

At the outset, the Commissioner notes that, on exception, petitioner submitted evidence that was not presented in the OAL. The submission of such supplemental evidence is specifically prohibited by *N.J.A.C.* 1:1-18.4(c) and, thus, was not considered by the Commissioner. In the remainder of petitioner's exceptions and the replies thereto submitted by respondent and the intervenor Board, the parties largely replicate their arguments advanced below. The Commissioner finds that these arguments were fully considered and appropriately addressed by the ALJ in her Initial Decision. Accordingly, they will not be revisited in depth here.

The Commissioner will, however, take this opportunity to specifically address petitioner's argument that jurisdiction is conceded upon transmittal to the OAL. Petitioner's argument is without merit. The mere act of transmitting a matter to the OAL cannot create jurisdiction where it does not otherwise exist. Rather, as correctly noted by the ALJ, jurisdiction is a non-waivable prerequisite to proceeding in the OAL. Thus, jurisdiction is a threshold matter for the ALJ's consideration in every case transmitted to the OAL. Where the ALJ correctly finds jurisdiction is lacking, the matter must be dismissed.

Here, upon his full review, the Commissioner concurs with the ALJ's determination that the petition of appeal and concomitant motion for emergent relief must be dismissed for lack of jurisdiction. To that end, *N.J.A.C.* 6A:11-2.5 specifies that decisions on charter school renewal applications are, in accordance with *N.J.S.A.* 18A:6-9.1, final agency decisions appealable to the Appellate Division of the Superior Court. Consequently, the ALJ correctly concluded that the Commissioner and the OAL lack jurisdiction to rule on the issues presented.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter, and the within petition of appeal and motion for emergent relief are hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/13/14
Date of Mailing: 5/13/14

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

D.U.E. SEASON CHARTER SCHOOL, DORIS CARPENTER AND E.B.,

PETITIONERS,

V.

NEW JERSEY DEPARTMENT OF EDUCATION AND EVO POPOFF,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The petitioners, D.U.E. Season Charter School, Doris Carpenter and E.B. (D.U.E. Season or petitioner) filed an emergent appeal from a March 5, 2014 determination of Assistant Commissioner Evo Popoff (Popoff) denying D.U.E. Season's renewal application. Later, the petitioner amended its emergent application to include the alternate relief of a stay pending final determination to keep the school open pending a hearing on the denial. On March 5, 2014, then-Commissioner Christopher Cerf designated Popoff to act on his behalf in matters relating to the 2013-2014 charter school renewal process. The petitioner alleges that this delegation of authority was potentially inauthentic or unauthorized. Respondents filed opposition to the motion for emergent relief, and a cross-motion to dismiss the appeal on the grounds that the Office of Administrative Law (OAL) lacks jurisdiction and that a direct appeal must be filed with the Appellate Division of the Superior Court.

The ALJ found, *inter alia*, that: it is unambiguously set forth in the law that a party aggrieved by the Department's charter determination – whether the charter school or the local board – may appeal, but the appeal must be made to the Appellate Division as set forth in *N.J.S.A.* 18A:36A-4(d); there is no jurisdiction at the OAL over D.U.E. Season's appeal or its motion for emergent relief; regarding D.U.E. Season's argument that Popoff had no properly delegated authority to issue a final decision under the Charter School Law, *N.J.S.A.* 18A:4-33 provides the Commissioner with legislative authorization to delegate powers, including final decision making authority; in order for D.U.E. Season to challenge the authenticity of the delegation of Popoff in this matter, the argument must be brought before the Appellate Division. The ALJ: concluded that the OAL has no jurisdiction to decide a charter school appeal; denied petitioner's application for emergent relief for lack of jurisdiction; denied petitioner's motion for a stay for the same reason; and granted the Department's motion to dismiss the petition. Further, the ALJ stated that D.U.E. Season may pursue its remedies in the Appellate Division of the Superior Court.

Upon a thorough and independent review, the Commissioner concurred with the determination of the ALJ that the petition and the concomitant motion for emergent relief must be dismissed for lack of jurisdiction. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter. The petition and motion for emergent relief were dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

May 13, 2014

determination on a charter renewal application is the Appellate Division of the Superior Court. On this basis, the ALJ further determined that the OAL lacked jurisdiction to review Assistant Commissioner Popoff's decision, and that the petition of appeal and request for emergent relief must, therefore, be dismissed.

Upon review, the Commissioner concurs with the ALJ's determination that the petition of appeal and concomitant motion for emergent relief must be dismissed for lack of jurisdiction. To that end, *N.J.A.C.* 6A:11-2.5 specifies that decisions on charter school renewal applications are, in accordance with *N.J.S.A.* 18A:6-9.1, final agency decisions appealable to the Appellate Division of the Superior Court. Consequently, the ALJ correctly concluded that the Commissioner and the OAL lack jurisdiction to rule on the issues presented. The Commissioner also finds that the exceptions submitted by the petitioners and the respondents largely replicate their arguments at the OAL, and were fully considered and appropriately addressed by the ALJ in her Order.

Accordingly, the Order of the OAL is adopted as the final decision in this matter, and the within petition of appeal and motion for emergent relief are hereby dismissed. No further proceedings at the OAL are necessary; therefore, the Clerk of the Office of Administrative Law is hereby requested to return the file pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/13/14
Date of Mailing: 5/14/14

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

202-14

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
GISELE AUGUSTE-WASHINGTON, :
BOARD OF EDUCATION OF THE CITY :
OF HOBOKEN, UNION COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In December 2013, the Commissioner of Education issued an Order to Show Cause upon respondent, requiring her to show cause why an order should not be entered suspending her teaching certificate for unprofessional conduct, pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9, for resigning her position on inadequate notice. The respondent failed to answer the order. Respondent was duly advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation raised by the Board to be deemed admitted, and might result in summary decision by the Commissioner.

There being no response to the order to show cause, the Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and justify suspension of respondent's certification. Accordingly, summary decision was granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

May 13, 2014

There being no Answer filed in that time, the Commissioner provided respondent, by notice dated March 25, 2014, and sent via certified and regular mail, a final period of 10 days to file an Answer, pursuant to *N.J.A.C.* 6A:3-1.5(e), or else allegations raised by the Board would be deemed true and this matter would be resolved in summary fashion by the Commissioner of Education; and

As of this date, Ms. Auguste-Washington has not provided an Answer to the Show Cause Order and, therefore, the Board's allegations against her are deemed to be admitted; and

Ms. Auguste-Washington, having ceased to perform her teaching duties in the Hoboken School District before the expiration of the term of her employment, without the Board's consent, and under the circumstances set forth in the Affidavit of Miguel Hernandez, Ed.D., Assistant Superintendent of Schools of the Hoboken Public School District; and

Thereby, Gisele Auguste-Washington being deemed to have engaged in unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9; now therefore

IT IS ORDERED on this _____ day of May 2014, that Gisele Auguste-Washington's instructional certificate shall be suspended for a period of one year, to commence upon the date of this decision. A copy of this decision is hereby forwarded to the State Board of Examiners for the purpose of effectuating this order and taking such further action, if any, as it deems appropriate.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/13/14

Date of Mailing: 5/14/14

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

204-14

RICHARD SCHEMPP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLAYTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the respondent Board's determination not to renew his contract as an assistant principal after employment in that position during the 2009-2010, 2010-2011, and 2011-2012 school years. Petitioner argued that the Board violated procedures during his performance evaluations, and contended that its action in failing to renew his employment was arbitrary, capricious and unreasonable. The Board filed a motion for summary decision, which was opposed by the petitioner.

The ALJ found, *inter alia,* that: there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; the sole issue in this matter is whether the Board's action in not renewing petitioner's non-tenured employment for the 2012-2013 school year was arbitrary, capricious or unreasonable; the petitioner bears the burden of proving by competent and credible evidence that the Board's non-renewal decision was arbitrary, capricious or unreasonable; absent constitutional constraints, local boards of education have an almost complete right to terminate the services of a non-tenured employee; in the instant case, the respondent Board based its decision upon input from administrators with personal knowledge of petitioner's work performance, including the Superintendent of Schools, as well as parental complaints regarding petitioner's administrative style and abilities; despite his allegation that the Board's non-renewal decision included retaliation for the filing of a discrimination complaint by his former principal, petitioner failed to raise a material question of fact as to other bona fide reasons for the Board's non-renewal action. Accordingly, the ALJ granted the respondent Board's motion for summary decision and dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

ISSUED 5/12/14

OAL DKT. NO. EDU 11881-12
AGENCY DKT. NO. 219-8/12

RICHARD SCHEMPP,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CLAYTON, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Richard Schempp, and the Board of Education's (Board) reply thereto.[1]

In his exceptions, the petitioner argues that the Administrative Law Judge (ALJ) erroneously decided this matter on summary decision. The petitioner takes exception to certain findings of facts made by the ALJ, and he further argues that there are genuine issues of material fact in dispute that require a testimonial hearing. Since the ALJ deemed true for purposes of summary decision his claim that he was non-renewed in retaliation for the discrimination complaint filed against the Board by his principal, who supported him and regarded him highly, the petitioner contends that a genuine issue of material fact was raised to warrant a hearing. The petitioner also maintains that other genuine issues of fact exist which lend credence to his argument that the Board acted with retaliatory motives and/or arbitrarily or capriciously towards him. Therefore, the petitioner contends that this matter must be remanded to the OAL for a hearing on the merits.

[1] Petitioner filed a reply to the Board's reply exceptions that was not considered by the Commissioner because there is no provision under the regulations for filing a reply to reply exceptions. See, *N.J.A.C.* 1:1-18.4.

In reply the Board reiterates the standard for reviewing a board of education's decision concerning the non-renewal of non-tenured employees, stressing that a board of education has almost a complete right to terminate the services of a non-tenured teacher. Despite the fact that the ALJ accepted all of the allegations of the petitioner as the non-moving party, the petitioner failed to refute the reasonable basis for the Board's non-renewal decision, which included the Superintendent's written reprimand of the petitioner as well as two written parental complaints filed against him. As a result, the Board argues that this matter was appropriately decided by summary decision, and the Initial Decision should be adopted as the final decision.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the Board's decision to non-renew the petitioner for the 2012-2013 school year was not arbitrary, capricious or unreasonable. The Commissioner also finds that the ALJ properly applied the standard for summary decision, giving all legitimate inferences to the petitioner as the non-moving party, to determine that there was no genuine issue of fact that required an evidentiary hearing. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/12/14

Date of Mailing: 5/14/14

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 11881-12
AGENCY DKT. NO. 219-8/12

RICHARD SCHEMPP,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF CLAYTON, GLOUCESTER COUNTY,
Respondent.

William Nossen, Esq., for petitioner

Sharon D. Larmore, Esq., for respondent (Parker McCay, attorneys)

Record Closed: February 24, 2014 Decided: March 26, 2014

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

Petitioner Richard Schempp (Schempp) was employed by the respondent Clayton Board of Education (Board) as an assistant principal assigned to Herma Simmons Elementary School during the 2009-10, 2010-11, and 2011-12 school years.

He appeals from a decision of the Board, not to renew his contract. Petitioner seeks reinstatement to his position arguing that procedures were violated during his performance evaluations and that the Board's action in failing to renew his employment was arbitrary, capricious, and unreasonable, violating N.J.S.A 18A:27-4.1.

PROCEDURAL HISTORY

By letter dated May 18, 2012, the Board Superintendent notified petitioner that the District was not renewing his contract for the 2012-13 school year. Petitioner requested an informal meeting before the Board. That meeting was held on June 11, 2012. After holding a public hearing on the issue, the Board did not renew his contract.

Petitioner then filed a petition with the Commissioner (Commissioner) of Education on August 2, 2012, seeking to overturn the Board's action. After being granted an extension, an answer was filed on behalf of the Board on August 30, 2012. The Commissioner transferred the contested case to the Office of Administrative Law (OAL) on August 30, 2012, for hearing as a contested case. The case was assigned to the Hon. Donald Stein, ALJ, for hearing. A telephone prehearing conference was scheduled for October 31, 2012. However, due to conditions resulting from Hurricane Sandy, the conference was rescheduled for February 7, 2013. The matter was then reassigned to the undersigned. After reassignment, a status conference was scheduled and held on April 19, 2013. At that time, a hearing date of September 9, 2013, was set but adjourned when counsel for the Board filed a motion for summary decision on August 12, 2013. The petitioner filed an answer in opposition to the motion on September 27, 2013. Oral argument on the motion was held on October 25, 2013. The record was then held open to allow the parties to file supplemental legal arguments. By letter dated October 29, 2013, petitioner stated that he would not seek to amend his petition to state a claim for retaliation under the New Jersey Law Against Discrimination (NJLAD). By letter dated November 15, 2013, respondent reiterated its request for summary decision, to which petitioner replied by letter dated November 20, 2013, stating that his decision not to pursue a NJLAD claim does not diminish his contention that the Board acted in an arbitrary, capricious, and unreasonable fashion.

Standard of Review

N.J.A.C. 1:1-12-5 governs motions for summary decisions. The provisions of N.J.A.C. 1:1-12-5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. Pursuant to these rules, a case may be dismissed before it is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12-5(b). To survive summary decision, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

"An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submissions of the issues to the trier of fact." R. 4:46-2. While it is true that a judge is not to "weigh evidence and determine the truth of the matter," Brill, supra, 142 N.J. at 540, "there is in this process a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Id. at 536. Thus, a judge is to scrutinize the competent evidential materials presented, in a light most favorable to the non-moving party, and consider whether a rational fact-finder could resolve the disputed issue in favor of the non-moving party. Id. at 540.

When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth, by affidavit, specific facts showing there is a genuine issue resolvable only by an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). Given this burden shift, a party opposing a summary judgment motion "who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers." Burlington County Welfare Bd. v. Stanley, 214 N.J. Super. 615 (App. Div. 1987).

Statement of Facts

Applying the applicable standard of review and viewing the facts in a light most favorable to petitioner as the non-moving party, the following relevant facts are determined for purposes of deciding the present motion for summary decision:

1. On or about September 16, 2009, petitioner commenced employment for the Board as Assistant Principal of the Herma Simmons Elementary School (Simmons). (Petition ¶ 1.)

2. During the 2009-10 school year, the only administrator to evaluate petitioner's job performance was Patrice Taylor, Principal of Simmons and petitioner's immediate supervisor. (Cert. of Richard Schempp, Ex. P-C to Sept. 27, 2013 Reply, ¶ 6. (hereinafter referred to as "Schempp").)

3. In petitioner's final 2009-10 evaluation, dated June 30, 2010, Ms. Taylor rated petitioner as "effective" in every applicable category. (Ex. P-A to Sept. 27, 2013 Reply.)

4. Ms. Taylor commended the progress that petitioner made in his first year in the position and noted that he has demonstrated a genuine desire to perform his job duties well and reflect upon and modify his practices as necessary to improve his performance. (Ibid.)

5. Ms. Taylor recommended that petitioner "be vigilant in dispelling the perception that [he does not] communicate with staff and family in a timely manner." (Ibid.)

6. Upon the recommendation of the then Superintendant, Cleve Bryan, the Board renewed petitioner's employment contract for the 2010-11 school year. (Schempp ¶ 7.)

7. On May 7, 2010, Mr. Bryan sent a memorandum to the petitioner identifying deficiencies in his performance as Site Test Coordinator at Simmons. (Ex. R-A to Aug. 12, 2013 Motion).

8. Mr. Bryan faulted petitioner because he "had shirked his responsibilities as Site Test Coordinator by having [another employee] communicate with the Department of Education testing official...." (Ibid.) As a result, Mr. Bryan was "certain that [the District] will be coming under closer scrutiny by the State as a result of the way [petitioner] handled the responsibilities...." (Ibid.)

9. During the 2010-11 school year, petitioner again served as Assistant Principal at Simmons. (Schempp ¶ 8.)

10. During the 2010-11 school year, the only administrator to evaluate petitioner's job performance was Ms. Taylor. (Ibid.)

11. In his final 2010-11 evaluation, dated May 15, 2011, Ms. Taylor again rated petitioner as "effective" in every applicable category. (Ex. P-B to Sept. 27, 2013 Reply.)

12. Ms. Taylor commended petitioner for demonstrating in his second year "an ability to foster good interpersonal relations among students, staff and community members." (Ibid.)

13. Ms. Taylor recommended that petitioner "[u]tilize the summer break to participate in professional development for administrative leadership to increase capacity to assume additional forthcoming responsibilities." (Ibid.)

14. Upon the recommendation of Mr. Bryan, the Board again renewed petitioner's employment contract for the 2011-12 school year. (Schempp ¶ 9.)

15. During the 2011-12 school year, petitioner again served as Assistant Principal at Simmons. (Ibid.)

16. Also during the 2011-12 school year, petitioner was assigned to serve two hours per day at Clayton Middle School (Clayton) to assist the new middle school principal with lunchroom supervision and disciplinary referrals due to the high number of behaviorally challenging students at the middle school. (Ex. P-S to Sept. 27, 2013 Reply.) The remainder of his day was spent at Simmons.

17. Ms. Taylor contended that the decision to remove petitioner from Simmons for two hours per day was an act of discrimination against her and she filed a complaint with the New Jersey Division on Civil Rights. (See Ex. P-I to Sept. 27, 2013 Reply.) The parties eventually reached a settlement agreement on November 2, 2011, which called for petitioner to continue his arrangement of working two hours per day at Clayton. (Ibid.)

18. In Ms. Taylor's subsequent 2011-12 performance evaluation, dated June 20, 2012, Mr. Bryan notes Ms. Taylor's decision to file a complaint in summarizing her performance, stating that her complaint "caused unnecessary distractions for the Superintendant ... and added expense to the District." (Ex. P-J to Sept. 27, 2013 Reply.)

19. On December 19, 2011, petitioner was provided with an administrative evaluation from Ms. Taylor in which she rated petitioner as "effective" or "outstanding" in every applicable category. (Ex. P-D to Sept. 27, 2013 Reply.)

20. Ms. Taylor commended the petitioner for taking the extra time to maintain the responsibilities inherent in both his roles at the elementary and middle schools. (Ibid.)

21. Ms. Taylor stated that petitioner "maintains a professional demeanor in the face of challenging students, parents and staff." (Ibid.)

22. On January 9, 2012, a parent submitted a written complaint regarding the petitioner and his handling of an issue concerning her daughter who was a third-grade student at Simmons. (Ex. R-E to Aug. 12, 2013 Motion).

23. The parent complained that petitioner failed to notify her of the incident and discipline imposed on her daughter. (Ibid.) When the parent learned of the events from her daughter and contacted petitioner, she described him as aggressive, abrasive, belligerent, rude, cavalier, and arrogant. (Ibid.)

24. Ms. Taylor investigated this complaint at Mr. Byan's direction and conveyed her conclusion to petitioner that he acted professionally and appropriately. (Schempp ¶ 17.)

25. On March 6, 2012, petitioner was provided with an administrative evaluation from Mr. Bryan, who observed petitioner for approximately four hours on January 20, 2012, at Simmons and for approximately one hour on February 29, 2012, at Clayton. (Ex. P-G to Sept. 27, 2013 Reply; Schempp ¶ 15.)

26. Based on the dates identified, this review was provided to petitioner within ten days of the second observation but almost a month and a half after the first observation at Simmons.

27. Mr. Bryan rated the petitioner as "minimally effective" under the areas of goal setting and monitoring – all in the area of pupil services. (Ex. P-G to Sept. 27, 2013 Reply at 2.) Petitioner was rated as "minimally effective" in communicating in the area of personnel management. (Id. at 3.) Petitioner was again rated as "minimally effective" in communicating to parents and the community and with his listening skills and responding positively to suggestions for improvement. (Id. at 4.) Finally, petitioner was rated as "minimally effective" in multiple areas of administration and management, such as problem solving and utilizing resources effectively. (Id. at 6.)

28. On April 16, 2012, petitioner was provided with an administrative evaluation from Dennis Haynes, principal at Clayton. (Ex. P-F to Sept. 27, 2013 Reply.)

29. Mr. Haynes rated the petitioner as "minimally effective" under the areas of goal setting for the staff, monitoring and implementing the curriculum, and evaluating programs – all in the area of educational leadership. (Id. at 1.) Mr. Haynes rated the petitioner as "minimally effective" under the areas of planning for student needs, goal setting for student growth, and evaluating student programs – all in the area of pupil services. (Id. at 2.) Petitioner was rated as "minimally effective" in staff recruitment, orientation, and utilization – all in the area of personnel management. (Id. at 3.) Petitioner was again rated as "minimally

effective" in his communication with staff and students and with his selection of communication methods and making effective oral presentations. (Id. at 4.) Finally, petitioner was again rated as "minimally effective" in multiple areas of administration and management, such as appropriate use of time, problem solving and utilizing resources effectively. (Id. at 6.)

30. In light of petitioner's limited duties at Clayton, Mr. Haynes' evaluation of petitioner in areas of curriculum implementation and personnel management clearly fell outside of petitioner's defined responsibilities to handle lunchroom supervision and disciplinary referrals. (See Ex. P-S to Sept. 27, 2013 Reply.)

31. On March 29, 2012, Mr. Bryan, Ms. Taylor and Mr. Daniel Antonelli, President of the Administrators Association, met and discussed petitioner's employment status for the 2012-13 school year. (Cert. of William Nossen, Esq., Ex. P-E to Sept. 27, 2013 Reply, ¶ 7 (hereinafter referred to as "Nossen").)

32. At that time, Mr. Bryan advised Ms. Taylor and Mr. Antonelli that he would not recommend the petitioner for renewal for the 2012-13 school year. (Ibid.)

33. By letter dated May 3, 2012, Ms. Taylor stated that the reasons provided by Mr. Bryan for the non-renewal decision was that petitioner was adequate but did not show initiative and that the Board did not want him to recommend mediocre employees. (Ex. P-D to Sept. 27, 2013 Reply.)

34. In making his determination, Mr. Bryan did not have the evaluations from Ms. Taylor since he asked for them after he had already told her of his decision. (Ibid.)

35. On May 8, 2012, another parent submitted a written complaint regarding the petitioner and his handling of an investigation into an alleged discriminatory statement made by a teacher to the parent's son who was a student at Simmons. (Ex. R-F to Aug. 12, 2013 Motion.)

36. The parent, a mother, complained that petitioner required her to first meet with the teacher who made the alleged discriminatory remark before petitioner would

meet with her and the parent was uncomfortable meeting alone with the teacher. (Ibid.) The parent also objected to petitioner insisting that she speak with the teacher over the phone as the parent wanted to come into the school for a meeting. (Ibid.)

37. Ms. Taylor investigated this complaint at Mr. Byan's direction and conveyed her conclusion to petitioner that he acted professionally and appropriately. (Schempp ¶ 17.)

38. On May 18, 2012, Mr. Bryan provided petitioner with a statement of reasons for his nonrenewal, specifically citing that petitioner's skill set as an administrator was not a good fit for the long-term needs of the District and that petitioner's leadership style and lack of initiative were contributing factors in the decision. (Ex. P-Q to Sept. 27, 2013 Reply.)

39. At petitioner's request, on June 11, 2012, the Board convened a public hearing to discuss petitioner's employment status for the 2012-13 school year. (Ex. P-R to Sept. 27, 2013 Reply.)

40. During the hearing, petitioner only addressed the issue of lack of initiative and did not address the remaining issues because they were too vague for him to provide an appropriate response. (Schempp ¶ 22.)

41. As articulated by petitioner, the Board did not vote on petitioner's non-renewal and thus it implicitly affirmed the superintendent's recommendation to non-renew the petitioner for the 2012-13 school year. (Schempp ¶ 23.)

42. Ms. Taylor believes that the decision to not renew petitioner is an act of retaliation against her for filing her discrimination complaint and her speaking on behalf of petitioner at the Board hearing on June 1, 2012. (Ex. P-L to Sept. 27, 2013 Reply.)

43. Petitioner failed to achieve tenure while employed with the Board. (Cert. of Fran Adler, Ex. R-I to Aug. 12, 2013 Motion, ¶ 7.)

Issue

The sole issue in this matter is whether the Board's action to not renew petitioner's employment for the 2012-13 school year was arbitrary, capricious, and unreasonable under the limited standard entitling non-tenured, nonrenewed teaching staff members to relief, as established by the New Jersey Appellate Division.

Legal Analysis

"A board of education shall appoint, transfer or remove a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons." N.J.S.A. 18A:27-4.1(a). In Dore v. Bd. of Educ. of the Twp. of Bedminister, 185 N.J. Super. 447, 456 (App. Div. 1982), the Court defined the breadth of a Board's discretion in renewing non-tenured staff as so great that "absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a [teaching staff member] who has no tenure and is regarded as undesirable by the local board." A board maintains the "right to reach its conclusion about a nontenured teacher on a broad base of input received from a variety of people, including members of the public, parents of students and a board member's own knowledge of a [teaching staff member] ...." Id. at 454. Additionally, a board's determination not to grant tenure "need not be grounded on unsatisfactory classroom or professional performance for there are many unrelated but nonetheless equally valid reasons why a board ... may conclude that tenure should not be granted." Donaldson v. Bd. of Educ. of North Wildwood, 65 N.J. 236, 241 (1974).

Petitioner, as a non-tenured employee challenging his non-renewal, has "the burden of proving unreasonableness" of the Board's decision. Kopera v. Bd. of Educ. of West Orange, 60 N.J. Super. 288, 297 (App. Div. 1960); see also Martin v. Bd. of Educ. of Asbury Park, EDU 06349-04, Initial Decision (Sept. 13, 2004), adopted, Comm'r (Oct. 15, 2004), appeal dismissed, State Bd. of Ed. (March 2, 2005) <http://njlaw.rutgers.edu/collections/oal/> (non-tenured employee must "demonstrate

that the Board's decision not to renew [his] contract was so far afield, so outside of the realm of rational, evidentially based decision-making as to fail to even stand as a reasonable determination"). "The burden of proof rests upon petitioner to show by competent and credible evidence that the Board's decision not to renew [his] contract was arbitrary, capricious or unreasonable [and] [t]he burden of proof for '[s]uch an allegation requires substantial proof that the Board acted improperly and to the exclusion of all other bona fide reasons." Kondratick v. Bd. of Educ. of the Borough of Hamburg, EDU 11195-07, Initial Decision, (June 29, 2009), adopted, Comm'r, (Sept. 29, 2009) <http://njlaw.rutgers.edu/collections/oal/> (quoting Bigart v. Paramus Bd. of Educ., 1979 S.L.D. 123, 133) (emphasis in original). Simply stated, arbitrary and capricious action is that which is not based upon any rationale grounds, which is unsupported by any objective evidence.

Although a board may look beyond evaluations and consider a broad base of input in making its employment decision, the action may be arbitrary, capricious, and unreasonable where it is based upon improper motives, personal animosity, or bias. See Kopera, supra, 60 N.J. Super. at 298 (stating that "local boards have the right to reward the capable and the efficient, provided they do it fairly, without bias, prejudice, favoritism or discrimination"). A board cannot "adopt employment practices 'based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served.'" Donaldson, supra, 65 N.J. at 247 (citing Ruch v. Bd. of Educ. of Greater Egg Harbor Regional High Sch. Dist., 1968 S.L.D. 7, 10).

In reviewing the respondent's action, a determination made by an administrative body such as a board of education, acting on a discretionary matter such as whether to renew the employment contract for a non-tenured employee who by means of renewal and statutory provisions will gain tenure upon renewal, will not be disturbed "if there is any fair argument in support of the course taken or any reasonable ground for difference of opinion among intelligent and conscientious officials ... and will not be disturbed unless patently corrupt, arbitrary or illegal." Flanagan v. Civil Service Dept., 29 N.J. 1, 12 (1959) (emphasis added). "Doubts held by the court as to the wisdom of the administrator's decision do not alter the case." Ibid. (citations omitted.) The Commissioner of Education likewise will not interfere with the discretionary actions of

local boards of education unless that action is patently arbitrary and without rational support. Kopera supra, 60 N.J. Super. at 295. Therefore, under the standard of review for non-renewals, "[t]he only question open for review by the Commissioner would be whether the Board had a reasonable basis for its factual conclusion." Ibid. The Kopera Court held that "since the proceeding before the Commissioner was the first 'hearing' afforded appellant ... the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts ..." Id. at 296-97.

Here, petitioner contends that the Board's decision was unreasonable because (1) the Superintendent did not consider the input of petitioner's immediate supervisor, Ms. Taylor, (2) the Superintendent did not adhere to regulations for evaluations, and (3) the decision was based on improper motives in that the Board non-renewed petitioner to retaliate against Ms. Taylor for her prior filing of a complaint with the Division on Civil Rights. Respondent contends that the decision was reasonable because it was based on the personal knowledge of other administrators, specifically the Superintendent and Mr. Haynes. Respondent also cites the written complaints by parents concerning petitioner as evidence of deficiencies in his work performance.

As to petitioner's claim that respondent did not consider the input of Ms. Taylor and her prior performance reviews of petitioner, the respondent denies this claim and contends that it considered her input among several administrators. This being a motion for summary decision, the petitioner's verified allegation as the non-moving party is deemed true, thus it is accepted that the respondent did not consider the input of Ms. Taylor before making its decision. However, petitioner has identified no statutory or regulatory requirement that a Board must consider a supervisor's input. Pursuant to the guidance of the Kopera Court, the issue in this non-renewal matter is whether the factual basis for the Board's decision is true and whether it is reasonable for the Board to conclude as it did based upon those facts. As set forth more fully below, even accepting the respondent did not consider Ms. Taylor's input, underlying facts respective to the complaints of the parents and the input of the Superintendant, based on his personal knowledge, make it reasonable for the respondent to conclude as it did.

First, for purposes of summary decision, petitioner has raised genuine issues of reliability of the ratings by Mr. Haynes because his evaluation included areas such as curriculum implementation and personnel management that clearly fell outside of petitioner's defined responsibilities to handle lunchroom supervision and disciplinary referrals at the middle school. Thus for purposes of summary decision, petitioner's factual contention is accepted and Mr. Haynes' evaluation is not considered a reliable basis for the respondent's action due to its illogical inclusion of evaluation criteria clearly outside the scope of petitioner's limited job duties at the middle school. However, despite this conclusion, the underlying facts respective to the complaints of the parents and the input of the Superintendant still make it reasonable for the respondent to conclude as it did.

Next, under the applicable regulation at the time of petitioner's evaluation, N.J.A.C. 6A:32-4.5(d)[1] requires a post observation conference to be held within 10 days of the observations. Petitioner alleges that respondent failed to adhere to this regulation because Mr. Bryan waited almost a month and a half to hold petitioner's post-observation conference following the elementary school observation on January 20, 2011. While this fact is uncontested, this fact alone does not render the Board's decision unreasonable because "the lack of strict compliance" with the evaluation requirements is not "a sufficient reason to afford petitioner either reinstatement or financial reward." Dore, supra, 185 N.J. Super. at 455-56. The renewal statute "does not provide for any penalty in the event a local board fails to follow the pr[e]scribed procedures." Id. at 456. In Dore, the school board did not act arbitrarily and capriciously despite not conducting the requisite three evaluations during the school year. Ibid. More recently, the Appellate Division reaffirmed this holding by stating that a district's failure to adhere to the evaluation requirements does not render a non-renewal decision to be arbitrary, capricious, or unreasonable. Tuck-Lynn v. State-Operated Sch. Dist. of Newark, Docket No. A-2072-09T3, 2011 N.J. Super. Unpub. LEXIS 518 (App. Div. March 3, 2011), certif. denied, 207 N.J. 189 (2011). Accordingly, in the present matter, the superintendent's failure to have the post-observation conference within 10

[1] N.J.A.C. 6A:32-4.5 was repealed by R.2013 d.046, effective March 4, 2013. See 45 N.J.R. 461(b). The requirement has been relocated to N.J.A.C. 6A:10-2.4 and requires the post-observation conference within 15 working days. N.J.A.C. 6A:10-2.4(h)(1).

days does not, as a matter of law, render the respondent's decision arbitrary, capricious, or unreasonable.

Finally, petitioner contends that the respondent's non-renewal decision was an act of retaliation against Ms. Taylor because of her prior filing of a discrimination complaint with the Division on Civil Rights and was motivated to deny her the services of petitioner as her vice-principal, whom she supported and highly regarded. This being a motion for summary decision, the petitioner's verified allegation as the non-moving party is deemed true, especially due to petitioner's evidence of the superintendant's statement in Ms. Taylor's performance evaluation in which he appears to criticize her for filing the complaint. If this were the respondent's sole motivation, petitioner would have a persuasive claim that his non-renewal was 'based on frivolous, capricious, or arbitrary considerations which have no relationship to the purpose to be served.'" Donaldson, supra, 65 N.J. at 247. However, accepting this allegation as fact does not render the respondent's decision unreasonable as petitioner has not refuted the other reasonable basis for the respondent's decision – specifically the written reprimand issued by the Superintendant before Ms. Taylor filed her complaint and the written complaints of the two parents. At best, accepting all of petitioner's assertions as fact, he has only established that the respondent possibly had illegitimate motives, in addition to legitimate motives, for its action. See Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (recognizing that employer's decision to terminate employee can be animated at once by legitimate and illegitimate reasons -- that is, "mixed-motives"). However, neither the parties nor the undersigned have located any New Jersey cases reversing a school board non-renewal decision regarding a non-tenured employee where the Board had legitimate and illegitimate basis for its action. Instead, a Board's discretionary hiring decision for a non-tenured teaching staff member requires the petitioner to prove the exclusion of all bona fide reasons. Kondratick v. Bd. of Educ. of the Borough of Hamburg, supra, EDU 11195-07.

Based upon the record as produced for this motion and the Brill standard, the petitioner's contention is deemed true that the decision not to renew his employment included retaliation against Ms. Taylor for her prior filing of a discrimination complaint. However, the record also demonstrates that respondent had, and did consider material

setting forth concerns about petitioner's administrative style and abilities. Under the applicable case law, the Board could rationally and without arbitrariness determine that those concerns with petitioner's job performance were such that it should not renew his contract and thereby grant him tenure. For purposes of summary decision, petitioner has not excluded these bona fide reasons and has only established that respondent may have had mixed-motives for its decision. Given the significant legal hurdle that the statute and case law present to one challenging a decision of nonrenewal, the petitioner's failure to raise a material question of fact as to the bona fide basis for the Board's action warrants summary decision for respondent.

ORDER

Respondent's motion for Summary Decision is **GRANTED** and Petitioner's appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/26/14
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 3/26/14

Date Mailed to Parties: 3/26/14

/lam

207-14

E.H., ON BEHALF OF MINOR CHILD, G.H.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her daughter, G.H., is not domiciled in the Ocean City School District and therefore not entitled to a free public education in Ocean City schools. The respondent Board contended that petitioner and G.H. reside at a home in Marmora, New Jersey, which was purchased in May 2013, and consequently owe tuition for the period of G.H.'s ineligible attendance during the 2013-2014 school year. A hearing in the matter was conducted on March 20, 2014.

The ALJ found, *inter alia*, that: petitioner and her family resided in Ocean City through 2012; however, a residency investigation in October 2013 confirmed that they are now domiciled at the home they purchased in Marmora in May 2013; petitioner receives her important mail at the Marmora address, and keeps two pets there full-time; petitioner failed to credibly establish that the two or three addresses she identified during the hearing were legitimate or lawful Ocean City residential locations for her and her daughter during the period in question; petitioner stated at hearing that she was simply trying to do what was best for her daughter and did not want to disrupt G.H.'s education and friendships that had been established over seven years in Ocean City schools. The ALJ concluded that petitioner and her daughter were domiciled in Marmora for the 2013-2014 school year. However, the ALJ also concluded that G.H. must remain in the Ocean City Intermediate school for the balance of the 2013-2014 school year, unless petitioner decides to remove her, as changing schools this late in the school year would be too disruptive; further, the ALJ concluded that petitioner owes the respondent Board tuition for the 2013-2014 year. The ALJ denied petitioner's appeal, and ordered that she must pay the Ocean City School District tuition for the period of G.H.'s ineligible attendance.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions in this matter, but determined that the Initial Decision recites no evidentiary findings at hearing with respect to the amount of tuition owed, nor does the record contain any evidence with regard to the amount of outstanding tuition due to the respondent Board. Accordingly, the ALJ remanded the case to the OAL for the sole purpose of factual findings with regard to the amount of tuition owed to the school district for the period of G.H.'s ineligible attendance.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

May 16, 2014

207-14

OAL DKT. NO. EDU 388-14
AGENCY DKT. NO. 299-12/13

E.H., ON BEHALF OF MINOR CHILD, G.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon such review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner has failed to sustain her burden of establishing that she was a domiciliary of Ocean City during the 2013-2014 school year. The Commissioner further concurs with the ALJ's conclusion that G.H. was, therefore, not entitled to a free public education in the District's schools during this time. However, the Initial Decision contains no evidentiary findings with respect to the amount of tuition due and owing the respondent Board of Education as a consequence of G.H.'s ineligible attendance in the District's schools. Nor was the Commissioner able to find evidence in the record, by way of certification or recitation of testimony,[1] regarding the outstanding tuition amount.

Accordingly, this case is remanded to the OAL for the sole purpose of factual findings regarding the tuition due to respondent.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/16/14
Date of Mailing: 5/16/14

[1] The Commissioner was not provided with a transcript of the hearing.
* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTITIAL DECISION
OAL DKT NO. EDU 388-14
AGENCY DKT. 299-12/13

E.H. ON BEHALF OF MINOR CHILD, G.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,
Respondent.

E.H., petitioner, pro se

Michael P. Stanton, Esq., for respondent (McCrosson & Stanton, attorneys)

Record Closed: March 20, 2014 Decided: April 3, 2014

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a request for relief on December 5, 2013. Petitioner challenges the district's finding that her child, G.H., is not domiciled in District and consequently must pay tuition. The

matter was transmitted to the Office of Administrative Law (OAL) on January 13, 2014; to be heard as an expedited matter. N.J.S.A. 18A:38-1. The Director of the OAL assigned the undersigned to hear this as an expedited matter pursuant to pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was scheduled for a plenary hearing on March 20, 2014. The hearing was held and the record closed.

SUMMARY OF RELEVANT TESTIMONY

Petitioner's daughter G.H. attended the Ocean City Public Schools since second grade. Petitioner and her family resided in Ocean City, New Jersey through 2012.

On May 2, 2013, petitioner and her husband purchased a home in Marmora, New Jersey. The home is valued at $261,100, has a mortgage of $216,015, and was purchased for $220,000 (R-4). Marmora is outside the Ocean City Intermediate School boundary. For the 2013-2014 school year, G.H. was in eighth grade. She continued to attend Ocean City's eight grade program, notwithstanding her parents purchased a home in Marmora.

Petitioner testified that she and G.H. still live in Ocean City for the 2013-2014 school year. They either resided at xxx Ocean Avenue under a lease arranged for a property owned by a relative or resided at petitioner's mother's home (G.H.'s grandmother) at xxx Simpson Avenue.

Petitioner and her husband had "issues" in 2013 and/or that she has to take care of her mother, due to age related issues. Petitioner and G.H. split their time between the Ocean City properties starting in July 2013. They did not stay at the Marmora property. Sometimes petitioner's older daughter, S.H., would also stay in Ocean City with them. S.H. is already attending Ocean City High School so even if she resided in Marmora, she would be permitted to remain matriculated at the Ocean City High School under the sending-receiving agreement with Marmora.

Petitioner acknowledged that she purchased a home in Marmora, and is on the deed, note, and mortgage for over $200,000. Petitioner admitted that she does stay (eat, sleep, and cook) at the Marmora home. Petitioner owns two dogs (boxers) and they stay at the Marmora home full-time. Petitioner's husband is an electrician and regularly works far away from Marmora. He is away from home for extended periods. Petitioner must therefore take care of the two dogs along with her children and mother.

Petitioner did not provide any medical reports for her mother, did not produce any bills, expenses, identification or other indicia confirming that she resides in and is domiciled in Ocean City. Petitioner produced a lease, dated August 10, 2013, for a family owned property (petitioner's brother) at the xxx Ocean Avenue. The rent is $2,000 per month. Petitioner conceded that she never paid any rent under this lease. Likewise, neither petitioner nor G.H. are on the lease at petitioner's mother's address. Petitioner argued that she is simply doing what is best for her youngest child G.H. She wanted to keep her in the same school for continuity of her educational programs and to maintain the friendships developed over the years.

Geoffrey Haines, Principal of the Ocean City Intermediate School, testified for respondent. In September-October 2013, the school received a complaint that petitioner's family was not living in Ocean City. The case was assigned to Investigator Lou DiJoseph, a licensed investigator.

DiJoseph is a retired New Jersey State Trooper where he served for twenty-five years. His rank and assignments included being the commander of the organize crime and street gangs units. DiJoseph has performed numerous residency investigations for Ocean City Public Schools. DiJoseph explained that he is not a "rubber stamp" for the district. In some instances, he has informed the district that the family under investigation meets the residency requirements and the case is dropped based upon his investigation. This occurred in about five out of twenty-five investigations.

On Tuesday, October 22, 2013, DiJoseph conducted surveillance at xx3 and xx8 Ocean Avenue, Ocean City, after school dismissal (R-3). These were locations where petitioner informed the district that she and G.H. were residing. Neither G.H. nor E.H. was observed at this location. No one appeared to residing at the xx8 location as the property was undergoing renovations. The xx3 location was also vacant.

On Thursday, October 24, 2013, DiJoseph conducted surveillance at the intermediate school during dismissal. Petitioner picked up G.H. and went shopping in Egg Harbor Township and Marmora. E.H. then drove to the Marmora home and stayed there for several hours until the surveillance was concluded.

On Monday, October 28, 2013, DiJoseph conducted early morning surveillance at the Marmora home. Petitioner's car, a BMW, was in the driveway and was covered with morning dew. Petitioner left the home at 7:05 a.m., headed onto the Garden State Parkway south. Petitioner works as a nurse at a hospital in Cape May County, which is the direction she was headed. G.H. was confirmed to be in school but was not transported by petitioner.

On Tuesday, October 29, 2013, DiJoseph conducted early morning surveillance the Marmora home. Petitioner's car, the BMW, was in the driveway and was covered with morning dew. In the afternoon DiJoseph conducted more surveillance at the intermediate school. Petitioner was parked at the school waiting for G.H. Petitioner left the school with G.H. and returned to the Marmora home. Petitioner exited the vehicle, picked up mail and remained at the Marmora home with G.H. for the balance of the surveillance.

On Wednesday October 30, 2013, DiJoseph conducted early morning surveillance the Marmora home. Petitioner's car, the BMW, was in the driveway and was covered with morning dew. Petitioner and G.H. left this location at 7:32 a.m. and G.H. was dropped off at the intermediate school. Petitioner's older daughter was thereafter dropped off at the High School.

On November 11, 2013, DiJoseph attended a meeting with petitioner and the school administration. The subject was petitioner residence/domicile. DiJoseph documented the meeting in a supplemental report (R-5). During the meeting petitioner stated that she resided at xx3 Ocean Avenue in Ocean City. Petitioner was thereafter informed of the ongoing surveillance and the district's receipt of documents confirming the purchase of her new home in Marmora. Petitioner became emotional and explained that her husband initiated the idea of buying a home in Marmora, over her objection. Petitioner wanted to stay in Ocean City. She looked for ways to keep her daughter in Ocean City for her eighth grade year.

CONCLUSIONS

The relevant statute is N.J.S.A. 18A:38-1 and it provides in part:

> Public schools shall be free to the following persons over five and under 20 years of age:
>
> a. Any person who is domiciled within the school district;

Where a local board of education removes a student, the parent may appeal to the Commissioner of Education. N.J.S.A. 18A:39-1(b)(2). In the proceeding before the Commissioner, the parent has the burden of proof by a preponderance of the evidence that the child meets eligibility requirements for a free education. Ibid. The child shall not be removed while the matter is pending before the Commissioner. Ibid. If the evidence does not support the parent's claim, the Commissioner shall assess the parent tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. Ibid.

Attendance at public schools shall be free to any person who is domiciled within a school district and meets age requirements. N.J.S.A. 18A:38-1(a). A person's domicile is "the place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has an **intention of returning**, and from which he has no intention of moving." Kurilla v. Roth, 132 N.J.L. 213, 215 (Sup. Ct. 1944). A person may have multiple residences but only one domicile. State v.

Benny, 20 N.J. 238, 251 (1955). As set forth in Mercadante v. City of Paterson, 111 N.J. Super. 35 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971), the following factors are important in determining a person's domicile:

> . . . the physical characteristics of each [place], the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return. [Id. at 39-40].

Establishment of a domicile is an act of volition. Matter of Unanue, 255 N.J. Super. 362, 375 (Law Div. 1991). "[A] choice of domicile by a person, irrespective of the motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." Id. at 376.

Three elements which must be considered in regard to a change of domicile are: "(1) whether there has been an actual and physical taking up of an abode in a particular state; (2) whether the subject had an intention to make his home there permanently or [at] least indefinitely; and (3) whether the subject had an intention to abandon his old domicile." Ibid. Once established, a domicile continues until superseded by a new one. Id. at 377.

Here, petitioner has clearly taken up residence in another jurisdiction to wit: Marmora. She purchased a home in May 2013. She incurred substantial debt to purchase the home. Her name is on the deed and mortgage. Petitioner receives her important mail at the Marmora home and keeps two pets full-time at the Marmora home. Surveillance on five dates in October 2013 confirmed that petitioner sleeps at the Marmora home with G.H., shops and returns to the Marmora home, leaves for work in the morning from the Marmora home. Surveillance also confirmed that petitioner picks G.H. up from the intermediate school and returns to the Marmora home. All indications are the petitioner and G.H. sleep, eat, and perform many other routine household functions at the Marmora home as if it is their primary place of residence.

On the other hand, the surveillance and testimony failed to confirm that petitioner maintained an alternative, genuine, and lawful residence in Ocean City. The addresses provided by petitioner were unoccupied, under construction, or family locations that were merely used to create the appearance that petitioner had a tenancy in Ocean City. Petitioner paid no rent; her addresses changed every few weeks or months; and they simply could not be verified as places that she intended to make a permanent home. The leases were not "arms length" agreements but involved family prepared documents to create an illusion that petitioner remained domiciled in Ocean City.

Based upon the foregoing analysis and proofs, I **CONCLUDE** that petitioner and her daughter G.H. are domiciled in Marmora for the 2013-2014 school year. The evidence and testimony offered by the district credibly established that petitioner resides in Marmora and intends to make Marmora her primary place of habitation for her family. Petitioner failed to credibly establish that the two or three addresses she identified during the hearing were legitimate or lawful Ocean City residential locations for her and her daughter.

Finally, petitioner stated that she was simply trying to do what was best for her daughter. She did not want to disrupt the continuity of her educational programs or her friendship that she had established over the last seven years. Petitioner effectively moved out of the Ocean City Intermediate School District in May 2013, when she purchased a new home in Marmora. This was before the start of the 2013-2014 school year.

G.H. might have been eligible for "last year" or "senior year" consideration. This entails school policies that permit students who move in their last year, to stay matriculated for continuity reasons, without paying tuition, depending on how the policy is written and interpreted by the board.

I **CONCLUDE** G.H. must remain in the Ocean City intermediate school for the balance of the 2013-2014 school year since it is already April 2014, unless of course petitioner decides to remove her. To order G.H. removed from the intermediate school this late in the year would be too disruptive.

I **CONCLDUE** that petitioner owes the Ocean City School District tuition for the 2013-2014 school year at the tuition rated approved by the Commissioner of Education for that year. Petitioner and the district are permitted to negotiate the amount, terms, and conditions of the tuition payment taking into consideration petitioner's ability to pay and other financial factors.

ORDER

Based upon the foregoing, I **ORDER** the relief sought by petitioner is **DENIED**. Petitioner must pay the Ocean City School District tuition as indicated above.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B 10.

. . . Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 3, 2014

DATE

W. TODD MILLER, ALJ

Date Received at Agency: 4/3/14

Date Mailed to Parties: 4/3/14

/lam

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

E.H., petitioner

For Respondent:

Geoffrey Haines, Principal of Ocean City Intermediate School
Lou DiJoseph, Licensed Private Investigator

EXHIBITS

For Petitioner:

P-1 Short Term Lease Agreement
P-2 U.S. Department of Labor Designation Notice (Family and Medical Leave Act)

For Respondent:

R-1 Letter from B.L.
R-2 Letter to E.H. from Dr. Kathleen Taylor, October 31, 2013
R-3 Report of Lou DiJoseph, October 31, 2013
R-4 Property Ownership Documentation for 325 Bergen Ave., Marmora, NJ
R-5 Report of Lou DiJoseph, March 17, 2014
R-6 Letter to E.H. from Dr. Kathleen Taylor, November 14, 2013
R-7 Ocean City School District Resolution

208-14

OAL DKT. NO. EDU 16369-12
AGENCY DKT. NO. 344-11/12

PATRICIA TREGO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Settlement Agreement and Release, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner observes that the President of the Madison Borough Board of Education signed the agreement on behalf of the Board. Neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Board President to sign the agreement on its behalf, and the agreement is not signed by the Board attorney, who is the Board's duly authorized representative in litigation. Consequently, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement and Release consistent with the concerns set forth above.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/16/14

Date of Mailing: 5/16/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 16369-12

AGENCY DKT. NO. 344-11/12

PATRICIA TREGO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MORRIS COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Jeffrey R. Caccese, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: March 28, 2014 Decided: April 1, 2014

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 12, 2012, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Settlement Agreement and General Release were submitted on March 28, 2014, indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

4/1/14
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 4-3-14

Date Mailed to Parties: APR - 3 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

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STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
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OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS AGREEMENT is made by and between Patricia Trego, P.O. Box 370 Far Hills, NJ 07931 (hereinafter referred to as "Ms. Trego") and the Board of Education of the Borough of Madison, 359 Woodland Road, Madison, NJ 07940, its predecessors, successors, individual Board members, officers, directors, administrators, representatives, employees, attorneys, agents, and assigns, individually, jointly and severally (hereinafter collectively referred to as "Board") pursuant to the following terms and conditions:

WHEREAS, Ms. Trego was employed by the Board as a teaching staff member since 2001;

WHEREAS, on or about June 30 2011, Ms. Trego was dismissed by the Board due to a reduction in force;

WHEREAS, at the time of her termination from employment, Ms. Trego was a part-time employee and as a part-time employee her adjusted salary was $31,594.00.

WHEREAS, on or about November 20 2012, Ms. Trego filed an appeal with the New Jersey Department of Education captioned *Patricia Trego v. Board of Education of the Borough of Madison, Morris County* (OAL Docket No. EDU 16369-2012N; Agency Docket No. 344-11/12) (hereinafter "Appeal") claiming that there were full-time positions to which she was entitled under her Instructional Certificate and relevant endorsements, but she was not offered those positions by the Board in violation of *N.J.S.A.* 18A:28-12 and *inter alia Capodilupo v. West Orange Bd. of Ed.*, 218 NJ Super 510 (App Div 1986) and *Bednar v. Westwood Bd. or Ed.*, 221 NJ Super 239 (App Div 1987).

WHEREAS, at all times, the Board has denied and continues to deny the allegations set forth in Ms. Trego's appeal;

WHEREAS, the parties wish to avoid the expense and uncertainty of continued litigation;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Ms. Trego and the Board hereby agree as follows:

1. GENERAL RELEASE OF CLAIMS

In consideration of the Settlement Amount set forth below and the other promises made herein, Ms. Trego and her respective heirs, shareholders, directors, officers, employees, agents, attorneys, affiliates, parents, subsidiaries, predecessors, successors, assigns, and all persons acting by, through, under or in concert with any of them each release the Board and its respective heirs, shareholders, directors, officers, employees, agents, attorneys, affiliates, parents, subsidiaries, predecessors, successors, assigns, and all persons acting by, through, under or in concert with any of them (the "Released Parties"), from any and all charges, complaints, claims,

liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims of any nature whatsoever, known or unknown, which they now have, claim to have, own, hold or which they at any time heretofore had, held, or claimed to have, relating in any manner whatsoever to: (i) the Appeal; (ii) any employment relationship between Ms. Trego and the Board, and (iii) any other relationship by, among, and/or between Ms. Trego and the Board. Ms. Trego further understands, covenants, and agrees that she will not enter, permit to be entered or cause to be entered, directly or indirectly, any suit or other claim against the Released Parties related to the foregoing. Ms. Trego represents and warrants that she has not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand or cause of action, including any claim for attorneys' fees, against the Board or the Released Parties which relates to the Appeal and the other matters stated above.

Ms. Trego's release and discharge also includes, without limitation, any contract or tort claim or potential claim, and any claim arising under common law, such as claims for breach of contract, defamation, breach of implied covenant of good faith and fair dealing, misrepresentation, libel, slander, invasion of privacy, negligence, interference with advantageous relations, infliction of emotional distress, loss of consortium, discrimination, retaliation, or wrongful termination.

This release shall not apply to any claim arising out of (a) the enforcement of this agreement; (b) any claim that arises after the date of this agreement; or (c) claims that may not lawfully be released, discharged, or waived.

2. NO OTHER LEGAL ACTION BY THE PARTIES.

The Parties confirm that no charge, complaint or action is pending in any forum or form, except the Appeal, which the Parties have agreed to voluntarily dismiss with prejudice in their entirety. Further, the Parties covenant and agree not to bring any charge, complaint, action, suit, or administrative proceeding in any forum before any federal, state, or local administrative agency or in any federal, state or local court against any of the Released Parties for any actions that could or did arise or accrue prior to and including the date of this Agreement; provided, however, it does not interfere with or limit either of the Parties protected right to file a charge with or participate in an investigation by or proceeding before the Equal Employment Opportunity Commission or any similar state or local commission that investigates and enforces anti-discrimination laws. Nothing contained herein shall in any manner be deemed a waiver or extension of any applicable statute of limitations, whether administrative or otherwise. Nonetheless, the Parties understands that, by signing this Agreement, they each waive any rights they may have to recover money or other relief in any lawsuit or proceeding they brings or that is brought on her behalf by any agency or third party against any of the Released Parties based on events arising out of or relating to the Appeal through the date of this Agreement. Except where otherwise permitted under this paragraph, the Parties agree that any such action shall be dismissed with prejudice upon presentation of this Agreement. Nothing in this paragraph is intended to limit either of the Parties from instituting legal action for the sole purpose of enforcing this Agreement.

3. SETTLEMENT TERMS

a. In consideration of the above, the Board agrees that Ms. Trego's employment with the Board shall be deemed terminated effective February 28, 2013.

b. In further consideration of the above, and since Ms. Trego's last day of employment will be considered February 28, 2013, Ms. Trego will receive back pay for the period of September 1, 2011 until February 28, 2013 in the amount of $39,492.50 ("Settlement Amount"), minus applicable deductions set forth in subsection (c) below, which will be inclusive of all accumulated sick leave, therefore, Ms. Trego's sick leave will be deemed exhausted as a result of this settlement agreement. For the period of set forth above, Ms. Trego will be considered as having been placed on a paid administrative leave.

c. The Board will deduct from the Settlement Amount all applicable withholdings and taxes, including the employer share of social security, Medicare, FUTA, and the New Jersey unemployment and temporary disability taxes, and pension deductions, if applicable.

d. Ms. Trego agrees that she is solely responsible and legally bound to make payments of any other taxes, if any, which are determined to be owed (including penalties and interest related thereto) by any taxing authority. Ms. Trego understands and agrees that the Board has not made any representation regarding the tax treatment of the Settlement Amount, and Ms. Trego agrees that she is responsible for determining the tax consequences of such payments and for paying taxes owed, if any, that may be owed with respect to the Settlement Amount. In the event of a claim for such taxes, and/or penalties or interest, by a taxing authority, Ms. Trego agrees to and does hereby indemnify and hold the Board harmless against any and all tax liability, penalties, and/or interest as due thereon.

e. The Settlement Amount will be paid by one regular check payable to the order of "and Patricia Trego (Social Security Number: 145-50-1878)" and delivered by mail to Oxfeld Cohen, P.C., 60 Park Place, Suite 600, Newark, NJ 07102, to the attention Sanford Oxfeld, Esquire.

f. Ms. Trego asserts that had she been employed for the month of February, 2013 she would have been entitled to health insurance as her claim was to a full-time position and there were non-tenured, full-time teachers employed by the Board in positions being claimed by Trego. The Board makes no representation as to the status of Ms. Trego's employment from June 30, 2011 through February 28, 2013, including the affect this settlement agreement will have upon Ms. Trego's pension, if any, but does acknowledge that full-time employees of the Board are entitled to health insurance coverage.

5. NO OTHER COMPENSATION DUE

Ms. Trego understands and agrees that the Settlement Amount represents benefits to which Ms. Trego is not otherwise entitled to but for her execution of this Agreement and her fulfillment of all of the promises contained herein and that no other compensation is due to her by the Board. Ms. Trego further acknowledges that she is not a "prevailing party" in the Appeal and that, in exchange for the consideration provided for by this Agreement, she waives any and all claims against the Board and the Released Parties for any attorneys' fees and/or costs relating to the

Action.

6. NON-ADMISSION

This Settlement Agreement shall not be construed as an admission of any wrongdoing of any kind whatsoever by the Parties, including the allegations set forth in the Appeal. The Board has specifically denied and continues to deny that they or Released Parties are liable to Ms. Trego for any damages whatsoever.

7. DISMISSAL OF THE ACTION WITH PREJUDICE

In consideration for the Settlement Amount and the other promises set forth herein, Ms. Trego agrees to dismiss the Appeal with prejudice upon execution by all parties of this Agreement.

8. POSITIONS WITH THE BOARD

Ms. Trego hereby waives any rights to seek any position, paid or unpaid, with the Board, and specifically promises not to apply for any position with the Board or the Release Parties. Ms. Trego agrees that any attempt to obtain a position with the Board or the Released Parties will constitute a breach of this agreement and the Board and the Released Parties may rely on the breach in rejecting the application or refusing to employ, reemploy, appoint, nominate, or contract with Ms. Trego.

Ms. Trego agrees that her signature on this Agreement constitutes an acknowledgment that her rights to employment, including any and all tenure rights and any and all future rights to employment and/or re-employment with the Board will end as of the end of the day on February 28, 2013. Ms. Trego agrees she shall never again seek employment with the Board.

9. PESONAL PROPERTY

Should Ms. Trego have certain personal property on Board premises, she and her designated representative shall be permitted, on notice to school administration, and at a mutually convenient day and time, to come onto school property, and, if deemed necessary, meet with a representative of school administration and accompanied by a representative, designate which property belongs to her and remove her personal property. The Board will cooperate in this regard.

10. AUTHORIZED SIGNATORY

By signing this Agreement, each signatory represents that he or she is a Party or has been duly authorized by a Party to sign on that Party's behalf and that this Stipulation is duly authorized, approved and consented to as to terms.

11. COUNTERPARTS AND FACSIMILES

The parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

12. ENTIRE AGREEMENT

This Settlement Agreement represents the entire understanding between the Board and Ms. Trego with respect to the subject hereof. This Settlement Agreement supersedes all prior written and oral understandings between the Board and Ms. Trego with respect to this subject. There are no representations which are not contained herein that have been made or relied upon by the Board and Ms. Trego in entering this Settlement Agreement. This Settlement Agreement may not be modified except by a writing signed by the Board and Ms. Trego. The Board and Ms. Trego acknowledge their obligations to act in good faith with respect to the performance of their obligations under this Settlement Agreement.

It is understood between the parties that neither party has relied upon any representation, express or implied, made by any other party or their counsel or any of their representatives, and that this Stipulation constitutes the entire understanding of the parties and cannot be modified except in writing signed by all of the parties hereto.

MS. TREGO ACKNOWLEDGES THAT SHE HAS BEEN ADVISED THAT HER LEGAL RIGHTS AND RESPONSIBILITIES WILL BE AFFECTED BY EXECUTING THIS AGREEMENT AND THAT SHE ACKNOWLEDGES THAT SHE IS REPRESENTED BY HER OWN ATTORNEY AND HAS CONSULTED WITH HER ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT.

13. SEVERABILITY

In the event that any section or part of this Agreement shall be found to be void or unenforceable, such section or part shall be deemed to be surplusage and the remainder of the Agreement shall remain in full force and effect.

14. GOVERNING LAW

The parties agree that this Agreement shall be interpreted in accordance with the laws of the State of New Jersey. All disputes arising under or relating to this Agreement or the breach of this Agreement shall be brought exclusively in the federal or state courts of the State of New Jersey.

15. REVOCATION/RIGHT OF REVIEW

Pursuant to the requirement of the Older Workers Benefit Protection Act, 29 U.S.C. § 626 *et seq.*, Ms. Trego acknowledges that she has been given the opportunity, if she so desires, to consider this Settlement Agreement for twenty-one (21) days before executing it. In the event that Ms. Trego executes this Settlement Agreement within less than twenty-one (21) days of the date of its delivery to him, Ms. Trego acknowledges that such decision was entirely voluntary and that she had the opportunity, if she had so desired, to consider this Settlement Agrcement for the entire twenty-onc (21) day period. Ms. Trego further acknowledges that for a period of seven (7) days from the date of Ms. Trego's execution of this Settlement Agreement, she shall retain the right to

revoke this Settlement Agreement by written notice to Jeffrey R. Caccese Esquire, Comegno Law Group, P.C., 521 Pleasant Valley Avenue, Moorestown, NJ 08057, and that this Settlement Agreement shall not become effective or enforceable until the expiration of such revocation period. Therefore, the consideration called for under paragraph 3 of this agreement above shall not be made until this Settlement Agreement has been fully executed and until after expiration of such revocation period.

PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE CONTAINS A GENERAL RELEASE OF ALL CLAIMS

Intending to be legally bound hereby, Ms. Trego and the Board execute the foregoing Agreement as indicated below.

WITNESS:

Kathleen O'Brien 3/10/14

KATHLEEN O'BRIEN
NOTARY PUBLIC OF NEW JERSEY
I.D. # 2371666
My Commission Expires 3/31/2018

WITNESS:

Patricia Trego 3/10/14
Patricia Trego

PATRICIA TREGO
DATED: 3/7/14

BOARD OF EDUCATION OF THE BOROUGH OF MADISON

BOARD SECRETARY

Lisa S. Ellis

LISA ELLIS
BOARD PRESIDENT
DATED:

209-14

OAL DKT. NO. EDU 12174-13
AGENCY DKT. NO. 132-6/13

BOARD OF EDUCATION OF THE BOROUGH OF HAMBURG, SUSSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY AND K.F., on behalf of minor children, A.F. AND R.F.,	:	DECISION
RESPONDENTS.	:	

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/16/14

Date of Mailing: 5/16/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12174-13

AGENCY DKT. NO. 132 - 6/13

BOARD OF EDUCATION OF THE BOROUGH OF HAMBURG, SUSSEX COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BUTLER, MORRIS COUNTY AND K.F. O/B/O MINOR CHILDREN A.F. and R.F.,

Respondents.

Bruce W. Padula, Esq., (Cleary, Giacobbe, Alfieri, Jacobs LLC), representing petitioner

Jeffrey R. Merlino, Esq. (Lindabury, McCormick, Estabrook and Cooper, PC), representing respondent, Butler Board of Education

Ira Fingles, Esq. and **Andrew D. Linenberg,** Esq. (Hinkle, Fingles and Prior, PC) representing respondent, K.F. on behalf of minor children A.F. and R.F.

Record Closed: March 26, 2014 Decided: March 31, 2014

BEFORE **SANDRA ANN ROBINSON,** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law on August 13, 2013 for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled for November 18, 2013 and adjourned at petitioner's request to afford an opportunity to complete discovery and file a Motion for Summary Decision. A Motion for Summary Decision and letter brief were filed. Oral arguments were scheduled for February 3, 2014. During the pendency of the case at the OAL, the parties voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached documents.

FINDINGS

I have reviewed the contents of the attached Settlement Agreement; the Extract from the Minutes of the January 28, 2014 Regular Meeting of the Board of Education of Hamburg Borough, Sussex County, as recorded in the official minute book – signed by the Board Secretary; the Extract from the Minutes of the March 18, 2014 Regular Meeting of the Butler Board of Education, Morris County, and the signed Certification to be a True Copy of the official records of Butler Board of Education signed by Board Secretary / School Business Administrator and **FIND**:

1. All parties have voluntarily agreed to the settlement as evidenced by their respective signatures on the document;

2. Respondents have approved the settlement through the passing of a Motion by a unanimous roll call vote of the members of the Hamburg and Butler Boards of Education, and by the signing K.F.'s attorney;

3. A copy of the meeting extracts are attached to the fully executed settlement agreement;

4. The settlement fully disposes of all issues in controversy and is consistent with law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

March 31, 2014
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Date Received at Agency: 4-2-14

Mailed to Parties: Laura Sanders

APR - 2 2014
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr

CLEARY GIACOBBE ALFIERI JACOBS
5 RAVINE DRIVE
MATAWAN, NEW JERSEY 07747
TEL 732.583.7474
FAX 732.290.0753
ATTORNEYS FOR PETITIONER HAMBURG BOARD OF EDUCATION

RECEIVED
2013 MAR 26 A 12:31
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

HAMBURG BOARD OF EDUCATION, SUSSEX COUNTY,

Petitioner,

v.

BUTLER PUBLIC SCHOOLS, and K.F., on behalf of minor children, A.F. and R.F.

Respondents.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Dkt. No.: EDU 12174-2013 N
Agency Ref. No.: 132-6/13

STIPULATION OF SETTLEMENT AND ORDER

WHEREAS, Petitioner instituted this matter seeking Commissioner of Education review of a residency determination concerning the appropriate district of residence for A.F. and R.F.; and

WHEREAS, pursuant to the parents' divorce decree dated December 18, 2012, at all times relevant, the minor children resided, and continue to reside with their mother in Butler, New Jersey and visit their father, who resides in Hamburg, on weekends; and

WHEREAS, the Parties wish to amicably resolve this matter on the terms stipulated herein.

NOW, THEREFORE, IT IS HEREBY stipulated and agreed by and between the parties, that this matter shall be amicably resolved on the following terms:

1. Hamburg's Petition is hereby withdrawn with prejudice;

2. Butler is the district of residence for A.F. and R.F. and Butler accepts financial and other responsibility for the free public education, and any ancillary costs associated with that

education, for the minor children A.F. and R.F. for the time period commencing March 4, 2013, pursuant to the December 18, 2012 dual judgment of divorce and marital settlement agreement between the biological parents of A.F. and R.F;

3. During all relevant time periods, A.F. was of high school age. Hamburg is a K-8 school district and, as such, is not responsible for the education of A.F; and

4. Each party shall be responsible for its own legal fees and costs.

The terms of this Stipulation of Settlement are hereby approved and so ORDERED.

Hon. Sandra A. Robinson, A.L.J.

Dated: 3.31.14

Dated: 1/31/14

By: Bruce W. Padula
Attorney for Petitioner Hamburg Board of Education

Dated:

By: Jeffrey R. Merlino
Attorney for Respondent Butler Board of Education

Dated: 1-30-14

By: ~~Andrew D. Lincnberg~~ FRED FINGLES
Attorney for Respondent K.F., on behalf of her minor children R.F. and A.F.

education, for the minor children A.F. and R.F. for the time period commencing March 4, 2013, pursuant to the December 18, 2012 dual judgment of divorce and marital settlement agreement between the biological parents of A.F. and R.F;

3. During all relevant time periods, A.F. was of high school age. Hamburg is a K-8 school district and, as such, is not responsible for the education of A.F; and

4. Each party shall be responsible for its own legal fees and costs.

The terms of this Stipulation of Settlement are hereby approved and so ORDERED.

Sandra Ann Robinson

Hon. Sandra A. Robinson, A.L.J.

Dated: 3.31.14

Dated: _____

By: Bruce W. Padula
Attorney for Petitioner Hamburg Board of Education

Dated: 3/21/14

By: Jeffrey R. Merlino
Attorney for Respondent Butler Board of Education

Dated: _____

By: Andrew D. Linenberg
Attorney for Respondent K.F., on behalf of her minor children R.F. and A.F.

EXTRACT FROM THE MINUTES
A MEETING OF THE BOARD OF EDUCATION
OF HAMBURG BOROUGH, SUSSEX
COUNTY, N.J. AS RECORDED
IN THE OFFICIAL MINUTE BOOK

The Board of Education of Hamburg Borough in the County of Sussex New Jersey convened in Regular Meeting Session of **28 January 2014** at 7:00 P.M. in the Hamburg Board meeting room.

The following members of the Board of Education were present:

Charlotte Ambrose
Sandra Cunningham
Robert Jones
Brad Carroll, Vice President
Mathew Christy
Sheila Frayko
Dawn O'Grady

The following members were absent: Patricia Harby, President, Donna Mangine

On motion by Mrs. Ambrose, seconded by Mrs. Cunningham, and carried unanimously by roll call vote, as per the Superintendent's recommendation, **approved the following resolution:**

Resolution Authorizing a Settlement Agreement in the Matter
entitled Hamburg Board of Education v. Butler Board of Education
before the Commissioner of Education and the Office of Administrative Law

WHEREAS, the Board filed a petition before the Commissioner of Education concerning the residency status of certain former students and financial responsibility for the those students;

WHEREAS, the parties have reached an amicable resolution of that matter and incorporated the terms of that resolution into a written settlement agreement, attached hereto and incorporated herein by reference; and

WHEREAS, the Board finds that this settlement is in the best interest of the District and wishes to approve its terms.

Now, therefore, be it RESOLVED by the Hamburg Board of Education that the Board approves the settlement agreement in the matter Hamburg Board of Education v. Butler Board of Education, OAL Docket Number: EDU 12174-2013 N, in substantially the form attached hereto and authorizes the Chief School Administrator to execute the agreement on behalf of the District.

Yes	7
No	0
Abstain	0

STATE OF NEW JERSEY
COUNTY OF SUSSEX

I, **William J. Sabo,** Secretary of the Board of Education of the Borough of Hamburg, in the County of Sussex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on **28 January 2014** has been compared by me with the original minutes as officially recorded in my office in the minute book of said Borough of Hamburg Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education.

SEAL

Board Secretary

BUTLER BOARD OF EDUCATION

High School Annex
Butler, New Jersey 07405

EXTRACT OF MEETING MINUTES

TYPE OF MEETING: (X) Regular ( ) Special ( ) Other

DATE OF MEETING: March 18, 2014

PLACE OF MEETING: Butler High School Library
32 Bartholdi Avenue, Butler, NJ 07405

BOARD MEMBERS PRESENT: Grecco, Luciani, Puglise, Ruighaver, Smith, Sokoloff, and Lee

MEMBERS ABSENT: Beaudoin, Thomas, and Bross (Bloomingdale Rep.)

AT THE MEETING IDENTIFIED ABOVE, THE FOLLOWING ACTION TRANSPIRED TO WIT: On motion of Mrs. Luciani and seconded by Mrs. Smith, upon recommendation of the Superintendent, it was moved to approve the **Stipulation of Settlement and Order** with Hamburg Board of Education as per attached document.

On a roll call vote the motion carried unanimously, 7-0.

CERTIFICATION

The foregoing information is hereby certified to be a true copy of the official records of the Butler Board of Education, having been extracted from and compared with the contents of the official minutes of the subject meeting.

3-21-14
Date

Barbara Murphy
School Business Administrator / Board Secretary

212-14L

212-14

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Acting Commissioner

May 20, 2014

Glen Ellsworth, Esq.
Dechert LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104-2808

Board Secretary
Mainland Regional High School
1301 Oak Avenue
Linwood, NJ 08221

Re: *E.V., on behalf of minor child, E.S. v. Board of Education of the Mainland Regional School District, Atlantic County. Agency Dkt. No. 15-1/14.*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with the above captioned matter and based upon the Board's failure to submit an Answer to the petition, I have determined to grant summary decision in favor of petitioner.

On January 16, 2014, petitioner filed a Petition of Appeal claiming that E.S. was not afforded adequate due process prior to her long-term suspension, and declaring Policy 5780 to be null and void.[1] A copy of the Petition of Appeal was served upon the Mainland Board of Education, as well as an acknowledgment of filing and notice that an Answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because the Board failed to respond to the initial notice, on February 10, 2014 a second notice was sent to the Board Secretary, via certified and regular mail, clearly indicating that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). The Board also failed to respond to the second notice. On February 25, 2014 a Final Notice was sent to the Board Secretary, via certified and regular mail, again clearly indicating that, absent receipt of an Answer to the Petition of Appeal within 10 days, each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis. The certified mail return receipt card indicates that the February 25, 2014 notice was delivered on February 29, 2014.

[1] The petitioner did not file a request for emergent relief in this matter.

To date, no Answer has been filed on behalf of the Board.[2] Accordingly, petitioner's claim that E.S. was not afforded adequate due process prior to her long-term suspension is deemed admitted by the Board.

Pursuant to *N.J.A.C.* 6A:16-7.3(a)10, in each instance of a long-term suspension, the board of education is required to provide the student with a formal hearing where the student is given the opportunity to present a defense to the charges. The regulations also require the Board, at the completion of a long-term suspension, to either reinstate the student or to continue the suspension. *N.J.S.A.* 18A:37-5; *N.J.A.C.* 6A:16-7.3(c). Pursuant to *N.J.A.C.* 6A:16-7.3(c), this determination must be made based on the following criteria:

i. The nature and severity of the offense;
ii. The district board of education removal decision;
iii. The results of any relevant testing, assessments or evaluations of the student; and
iv. The recommendation of the chief school administrator, principal or director of the alternate education program or home or other in-school or out-of-school instruction program in which the student has been placed. [*N.J.A.C.* 6A:16-7.3(c)1.i.-iv.]

The Commissioner finds that the Board must provide the petitioner with a due process hearing to determine whether E.S.'s suspension was appropriate, and if so, whether the long-term suspension should continue or whether E.S. should immediately return to the general education program.[3] Therefore, the Board is directed to provide the petitioner with a due process hearing as soon as possible, but not later than May 23, 2014. To that end, if there are currently no Board meetings scheduled prior to May 23, 2014, the Board is directed to schedule a special meeting to afford the petitioner with the opportunity to have a due process hearing. The Board is reminded that it must also continue to follow the applicable regulatory provisions concerning the educational services that must be provided to E.S. while she is on long-term suspension. *N.J.A.C.* 6A:16-7.3(a)9.[4]

Sincerely,

David C. Hespe
Acting Commissioner

c: Louis Greco, Esq.
County Superintendent
State Law Library

DCH/MKD/JKH

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[2] The Commissioner cannot fathom why the Board would fail to file an Answer in this case or even acknowledge that the Petition of Appeal was filed.

[3] Based on the limited record before the Commissioner, the Commissioner finds that Policy 5780 is not ultra vires on its face because the policy requires the Board to determine after the completion of a 10 day suspension if there shall be a continuation of the suspension. The language in the policy complies with *N.J.A.C.* 6A:16-7.3(c).

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

213-14

J.L. on behalf of minor child J.L.-C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that his daughter, J.L.-C., was not eligible for a free public education in the Ewing Township school district during the 2012-2013 school year. Petitioner contended that J.L.-C. lived with him in Ewing, but went undetected by the school district's surveillance during the fall of 2012 and winter 2013 because she left for early track practice at 5:45 a.m., before surveillance began at 6:15 a.m. The Board alleged that J.L.-C. did not reside at the address provided by petitioner within its school district, and therefore must be residing elsewhere. Further, the Board argued that tuition reimbursement is required for the period of J.L.-C.'s ineligible attendance.

The ALJ found, *inter alia,* that: petitioner admitted that J.L.-C. lived with her grandmother in Trenton from September to December 2012, but thereafter her residency is not clear; the evidence presented regarding the domicile of the petitioner is unclear as he presented letters and leases bearing different Ewing addresses which he purported to live at with his daughter; the Board's surveillance failed to show the child coming from any of the observed addresses to go to school; and petitioner's driver's license bears a Trenton address. Although she found that J.L.-C. may have resided in Ewing during the period in question, the ALJ concluded that the petitioner failed to carry his burden to prove that his daughter is entitled to a free public education in Ewing schools. Accordingly, the ALJ affirmed the Board's determination that J.L.-C. is not domiciled in Ewing Township and ordered that respondent is entitled to reimbursement from the petitioner for tuition for her period of ineligible attendance.

Upon review, the Commissioner concurred with the ALJ's conclusion that the petitioner has failed to sustain his burden of proving that J.L.-C. was entitled to a free public education in Ewing schools. Accordingly, the petition was dismissed and petitioner was ordered to reimburse the school district tuition for the period of J.L.-C.'s ineligible attendance in the amount of $13,013.36, representing 188 days at a daily tuition rate of $69.22.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 5/19/14

OAL DKT. NO. EDU 8903-13
AGENCY DKT. NO. 68-3/13

J.L. on behalf of minor child J.L.-C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

The instant controversy concerns the eligibility of J.L.-C. to receive a free public education in respondent's school district. Upon consideration of the record and Initial Decision of the Office of Administrative Law (OAL), the Commissioner concurs with the finding of the Administrative Law Judge (ALJ) that petitioner failed to show that his daughter, J.L.-C., is so entitled.

First, in most cases, a student is not entitled to a free education in a public school district unless he or she is domiciled in that district. *N.J.S.A.* 18A:38-1(a). As the ALJ noted, the domicile of a minor child is defined by the domicile of his or her parents or legal custodians. *N.J.A.C.* 6A:22-3.1(a)(1). Although J.L. is J.L.-C.'s father, he testified that it is J.L.-C.'s maternal grandmother, L.C., who has legal custody of her. Thus, J.L.-C. is domiciled with L.C. in Trenton, where L.C. resides, and is entitled to a free public education in Trenton – not Ewing.

Second, various documents entered into evidence at or after the December 5, 2013 hearing in this matter contain conflicting representations about where petitioner lived during 2011, 2012 and 2013. Petitioner's driver's license shows the Trenton address of L.C. An

affidavit which petitioner provided to respondent when he applied – on August 23, 2012 – to enroll J.L.-C. in respondent's school district indicated that petitioner and his daughter were living with a family member on R. Avenue in Ewing at that time. (Respondent's Exhibit R-6) However, both the copy of a lease for 120 West F. Avenue, Ewing, and a copy of a renewal notice for that address appear to indicate that respondent lived at 120 West F. Avenue from February 2011 through at least February 2013. (Petitioner's Exhibits P-1 and P-2) This raises a question about whether petitioner resided on R. Avenue, F. Avenue or elsewhere in August 2013 when he enrolled J.L.-C. in respondent's school district.[1]

Finally, the copy of the lease for 120 West F. Avenue – which petitioner submitted to the OAL after the hearing (Petitioner's Exhibit P-1) – conflicted with a copy he had previously given respondent (Respondent's Exhibit R-4), in that the former indicated that he and his daughter had begun residency at West F. Avenue in February 2011, and the latter indicated that he was the only resident of the apartment. In the Commissioner's view, the fact that the two lease copies purportedly covered the same time period but contained two different representations about the number of persons residing in the subject apartment, suggests that one or both documents may be tainted.

As the ALJ explained, the individual challenging a district's determination about the domicile of a student has the burden to show, by a preponderance of the evidence, that the

[1] Further, in a letter from petitioner to the school district, dated January 8, 2013, petitioner asserted that his daughter would soon be moving from 119 R. Avenue, Ewing, to West F. Avenue, Ewing. (Respondent's Exhibit R-5) That letter does not explain why Petitioner's Exhibit P-1 shows petitioner and his daughter already living at 120 West F. Avenue in Ewing at a time when he certified, in an affidavit/application to respondent for the enrollment of his daughter, that he and his daughter resided at R. Avenue, Ewing.

district's determination was wrong. *N.J.S.A.* 18A:38-1(b)(2). In the final analysis, petitioner was neither able to unambiguously show that J.L.-C. was domiciled with him, nor that he actually resided in respondent's district at the time he applied to enroll his daughter in respondent's schools.

Accordingly, the petition is dismissed and J.L.-C. is disenrolled from respondent's school district. Further, petitioner shall pay to respondent $13,013.36, the amount of tuition which the ALJ found is due and owing for J.L.-C.'s attendance in respondent's schools while ineligible for a free public education in respondent's district.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/19/14

Date of Mailing: 5/21/14

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8903-13
AGENCY DKT. NO. 68-3/13

J.L. ON BEHALF OF J.L.-C.,
Petitioner,
v.
TOWNSHIP OF EWING, MERCER COUNTY,
BOARD OF EDUCATION,
Respondent.

J.L., petitioner, appearing pro se

Joseph L. Roselle, Esq., for respondent (Schenck, Price, Smith and King, LLP, attorneys)

Record Closed: January 2, 2014 Decided: February 14, 2014

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioner, J.L., the father of minor child J.L.-C., appeals the determination of the Ewing Township Board of Education (district) that J.L.-C. did not reside within the district and that tuition reimbursement is required. The district alleges that the minor child J.L.-C. was not residing at the Ewing Township address provided by the petitioner

and must have been residing elsewhere. At issue is whether J.L.-C. is entitled to be enrolled in the district free of charge pursuant to N.J.S.A. 18A:38-1 for purposes of receiving a thorough and efficient public education.

PROCEDURAL HISTORY

On March 1, 2013, the district notified J.L., the father of J.L.-C., that the child was dis-enrolled from the Ewing Township School District. The petitioner filed a timely notice of appeal on or about March 19, 2013. The district filed an answer on April 15, 2013.[1] On June 27, 2013, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on December 5, 2013, and the record remained open for the receipt of briefs until January 2, 2014.[2]

FACTUAL DISCUSSION

Peter Manetto is a residency investigator for the district. He receives cases and conducts surveillances to prove or disprove allegations of non-residency. He is familiar with investigations, as he is a retired lieutenant from the Trenton Police Department with twenty-five years of investigation experience.

Manetto was assigned to conduct an investigation into J.L.-C.'s residency. His surveillances (on various weekdays) covered the period from November 21, 2012, to December 13, 2012. He performed twelve surveillances, two at 119 R. Avenue, Ewing, and ten at 219 M. Avenue, Trenton, New Jersey. J.L.-C. was observed exiting 219 M. Avenue and being transported to school on the days in question in a vehicle registered to L.C.[3] of 219 M. Avenue, Trenton. Manetto concluded that J.L.-C. resided in Trenton, and was not a resident of Ewing. He closed his investigation.

[1] Although the answer did not include a counterclaim for tuition reimbursement, it is clear that the answer contemplated such relief.
[2] A letter brief was filed by the district; no brief was received from the petitioner.
[3] L.C. was later identified as the child's maternal grandmother.

The investigation was reopened in September 2013, and Manetto conducted surveillances from September 12, through December 4, 2013. He performed nineteen surveillances, fifteen at 120 West F. Avenue, apartment A-6, Ewing[4]; two at 119 R. Avenue, Ewing; and two at 219 M. Avenue, Trenton. All investigations were negative, and the child was not located at any of these addresses. However, a check with the school authorities showed that the child was in class on each of the surveillance days.[5]

David Mikalauskas is the attendance and residency officer at Ewing Township schools. His job is to make sure students attend school and reside within the district. His office employs three retired police officers to physically surveille the residences of students who claim to reside within the district. Mikalauskas knew J.L.-C. had come to the district from the Village Charter School in Trenton, which had closed, so he initiated investigations on her and nine other former charter-school students who purportedly now resided in the district.

Mikalauskas spoke with Manetta, who originally reported that J.L.-C. was not exiting from a Ewing Township address when she left for school, but was coming from Trenton. The matter was presented to the Board, which passed a resolution on February 26, 2013, to dis-enroll J.L.-C. for non-residency, and to assess tuition in the amount of $4,499.30 from November 21, 2012, through February 26, 2013.[6] Since the initial date of surveillance to the date of hearing on December 5, 2013, there were 188 days of possible school attendance, for total tuition due of $13,013.22.

J.L. is the father of J.L.-C., age sixteen. He graduated from Ewing Township High School and loved it there. He wants his daughter to have the same experience of education, sports and friends, and for her to be safe and get a good education.

After J.L.-C. was born, she lived in Trenton with her mother, S.C., and her grandmother, L.C. The mother moved out when J.L.-C. was small, and then J.L.-C. stayed at R. Avenue with her grandmother, who has legal custody. The mother and

[4] 120 West F. Street, Ewing, is an apartment complex.
[5] The surveillances generally ran from 6:15–6:30 a.m. to 7:45–8:00 a.m. School started at 7:45 a.m.
[6] Tuition was calculated based on a cost of $12,641 per year to educate a child; the per diem cost was $69.22 per day, and was assessed back to the date of initial surveillance.

grandmother were not on good terms. There is no present court order between L.C. and J.L. for custody of J.L.-C.

J.L. lived in California for a few years and then returned to New Jersey. He has worked for Educational Testing Service for thirteen years as a program coordinator. He moved to the West F. Avenue address in Ewing, and is dating a friend who lives across the way in the apartment complex. J.L.-C. walks home from school, and goes early to track practice. She frequently stays with his friend at 122–123 West F. Avenue because she is a member of the spring track team and needs to leave early for school.

J.L. advised the district by letter dated January 8, 2013, that J.L.-C. had recently resided at 119 R. Avenue, Ewing Township, and that her address would be changing to 120 West F. Avenue, apartment A-6, Ewing Township, as he had recently moved to that address. Although the letter is dated January 8, 2013, J.L. could not provide an explanation for the date, as he said he had moved to the West F. Avenue address in 2011.

After the February 2013 hearing before the Board of Education, J.L. provided a copy of his lease for 2011–2012 showing that he and one child resided at 120 West F. Avenue, Ewing. However, the Board was in possession of a lease purportedly made on January 24, 2011 (for the period through February 29, 2012), which showed that the apartment was occupied by one adult and no children. (R-4.) The lease renewal dated November 29, 2012, indicated that the lease could be renewed effective March 1, 2013, through February 28, 2014. The petitioner presented a copy of the lease for the period of February 1, 2011, to February 29, 2012, showing that the apartment was occupied by one adult and one child. (P-1.) No explanation was offered for the disparity in the leases.

J.L. agreed the photographs taken in the fall of 2012 were accurate, but the nineteen surveillances in 2013 were not, as he said that J.L.-C. left the apartment very early (at approximately 5:45 a.m.) before the surveillances occurred because she was on the track team and had early practice. She would walk to the school, but sometimes she went to see her grandmother, with whom she has a good relationship, and one that

he encourages. J.L. did not deny that his driver's license retains the 219 M. Avenue, Trenton, address.

Findings

I accept the testimony of all parties as truthful. The witnesses for the district testified as to the actions of surveillance and student attendance and the calculations of tuition due and owing. They have no direct interest in the outcome of this matter, and their testimony is credible. I also accept the testimony of J.L., a father who is seeking to have his daughter educated, as he was, in Ewing Township. And indeed, the child appears to be taking advantage of that opportunity by doing well in school and participating on the track team.

There is no question that during the period of September to December 2012 J.L.-C. resided with her grandmother in Trenton. J.L. admits that. Thereafter, the place of her residency is not as clear. One lease indicates that J.L. resided at the West F. Avenue apartment by himself, and another indicates that he resided there with one child. It is also apparent that J.L. did not change the address on his driver's license from Trenton to reflect his relocation to Ewing. The affidavit executed on August 22, 2012, by the petitioner to admit the child into the district school states his address as 119 R. Avenue, Ewing Township, not West F. Avenue.

On the other hand, the surveillances in the fall of 2012 and early winter of 2013 do not show the child coming from any of the surveilled addresses to go to school. These surveillances were conducted from 6:15 a.m. at the earliest, well after the child would have gone to track practice at 5:45 a.m. At the West F. Avenue apartments, the focus was on apartment A-6, and not on any other unit. No surveillance appears to have been done after school to see where the child went for the evening.

LEGAL ANALYSIS AND CONCLUSION

Residency

The issue in this matter is whether J.L.-C. was entitled to a free education under N.J.S.A. 18A:38-1(a), which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom. Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, in order for a student to receive a free education). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374–76 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed.2d 518 (1999). A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001).

A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district. N.J.A.C. 6A:22-3.1(a)(1). The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parent/petitioner has the burden of proving domicile by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

Where a person has more than one residence, the following factors are useful in determining his domicile: the physical characteristics of each place, the time spent and the things done in each place, the other persons found there, the person's mental

attitude towards each place, and whether there is or is not an intention, when absent, to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39–40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). "[A] choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In re Unanue, 255 N.J. Super. supra, at 374.

Here, the domicile of the petitioner is not clear. His driver's license suggests he is domiciled in Trenton; his leases suggest he is domiciled in Ewing, although whether that is with his daughter or without is not clear from the evidence. And without an explanation of the difference in the two leases regarding occupancy of the apartment of the child, I cannot conclude that either lease is dispositive as to her residence. Even if I accept the petitioner's testimony that the child does not reside in Trenton, I still cannot conclude that he has met his burden to show that his daughter is domiciled in Ewing. She was present in school on nineteen occasions and yet was not seen exiting any dwelling where she allegedly resided. It may well be that she did reside in Ewing Township during the period in question, but that cannot be concluded on the evidence presented.

Tuition Reimbursement

The Board asserts that it is entitled to be reimbursed for tuition for the period of J.L.-C.'s ineligible enrollment in its schools. Where, as here, the evidence does not support the claims of the resident, the Commissioner of Education is authorized to assess tuition pursuant to N.J.A.C. 6A:22-6.2(a). Tuition shall be assessed as follows:

> If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.
>
> [N.J.S.A. 18A:38-1(b)(1).]

In this matter, the respondent testified that the school tuition rate is $12,641 per year. Dividing that by 180 days yields a daily tuition rate of $69.22 per day. Multiplying the tuition rate by 188 days of possible attendance by J.L.-C. yields a total tuition due of $13,013.22 from November 21, 2012, through December 5, 2013.[7]

Based upon the evidence and testimony presented in this matter, I **CONCLUDE** that the petitioner, J.L., failed to carry his burden of proof that his daughter, J.L.-C., is domiciled in the Township of Ewing, thereby entitling her to a free public education in the district during the relevant time periods. I further **CONCLUDE** that the respondent is entitled to reimbursement from the petitioner for the costs of audited tuition in the amount of $13,013.22, representing the amount due from the initial date of surveillance, November 21, 2012, through the date of hearing on December 5, 2013.

ORDER

It is hereby **ORDERED** that the respondent's determination that petitioner J.L. is not domiciled in Ewing Township, and that his daughter, J.L.-C., is neither resident nor domiciled in Ewing Township, New Jersey, and was not so domiciled within its school district during the period of November 21, 2012, to December 5, 2013, is hereby **AFFIRMED**. It is further **ORDERED** that respondent is entitled to reimbursement from petitioner for the cost of audited tuition in the amount of $13,201.36, representing the period from the initial date of surveillance, November 21, 2012, through the date of hearing on December 5, 2013.

It is, therefore, **ORDERED** that, without proof of current domicile and residency, J.L.-C. may be excluded from further attending the Ewing Township public schools, at the discretion of the district.

[7] Tuition reimbursement continues to run at the rate of $69.22 per day for each day of continued ineligible attendance.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/19/14
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: February 18, 2014

Date Mailed to Parties: 2/19/14

mel

WITNESSES

For petitioner:

J.L.

For respondent:

Peter Manetto

David Mikalauskas

EXHIBITS

For petitioner:

P-1 Apartment lease dated January 24, 2011

P-2 Apartment renewal letter dated November 29, 2012

For respondent:

R-1 Summary of Investigation (Surveillance Report) November 21, to December 13, 2012

R-2 Summary of Investigation (Surveillance Report) September 12 through November 27, 2013

R-3 Letter to petitioner advising of Board's decision dated March 1, 2013

R-4 Apartment lease dated January 24, 2011

R-5 Letter to district advising of address change dated January 8, 2013

R-6 Affidavit of petitioner dated August 22, 2012, advising of domicile in Ewing Township

214-14

SHALOM ACADEMY CHARTER SCHOOL,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

The petitioner, Shalom Academy Charter School (Shalom), challenged the July 2012 decision of the New Jersey Department of Education (Department) denying it an additional "planning year" in which to secure final approval to operate a Hebrew immersion charter school. Shalom contended that the Department treated it differently from other charter school applicants, and that its decision to deny the additional planning year was arbitrary and capricious.

The ALJ found, *inter alia*, that: on remand from the Appellate Division of the Superior Court, the issue for determination in this case was whether the Department unfairly treated Shalom Academy differently than other charter schools when it denied Shalom's request for a second planning year; to properly frame this issue and create a factual record, it was necessary to compare Shalom's application with those of the seven charter schools that were, in fact, granted an additional planning year in 2012; the schools that were successful in obtaining an additional year were those that recognized on their own that they were unready to receive students – and stated this – prior to a Department preparedness team's site visit, *or* were partnered with a recognized organization that had previously been successful in opening and operating a charter school, *or* were located in an underserved community; none of these factors applied to Shalom Academy, which twice participated in a Department preparedness visit without having a suitable approved facility in place; further, Shalom twice needed to be informed by the Department that it was not ready to open, thereby raising questions as to whether Shalom's founding team lacked the leadership and organizational capacity to successfully run a charter school; charters are innovative educational programs funded by public dollars, and accordingly, the statutory and regulatory scheme vests the obligation and authority in the Commissioner to carefully vet aspiring charter programs in accordance with a prescribed application process (*N.J.S.A.* 18A: 36A-4 *et seq.; N.J.A.C.* 6A:11-2.1 *et seq.*); and there is ample factual support for the Department's determination that Shalom lacked the capacity to successfully operate a charter school. The ALJ concluded that the Commissioner's decision to reject Shalom's application, together with his decision to deny additional time to demonstrate preparedness, was not arbitrary or capricious, but rather demonstrated a thoughtful and thorough judgment of the merits of Shalom's application. Accordingly, the Department's action in denying an additional planning year was affirmed, and the petition was dismissed.

Upon consideration of the record and the Initial Decision of the OAL, the Commissioner concurred with the determination of the ALJ that the petitioner failed to meet its burden to show that the Department's actions were arbitrary, capricious, unreasonable or discriminatory. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued May 19, 2014

OAL DKT. NO. EDU 2678-13
AGENCY DKT. NO. 32-2/13

SHALOM ACADEMY CHARTER SCHOOL,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

Petitioner Shalom Academy Charter School challenges the Department of Education's (the Department) denial of petitioner's request for an extra planning year, and the Department's ultimate decision not to grant petitioner a final charter. The basis for petitioner's challenge is its contention that the Department treated it differently from other charter school applicants. After consideration of the record and Initial Decision of the Office of Administrative Law,[1] the Commissioner concludes – for the reasons articulated by the Administrative Law Judge – that petitioner failed to meet its burden to show that the Department's actions were arbitrary, capricious, unreasonable or discriminatory.

Accordingly, the Initial Decision is adopted as the final decision in this case and the petition is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/19/14
Date of Mailing: 5/21/14

[1] Neither party filed exceptions to the Initial Decision.

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02678-13
AGENCY DKT. NO. 32-2/13

SHALOM ACADEMY CHARTER SCHOOL,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Kevin Mitchell, Esq., for petitioner (Mitchell and Falkenstein, attorneys) and **Joseph Kunicki**, Esq., for petitioner

Angela Velez, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of the State of New Jersey, attorney)

Record Closed: February 19, 2014 Decided: April 4, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Shalom Academy Charter School (Shalom), challenges the July 16, 2012, decision of the Department of Education (the Department) denying it an additional "planning year" in which to secure final approval to operate a Hebrew immersion school.

Shalom contends that the Department arbitrarily treated it differently from other charter school applicants.

PROCEDURAL HISTORY

Via letter dated July 16, 2012, the Department informed Shalom that it "will not receive another planning year, nor will the school be granted a final charter." (R-44.) On or about August 28, 2012, Shalom appealed the Department's decision to the Appellate Division of the Superior Court. Via order dated February 1, 2013, the Appellate Division remanded the matter to the Department with the directive that it forthwith be referred to the Office of Administrative Law (OAL) for "the development of a record regarding, and a disposition of, appellant's claim of disparate treatment." Shalom's appeal was transmitted to the OAL on February 25, 2013.

Hearings were conducted on October 7, 8, and 9, 2013. At the commencement of the hearing, counsel and I agreed that the evidence would be more efficiently presented by allowing the State to put its case on first; thus permitting me to fully understand the rationale for the planning year denial, and allowing Shalom to more efficiently rebut any evidence so presented. Shalom retained the ultimate burden of proof. It appearing that both parties had intended to call several of the same witnesses, I made it clear that Shalom would not be limited in its questioning of Department witnesses by the scope of the direct examination.

Post-hearing briefs were filed by Shalom on November 12, 2013, and by the Department on December 12, 2013. I afforded Shalom the opportunity to file a reply to the Department's submission and held the record open until February 18, 2014. Upon receiving no further submissions, I closed the record on February 19, 2014.

ISSUE PRESENTED

The remand of this matter to the Commissioner presents the following issue for determination:

Did the Department unfairly or improperly treat Shalom differently than other charter schools when it denied its request for a second planning year?

Counsel and I discussed the scope of the hearing during the course of several prehearing telephonic and in-person conferences. Since the Department reviews a large number of charter school applications annually, it became apparent that it was necessary to further define the "other charter schools" referenced in the "issue presented." Accordingly, we identified the schools that were granted additional planning years during the same approximate time frame. In 2012, seven schools were granted a second or third planning year. An Amended Prehearing Order was entered on July 25, 2013, at which time I directed that the proofs at hearing be limited to a comparison of Shalom's application and the applications filed by following schools:

- Atlantic City Community Charter School
- Camden Community Charter School
- Excellence Charter School
- New Jersey Virtual Charter School
- Arête Charter School
- Forest Hill Charter School
- New Jersey Virtual Academy Charter School

A consideration of why Shalom was denied an additional planning year, while these schools were not, would create the factual record needed to adjudicate Shalom's claims in accordance with the directive of the Appellate Division.

FINDINGS OF FACT

How Charter Schools Are Approved

The charter school approval process was reviewed at hearing, and I **FIND**:

Charters schools are public schools funded by taxpayer dollars. They may not discriminate in terms of enrollment, and are intended to fill a demonstrated need for innovative and expanded educational opportunities. Amy Ruck is the Director of the Office of Charter Schools. Ruck came to her current position with prior teaching and charter school development experience.

Ruck supervises a staff of ten employees, whose task it is to ensure that charter school programs are aligned with the mission of the New Jersey Charter School Law. Consistent with that goal, Ruck is responsible for building an accountability system for charter schools; for the logistics of the charter school life cycle including new school development; and for making and implementing charter school policies. The Department approves charter applications based on Ruck's recommendation; and with input from the County Office of the Department of Education and the local school district where the charter will be located. Upon approval, the trustees of the school receive a charter for four years, which is then renewable for additional five-year terms. Renewal applications are carefully reviewed to include document inspections, site visits, and interviews with stakeholders. On occasion, charters are revoked outside the renewal cycle due to fiscal malfeasance or poor student-academic performance. Last year ten schools failed and were closed.

The Charter School Law was enacted to increase educational options for underserved populations; accordingly, demonstrated need is a critical factor in determining whether to approve a charter school application. Ruck explained that under the Federal Elementary and Secondary Education Act (ESEA), states could obtain waivers of No Child Left Behind (NCLB) requirements. New Jersey has obtained such a waiver; to do so, the Department was required to advise the federal government how it

intended to assist failing schools. In response, a system was created that categorized schools as high performing (Reward Schools), lowest performing (Priority Schools), and schools that rated as low performing based on subgroup performance (Focus Schools). The creation of additional educational options is a Departmental priority in districts with Priority Schools.

Charter schools are by design models of innovation, hence the perception is that "the rules don't apply." Just the opposite is the case. Indeed, Ruck detailed the rigorous process in place when Shalom made its application in October 2010.[1] A comprehensive application was required, including information about the educational mission of the school; its governance structure; grade and age range; admissions policy and criteria for evaluating the admission of students; a description of the facility to be used; a discussion of community involvement in the school's development; and a discussion of the school's financial plan. An application filed in October 2010 would typically seek approval for a September 2011 opening.

The application was reviewed for completeness, and on occasion requests for additional information, or "addenda" were made by Ruck's review team. Some applications were denied; other applicants were invited for an interview.[2] The interview was a critical juncture in the road to final approval. Ruck noted that it is often easy to put a proposed plan down on paper, and that in fact, entities exist that assist charter school applicants in doing so. But the real test is whether the applicant has the leadership and organizational capacity to bring its proposal to life. The interview was designed to answer the fundamental question—"Can they run a school?" A recommendation would then be brought by Ruck's office to the Commissioner of Education (the Commissioner), who in turn would review public comments, assess educational need, and study impact information. At this point, a decision as to preliminary approval would be made by the Department. Ruck emphasized that preliminary approval did not necessarily equate with final charter approval.

[1] The charter school approval process was amended effective January 2013.

[2] Importantly, an applicant who is denied a charter may always reapply.

The preparedness process was the next step on the road to final approval. Both Ruck and Colleen Eskow, a member of her team, urged that it was a supportive process. In addition to ongoing assistance with inquiries via telephone and email, the Department hosted a five-day "Boot Camp" each spring. Each day was devoted to another aspect of charter school preparedness; including the fiscal, operational, and regulatory requirements that guide the day-to-day activities of a successful charter school. The preparedness process culminated with a "preparedness visit" in or about June of the year that the school intended to open its doors.

At the preparedness visit, a review team assessed all aspects of readiness for a September opening. The school facility was inspected for suitability for educational purposes. Although strict code requirements were not enforced, the charter school would be required to present a certificate of occupancy for educational "E" use (CO-E), a sanitary inspection report, and fire inspection report. The County Department of Education signed off that a facility was ready for teaching and learning. The review team made sure that all other regulatory requirements were in order and that the leadership team at the school had the organizational capacity to operate a successful school. A recommendation that the charter was ready to open was then made to the Commissioner, who would give his or her final approval by July 15.

Where a school did not demonstrate readiness, the Commissioner would either deny the application or give the founding team more time; this is the "planning year" that is the subject of this dispute. The Department might be inclined to grant a planning year when a school needed additional time to secure a leader, a facility, or additional funding. It was a fact-sensitive determination that required Ruck and her team to assess what was holding the school back from opening, and whether in a year's time it was realistic that the school would be ready to receive students. During the planning year, school personnel again were expected to attend Boot Camp and their readiness to begin instruction was again assessed at a preparedness visit.

Shalom's Application

Shalom is a Hebrew language immersion school, intended to serve the communities of Englewood and Teaneck. It proposed to open with grades K-5, and eventually expand to grades K-8. Preliminary approval of Shalom's October 2010 application came via letter dated January 18, 2011. The Department confirmed that final approval was "contingent upon receipt of outstanding documentation . . . successful participation in the preparedness process . . . and compliance with applicable state and federal regulations." (R-41.)

Raphael Bachrach, lead founding team member for Shalom, testified that he attended boot camp in 2011 and participated in a preparedness visit on June 22, 2011. Eskow was a member of the preparedness team. She recalled serious concerns about the facility that Shalom intended to utilize for instruction. Housed in a church, it was clearly unready for students. Security was a concern, as was sanitation; Eskow described the intended space as "smelly and musty." Her team was shown one large room, and was not confident that the space could be partitioned and rendered conducive for learning in time for a September opening. Bachrach testified that he was urged to seek a planning year; the record is clear that absent one, his application would have been denied. Accordingly, via letter dated July 15, 2011, the Commissioner granted Shalom a planning year, noting its inability to secure a viable facility. The letter provided that "[e]vidence of complete satisfaction of preparedness must be demonstrated by June 30, 2012 for the school's anticipated opening in September 2012." (R-43.) The Commissioner stressed that it was imperative that Shalom keep the Department informed regarding its progress toward operational readiness.

Ruck participated in a second preparedness visit in 2012. She and her team were forced to conclude that Shalom still was not prepared to open its doors for teaching and learning. The school had now moved to a new facility, but this new space was undergoing construction, and fire and sanitary approvals were not in place. Nor had Shalom obtained a certificate of occupancy for educational use. Shalom was to be housed in a building that included commercial businesses, and the preparedness team expressed concerns about the safety of children who would be entering the facility with

patrons and employees of these businesses. The landlord gave verbal assurances that needed facility renovations would be finalized by September, but this did not suffice to make Ruck and her team comfortable. Indeed, the preparedness visit comes after the regulatory deadline for submission of all approvals and other materials, and the team expects to see a school that is ready to open in September.

Accordingly, the decision was made to deny Shalom's request for an additional planning year. Moreover, although the founding team seemed passionate and committed to its charge, Ruck questioned its ability to effectively operate a charter school. She noted that twice Shalom had participated in a preparedness visit, and twice needed to be told the obvious by her staff; that is, that it was wholly unready to open its doors. The individual slated to serve as principal lacked charter-specific experience; her educational background was in special education. Notwithstanding this special education background, questions about how special education needs would be met in the language immersion environment were inadequately answered.

Bachrach was an earnest and sincere witness who presented as dedicated to Shalom's success. He described extensive community-outreach efforts which yielded evidence of community support for the school and its mission. Bachrach indicated that he communicated regularly with the Department, and worked tirelessly. He expressed offense at the Department's reservations about his leadership capacity, expressing the belief that he led well, and pointing to successes along the way, such as obtaining grant moneys from a variety of sources. Bachrach urged that he was in communication with other groups that had successfully started Hebrew immersion schools, seeking advice from these groups and using their schools as models for Shalom.[3] Shalom's proposed Head of School had extensive prior experience with the immersion school model.

But Bachrach's testimony also bolstered the credibility of Ruck's expressed reservations. I asked him whether his proposed lead person or principal had any working of knowledge of Hebrew, and he replied that the proposed lead person had

[3] Importantly, Bachrach conceded that Shalom was not in any sort of formal partnership with these other Hebrew immersion schools.

none, whereas the proposed principal had a minimal command of the language. I expressed surprise and questioned how they could then supervise the work of the teachers; Bachrach earnestly replied that it was his understanding that knowledge of the substantive material being taught is unnecessary to supervise instruction.[4] Although he urged that he communicated with the Department during the course of the approval process, Bachrach at no time informed the Department that Shalom itself recognized that it was unready to receive students.

I **FIND** that the Department, through Ruck's office, was unable to grant an additional planning year to Shalom because it twice participated in a preparedness visit without having a suitable approved facility in place; needed twice to be informed by Department personnel that it was not ready to open; and that accordingly, the Department was concerned that the founding team lacked the leadership and organizational capacity to successfully run a charter school.

The Charters That Were Granted Additional Planning Years

Several other schools were granted a second or third planning year during the same time period. Ruck reviewed her decision-making process and compared and contrasted these schools with Shalom. A theme that ran through Ruck's testimony was that she was favorably impressed when a school recognized it was unready to receive students, and said so prior to a preparedness team's site visit; when a school partnered with a recognized organization that had previously successfully opened a charter school; and when a school was located in an underserved community. It is noteworthy that none of these factors were applicable to Shalom.

Arête Academy Charter School

Arête Academy Charter School (Arête) intended to deliver instruction in single-gender classrooms within the larger school environment; and to serve students in the

[4] While a supervisor with no knowledge of the material taught perhaps can assess pedagogical technique, he or she clearly cannot determine if accurate content is being delivered to students. This is clearly a concern when the subject matter taught is a foreign language, and other academic instruction is also being delivered in that language.

Essex County communities of Orange and East Orange.[5] Arête would initially serve grades kindergarten and first grade, and grow to grade four by the school's fourth year. The lead founder of the school was Reverend Reginald Jackson, who is associated with the Black Ministers Council of New Jersey. On January 18, 2011, Arête received preliminary approval to move forward to the preparedness process, with an intended fall 2011 opening.

But the school did not open as planned. On April 1, 2011, Reverend Jackson wrote to the Department and advised that his board of trustees had decided to seek a planning year. He cited a number of concerns that prompted his planning group to feel that it was unready for a September 2011 school opening; to include, the need to find a school leader and involve that leader in key planning activities; together with the need to finalize negotiations for a school facility rental. Jackson wrote that "[i]t is imperative that the Arête Academy Charter School be fully prepared to open with an excellent school leader, excellent teaching staff and be able to provide an excellent education for students and their families." (R-4.) On April 15, 2011, the Commissioner granted the requested planning year, extending the planned opening of the school until September 2012.

But on June 12, 2012, Arête wrote to the Commissioner and requested a second planning year. Jackson noted that although the Charter School trustees had worked "tirelessly" to find a facility that was appropriate, its work in that regard was not yet completed. In addition, Arête reported that its 501(C)(3) status was not complete, due to Internal Revenue Service backlogs. Via letter dated June 19, 2012, the Department granted Arête's request to defer its opening for one additional year, until September 2013.

Ruck explained why the Department was inclined to grant Arête's request for a second planning year. She and her staff had no concerns about the school's organizational capacity because Jackson had approached the Department with concerns about readiness before the site visit by the Department. Accordingly, there

[5] The transcripts incorrectly refer to this school as "Arita."

was no doubt that Arête's personnel understood what was needed to operate an appropriate and well-functioning school. Ruck compared Arête's request for additional time to that made by Shalom, testifying as follows:

> I -- I would say that the main issue stemmed to the timing of the requests and the ability of the groups to say "We need additional time, and we recognize this" up front, rather than "We're going through this, and we hope we are ready" . . . organizationally Arête was able to recognize that and request those pieces ahead of time.

Atlantic City Community Charter

Atlantic City Community Charter's (Atlantic City) application was approved preliminarily on January 18, 2011. Intended to serve students in a depressed community, its founding group was partnered with Charter School Management, Inc. (CSMI), a charter management organization that had successfully opened a charter school in Chester, Pennsylvania, and had consulted with several other charter start-ups. Ruck described Atlantic City as a traditional school, with a "rigorous, no excuses model" of instruction at the elementary level.

Atlantic City should have opened its doors for instruction in September 2011. But by letter dated April 1, 2011, the founding group asked to defer opening until September 2012. Its letter cited delays in construction of its proposed school facility. The Commissioner granted this request. But via letter dated February 29, 2012, Atlantic City asked for yet another planning year, and to defer its opening until 2013, again citing construction delays. An additional year was granted by the Department.

Ruck was emphatic that she harbored no concerns about the school's organizational capacity. The school was backed by a group that had successfully opened charter schools in the past and "had demonstrated that they [sic] had both the financial and organizational capacity to build new facilities and get the school up and running." While Atlantic City had not yet appointed a leader, the Department did meet with its founding group and received appropriate information regarding how the group intended to choose and train school leaders. Ruck stressed that Atlantic City

acknowledged its lack of readiness prior to the preparedness process, thus "showing [the Department] that the group had the awareness and the ability to still continue moving forward in their plans." The request for a second planning year was granted via letter dated April 4, 2012.

Forest Hill Charter School

Forest Hill Charter School (Forest Hill) made application to the Department in October 2010. Its educational focus was to serve children with autism. The school received preliminary approval via letter dated January 18, 2011; that approval included a planning year, and indicated that the Department anticipated that Forest Hill would open its doors for teaching and learning in September 2012. But Forest Hill did not go through the preparedness process in 2012 and was granted an additional planning year.

Ruck explained that Forest Hill was intending to enroll a highly specialized population of special needs students. Its instructional model thus raised legal questions, as charters by design must open their doors to any and all interested students. Thus, in theory, Forest Hill should have been able to accommodate regular education students who might wish to attend. The founding group was granted additional time to further research and resolve this concern.

Moreover, Ruck stressed that Forest Hill was affiliated with the North Ward Center, a Newark based organization with a history of successfully working with under-served school-aged students. This affiliation eliminated any concerns about organizational capacity. She compared Forest Hill with Shalom, noting that Shalom twice failed preparedness; conversely Forest Hill was "a school that was unique in its nature . . . trying to work with the Department in figuring out the last remaining pieces about the students and the population."

New Jersey Virtual Academy Charter School

New Jersey Virtual Academy Charter School (New Jersey Virtual Academy) applied for a charter in October 2010. New Jersey Virtual Academy was a Newark

based K-12 school that intended to provide instruction in a fully online format. Students would be required to have a learning coach; typically a parent or other family member. New Jersey Virtual Academy was granted preliminary approval via letter dated January 18, 2011. The initial approval included a planning year, and anticipated that New Jersey Virtual Academy would open its "doors" in September 2012. Ruck did not question the school's organizational capacity, noting that it was partnering with a vendor with national experience in operating virtual charter schools.

A preparedness site visit took place in 2012; a July 16, 2012, letter outlined concerns about missing documentation, to include food service, nursing and physician's contracts. But more importantly, Ruck and her team were concerned about lingering legal questions surrounding this model of instruction; to include, how to meet regulatory curriculum requirements. Ruck offered the example of physical education, and noted that her team needed to further explore how this requirement could be met by a virtual school. Additionally, Ruck questioned how free and reduced lunches would be delivered in the virtual setting.

The Department's July 16, 2012, letter afforded New Jersey Virtual Academy an additional planning year to allow the Department and the charter school to continue to work out the remaining legalities. Ruck pointed both to the uniqueness of the virtual school model and to her confidence that the program had a strong organizational capacity, as rationales behind her department's decision to grant New Jersey Virtual Academy additional planning time.

New Jersey Virtual Charter School

New Jersey Virtual Charter School (New Jersey Virtual) applied for a charter in October 2010, and sought to serve students from Camden, Perth Amboy, Neptune Township, and Paterson. New Jersey Virtual was intended to be a "credit recovery" program for "over-age under-credited" high school students seeking to obtain a high school diploma. The founding group was affiliated with the Monmouth/Ocean Educational Services Commission, an organization that provides a range of ancillary services to New Jersey school children, to include special education services and

related services. Via letter dated January 18, 2011, the Department approved New Jersey Virtual's application with a planning year, thus anticipating that it would open its "doors" in September 2012.

New Jersey Virtual's founding group requested an additional planning year prior to their 2012 preparedness visit, however. In a letter dated June 21, 2012, the school founder related that his team was experiencing difficulties in enrolling a sufficient number of students because the high-school-dropout population is a difficult group to identify.[6] Reiterating that this had been discussed at a recent meeting with Department officials, the founder requested an additional planning year. An additional planning year was approved via letter dated July 16, 2012. Indeed, Ruck confirmed that New Jersey Virtual had worked continuously with the Department to discuss and address program delivery issues.

Ruck noted that the organizational concerns that continued through the first planning year for Shalom were simply absent here. The founding group for New Jersey Virtual, together with the Monmouth/Ocean Educational Services Commission, had successful prior experience in the virtual service delivery model as well as experience in dropout credit recovery. The difficulties encountered by New Jersey Virtual were a direct and understandable outgrowth of its unique enrollment model.

Camden Community Charter

Camden Community Charter's (Camden Community) application was approved via letter dated January 18, 2011. It was anticipated that the school would open in September 2011. The school was to be located in the city of Camden, where eighty-seven percent of the schools are failing. Accordingly, twenty-three of the twenty-six traditional public schools in Camden are classified as Priority Schools. Ruck reiterated that demonstration of need is a key application focus; and one that was clearly addressed by this application.

[6] N.J.A.C. 6A:11-2.1(i)(14) required an applicant demonstrate evidence of enrollment of at least ninety percent of approved maximum enrollment.

Camden Community intended to operate a traditional "no excuses" model of instruction and was partnered with CSMI, the same organization that was working with the Atlantic City founding group. Camden Community did not complete the preparedness process in 2011. Prior to the preparedness visit its founding group requested a planning year, via letter dated April 1, 2011. Camden Community cited the ongoing construction of its school facility, and indicated that it did not anticipate that it would be ready for a September 2011 opening. The initial request for a planning year was granted by the Department, and the anticipated opening date for Camden Community was adjusted to September 2012. But via letter dated February 29, 2012, Camden requested another planning year. The Department granted this request via letter dated April 4, 2012.

Ruck explained why this additional extension was granted to Camden Community, and how unique circumstances factored into the Department's decision-making process. Camden had applied for funding under the Urban Hope Act, a 2012 quality school and urban revitalization law that was intended to allow schools in urban centers to apply for funding as "renaissance schools." There are advantages and disadvantages to establishing oneself as an Urban Hope Act school as opposed to a charter school; according to Ruck, Camden Community delayed construction of its facility to consider its options while its Urban Hope application was pending.

Excellence Charter School (also known as Mastery Charter)

In October 2009, Excellence Charter School, (Excellence) made application to the Department under the name Mastery Charter. Intended to serve students in the City of Camden, Excellence was affiliated with the Mastery Charter School Network, a Philadelphia organization that operates traditional, high expectations educational programs. Excellence's application was granted by the Department in January 2010, for an anticipated September 2010 opening.

But Excellence did not complete the preparedness process in 2010 as planned. Via letter received by the Department on March 26, 2010, Excellence requested a planning year, citing environmental contamination in the facility it had selected that

could not be timely remediated. It was in the process of attempting to secure a new facility. The request was granted via letter dated April 30, 2010, with the intent that Excellence participate in the preparedness process and open its doors in September 2011.

Excellence continued to encounter facility challenges, however, and the school was granted a second planning year in 2011, with the intent that the school open in September 2012. But Excellence again did not go through the preparedness process. Via letter dated February 1, 2012, Excellence requested a third planning year, continuing to cite challenges in securing an appropriate facility. Ruck noted that she and her office staff had been working closely with Excellence and were continually being kept up-to-date regarding its facility problems. Apparently, Excellence was in discussion with the public schools, which intended to supply a facility. But the public school district was in the process of a state takeover, which occasioned further delays. In light of these constraints, the Department granted Excellence a third planning year via letter dated February 27, 2012.

In explaining why she granted Excellence further time to plan, Ruck emphasized that her staff was unconcerned about its organizational capacity, as the school was backed by an organization with a proven track record in opening and operating charter school programs. She moreover stressed that Excellence had proactively kept the Department informed about its ongoing facility difficulties. She compared Excellence to Shalom, again stressing that Excellence had facility challenges but was cognizant of those challenges, unlike Shalom.

ANALYSIS AND CONCLUSIONS OF LAW

Shalom seeks approval to operate a Hebrew language immersion charter school in accordance with the provisions of N.J.S.A. 18A:36A-4. The Charter School Program Act of 1995, L. 1995 c. 426, authorized the establishment of charter schools in New Jersey; finding that they "'can assist in promoting comprehensive educational reform,' and that their establishment 'is in the best interests of the students of this State.'" In re Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., 216 N.J. 370, 373

(2013). These innovative educational programs are funded with public dollars, and accordingly, the statutory and regulatory scheme vests the obligation and authority in the Commissioner to carefully vet aspiring charter programs in accordance with a prescribed application process. See N.J.S.A. 18A:36A-4 et seq.; N.J.A.C. 6A:11-2.1 et seq. That process, described by Ruck in her testimony in detail, and embodied in the regulations, includes review of a comprehensive application; submission of addenda and supporting documents; an "in-depth" interview; and an on-site preparedness visit. N.J.A.C. 6A:11-2.1 et seq.[7]

Our courts have recognized that the Commissioner is "exceedingly careful in the approval of charter schools because of the impact that a wrong decision will have on students who attend a charter school that falters, or worse, fails to provide an educational program that satisfies the constitutional standard of a thorough and efficient education." Quest Acad. Charter Sch. of Montclair Founders Grp., supra, 216 N.J. at 388 (citing In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J. 316, 323 (2000)). Our Supreme Court has affirmed that "[t]here is no right to operate a charter school. There is only the opportunity to apply for approval to operate one if the application demonstrates proper merit." Quest Acad. Charter Sch. of Montclair Founders Grp., supra, 216 N.J. at 389. Accordingly, the burden is on Shalom "to show that it can meet the requirements for obtaining permission to educate public school children in a charter school setting." Id. at 390.

Consistent with the statutory view that charter schools promote educational opportunities for New Jersey children, the Commissioner wants fledgling schools to succeed. Accordingly, Ruck and her office personnel assist charter hopefuls in presenting a successful application. Shalom urges that these efforts, which include "boot camp," ongoing technical support, and the planning year that is at the center of the present controversy, are inappropriate because they are not expressly embodied in regulatory language. Indeed, it is well-established that when an agency requirement constitutes a rule, it must comply with the rulemaking procedures contained in the Administrative Procedure Act. N.J.S.A. 52:14B-2(e); Metromedia v. Div. of Taxation, 97

[7] N.J.A.C. 6A:11-2.1 was rewritten effective January 7, 2013. R. 2013 d. 005. 45 N.J.R. 26(a). But Shalom's application predates these amendments.

N.J. 313, 331 (1984). Thus, Shalom urges that the granting of planning years is on its face arbitrary and unsustainable because this extra time to demonstrate preparedness lacks regulatory support.

Shalom's arguments are unavailing. Along with the discretion to decide whether a founding group is capable of effectively delivering instruction comes the discretion to take a flexible approach in assisting charters with the approval process; to include extending them more time to achieve readiness when it is apparent that a proposed program promotes the goals of the Charter School Act. Shalom argues that decisions about planning years are "made on an informal and improvised basis completely devoid of standards." But each step of the approval process creates multiple opportunities for the Commissioner and his staff to exercise their professional judgment. The decision to request addenda and other additional documentation; to grant an interview rather than reject an applicant; to grant one planning year, or several; and to ultimately find that a school is prepared to open its doors for teaching and learning, are all inherently subjective. Subjective decision-making is not "improvised" or "informal" when made by agency personnel statutorily invested with the authority to determine what constitutes an appropriate educational environment for the children of our state.

I **CONCLUDE** that the Commissioner's decision to reject this application, together with his decision to deny Shalom additional time to demonstrate preparedness, is readily sustainable on the record developed at hearing. There is ample factual support for the Department's determination that Shalom lacked the capacity to successfully operate a charter school. Twice, Shalom mistakenly perceived that it was ready to open its doors for teaching and learning; twice, a preparedness team found that Shalom lacked an appropriate facility in which to house its educational program. In 2011, the State preparedness team was shown a facility that "smelled" and was "musty"; in 2012 a new facility was under construction, and there were insufficient assurances that it would be ready in September. Shalom's founding team thus left Ruck unsure that it had the organizational and leadership capacity to successfully operate a charter school. Moreover, the administrators slated to assume key roles had

little or no charter experience, and likewise little or no knowledge of the foreign language in which instruction was to be delivered.[8]

Necessary documentation, such as required certificates of occupancy and fire permits were not produced. See N.J.A.C. 6A:11-2.1(i). The Department persuasively argues that these events reflected a "capacity disconnect"; even at hearing Bacharach continued to maintain that his school had been "ready to go." I agree that the apparent failure of the Shalom founding group to recognize it was unready to open its doors validates the Department's expressed concerns about its leadership capacity. By contrast, the seven charter applications reviewed in response to Shalom's claim of disparate treatment better demonstrated readiness and organizational and leadership capacity. Almost all were partnered or supported by charter school management organizations or other entities with proven records of community involvement and program success.[9] These applicants communicated their progress toward readiness and the factors that were impeding progress, and proactively sought the Department's help. Planning years were requested before a lack of readiness was revealed at a preparedness visit.

Other programs proposed unique instructional models, giving rise to legitimate and necessary timeline extensions. For example, two of these charters were virtual schools, and presented unique logistical and legal problems that necessitated additional time to achieve readiness. As a result, their applications were granted preliminarily with one planning year built in. One program was intended to serve a unique population of special needs students; this charter model likewise presented legal concerns that could not be resolved without additional time. Another aspiring school intended to serve high school drop-outs; an underserved but likewise difficult to target group of students.

Several of these proposed charters would create additional educational opportunities for students in depressed urban centers, an expressed emphasis of the

[8] It bears reemphasizing that these proposed school leaders did not have a working knowledge of Hebrew, the language in which their students would be immersed.

[9] Arête's lead founder was a member of the Black Ministers Council of New Jersey, although Ruck's testimony left it unclear whether this group sponsored or supported his efforts to establish a charter school.

charter school legislation. Since the Department did not harbor concerns about the organizational capacity of these schools, it extended the founding groups the time they needed in the hope and aspiration that, in the end, the students of Camden, Atlantic City, and Newark would benefit from broadened educational opportunities.

Shalom nonetheless asserts that it was denied Equal Protection under the law in violation of the New Jersey and Federal Constitutions. Shalom's claims do not arise from membership in a protected class; hence, to succeed in its claim of disparate treatment under a Federal Equal Protection theory, Shalom must demonstrate that the Department intentionally treated it differently than other similarly situated schools and that there was no rational basis for the difference in treatment.[10] Phillips v. County of Alleghany, 515 F.3d 224, 242 (3d Cir. 2008), citing the analysis of a "class of one" equal protection claim found in Village of Willowbrook v. Olech, 528 U.S. 562,120 S. Ct. 1073,145 L. Ed. 2d 1060 (2000). New Jersey courts apply a balancing test that considers "the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction." Brown v. Newark, 113 N.J. 565, 573-74 (1989). I **CONCLUDE** that Shalom has no "right" to operate a charter school; that the government's need to stringently regulate charter schools is legitimate and essential to the well-being of our children; and accordingly, serves an essential public purpose. Thus, on balance, the public's need to be assured that schools that are supported by taxpayer money deliver a thorough and efficient education outweighs any asserted entitlement by Shalom to additional time to demonstrate that it is ready to open its doors. See N.J. Const. Art. VIII, § 4.

Moreover, under both New Jersey and Federal Equal Protection analyses, a threshold requirement is that Shalom demonstrate that it was treated disparately relative to "similarly situated" charter school applicants. See Roman Check Cashing v New Jersey Dep't of Banking and Ins., 169 N.J. 105, 117 (2001). The Department urges that unique educational instructional models are at the heart of the Charter School Program Act; that as a result no applicants truly are "similarly situated"; and that accordingly, Shalom's disparate treatment claims are baseless. I concur.

[10] At no time did Shalom portray itself as anything other than a language immersion school. It at no time urged that it had any religious affiliation.

The comparables reviewed at hearing proved the point that charters do not lend themselves to easy comparison; indeed, these proposed programs ran the gamut from special education schools, to traditional "no excuses" programs, to virtual schools and single-sex classroom models of instruction. Shalom was the only language immersion school considered for a second planning year in 2012. Accordingly, each application reviewed at hearing was by necessity treated differently; what is essential is that they nonetheless were all treated identically because each was evaluated fairly and honestly by Department personnel. I **CONCLUDE** that the Commissioner's decision, as amplified at hearing, "demonstrates a thoughtful and thorough weighing and judgment of the merits of the [Shalom Academy] application." Proposed Quest Acad. Charter Sch. of Montclair Founders Grp., supra, 216 N.J. at 389.

ORDER

Based on the foregoing, the action of the Department of Education denying an additional planning year to Shalom Academy is **AFFIRMED** and the petition of appeal is **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 4, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: April 4, 2014

Date Mailed to Parties: April 7, 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

Raphael Bachrach

For Respondent:

Amy Ruck

Colleen Eskow

Exhibits

For Petitioner:

P-1 Answers to Interrogatories

P-2 Answers to Interrogatories

For Respondent:

R-1 Not admitted

R-2 Arête Academy Charter School Application

R-3 Arête Academy approval letter, January 18, 2011

R-4 Arête Academy request for planning year, April 1, 2011

R-5 Arête Academy planning year approval letter, April 15, 2011

R-6 Arête Academy request for planning year, June 12, 2012

R-7 Arête Academy planning year approval letter, June 19, 2012

R-8 Atlantic City Community Charter School Application

R-9 Atlantic City Community approval letter, January 18, 2011

R-10 Atlantic City Community request for planning year, April 1, 2011

R-11 Atlantic City Community request for planning year, February 29, 2012

R-12 Atlantic City Community planning year approval letter, April 4, 2012

R-13 Camden Community Charter School Application

R-14 Camden Community approval letter, January 18, 2011

R-15 Camden Community request for planning year, April 1, 2011

R-16 Camden Community request for planning year, February 29, 2012

R-17 Camden Community, planning year approval letter, April 4, 2012

R-18 Excellence Charter School application

R-19 Excellence request for planning year, March 26, 2010

R-20 Excellence planning year approval letter, April 30, 2010

R-21 Excellence request for planning year, February 1, 2012

R-22 Excellence planning year approval letter, February 27, 2012

R-23 Forest Hill Charter School application

R-24 Forest Hill approval letter, January 18, 2011

R-25 New Jersey Virtual Academy Charter School application

R-26 Not admitted

R-27 New Jersey Virtual Academy approval letter, January 18, 2011

R-28 New Jersey Virtual Academy, planning year approval letter, July 16, 2012

R-29 New Jersey Virtual Academy lease

R-30 New Jersey Virtual Academy CO

R-31 New Jersey Virtual Academy Fire Inspection Certificate

R-32 New Jersey Virtual Academy Sanitary Inspection Certificate

R-33 New Jersey Virtual Charter School application

R-34 Not admitted

R-35 New Jersey Virtual Charter School approval letter, January 18, 2011

R-36 New Jersey Virtual Charter School planning year approval letter, April 28, 2011

R-37 New Jersey Virtual Charter School request for planning year, June 21, 2012

R-38 New Jersey Virtual Charter School, planning year approval letter, July 16, 2012

R-39 Shalom Academy Charter School application

R-40 Not admitted

R-41 Shalom approval letter, January 18, 2011

R-42 Shalom request for planning year, June 29, 2011

R-43 Shalom planning year approval letter, July 15, 2011

R-44 Shalom final denial letter, July 1, 2012

R-45 Not admitted

R-46 Not admitted

R-47 Excellence Charter School approval letter, January 11, 2010

218-14

OAL DKT. NO. EDU 14450-13
AGENCY DKT. NO. 235-9/13

C.C. on behalf of minor child, H.J.Z.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms, with the following observation. Term #3 of the settlement agreement refers to an action which may have already taken place, thus preceding consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

Accordingly, the Commissioner adopts the Initial Decision as the final decision in this case, providing that the parties have either successfully implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/23/14

Date of Mailing: 5/23/14

OAL DKT. NO. EDU 14450-13
AGENCY DKT. NO. 235-9/13

C.C. on behalf of minor child, H.J.Z.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

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IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/23/14

Date of Mailing: 5/23/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 14450-13

AGENCY DKT. NO. 236-9/13

C.C., ON BEHALF OF MINOR CHILD, H.J.Z.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,

Respondent.

C.C., petitioner pro se

Christopher B. Parton, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: April 1, 2014 Decided: April 2, 2014

BEFORE **JOHN F. RUSSO, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 9, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

3. Deborah L. Lodsto, Business Manager of Friendship Train Foundation, a non-profit agency, appeared as a guarantor of payment of the funds due, and agreed in the settlement to make the payment on behalf of C.C.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

April 2, 2014
DATE

JOHN F. RUSSO, JR., ALJ

Date Received at Agency:

Date Mailed to Parties:
4/7/14
/bdt

CC. o/b/o HZJ

v.

Bd. of Ed. of the
Township of Ocean,
Monmouth County

New Jersey Office of Administrative Law
EDU-14450-2013 S

The parties to this matter agree to resolve all issues between them in accordance with the following terms:

1. Respondent acknowledges that Claudia Campodonico is the legal guardian of HJZ, and has been since October 28, 2013, and that as long as said guardianship continues, HJZ is legally entitled to a free, public education in the Ocean Township School District.

2. Petitioner acknowledges that from September 13 through October 28, 2013, HJZ did not have a clear legal entitlement to a free, public education in Ocean, although guardianship proceedings were commenced on or around October 1, 2013.

3. In full and final resolution of this matter, Petitioner shall pay Respondent the sum of one thousand dollars ($1,000.00). This sum shall be paid on Petitioners behalf by FriendshipTrustFoundation, to Christopher B. Purton Attorney Trust Account, and shall be paid no later than Friday, April 4, 2014.

(2)

4. The parties mutually waive and release all other claims, and Petitioner hereby withdraws the Petition of Appeal. The parties reserve all legal rights in the event that circumstances change in the future.

5. This agreement is subject to approval by Comm. of Education, State

Agreed to by the parties on this 1st day of April, 2014

Petitioner

Claudia Campodonico

Claudia Campodonico

Respondent

by Christopher B. Pinton, Esq.

Friendship Train Foundation
Business Mgr.

by Deborah L. Lodato

219-14L

219-14

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Acting Commissioner

May 27, 2014

K[redacted] B[redacted]
[redacted]
Trenton, New Jersey 08629

K[redacted] B[redacted]
[redacted]
Hamilton, New Jersey 08609

B[redacted] B[redacted]
[redacted]
Hamilton, New Jersey 08609

Sanmathi Dev, Esq.
Capehart & Scatchard, P.A.
8000 Midlantic Drive, Suite 300S
P.O. Box 5016
Mount Laurel, New Jersey 08054-5016

Re: *Board of Education of the Township of Hamilton, Mercer County v. K.B. and B.B., on behalf of minor child, J.H., Agency Dkt. No. 285-11/13.*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with the above captioned matter and based upon the respondents' failure to submit an Answer to the petition that complies with *N.J.A.C.* 6A:3-1.5, I have determined to grant summary decision against K.B. in favor of the petitioner. [1]

On November 19, 2013, petitioner filed a Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 *et seq.* claiming that minor child J.H. was not entitled to attend school in the District between September 5, 2012 and May 31, 2013, in accordance with *N.J.S.A.* 18A:38-1 *et*

[1] Although the Petition of Appeal names B.B., the grandmother of J.H., as a respondent in this matter, the petition does not include any specific allegations against B.B. It should also be noted that all correspondence from the petitioner regarding J.H.'s ineligible attendance in the District, including the Final Notice of Ineligibility that states that tuition will be assessed, are all addressed only to K.B. and not B.B. Therefore in the absence of any allegations against B.B. to be deemed admitted, the Commissioner cannot enter an order for tuition against B.B.

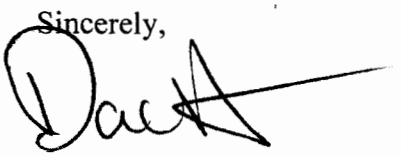
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seq. A copy of the Petition of Appeal was served upon both K.B. and B.B. on November 4, 2013, together with an acknowledgment of filing and notice that an Answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because K.B. and B.B. failed to respond to the initial notice, on December 12, 2013 a second notice was sent to the respondents, via certified and regular mail, clearly indicating that – absent receipt of an Answer to the Petition of Appeal within 10 days – each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). K.B. and B.B. also failed to respond to the second notice. On January 13, 2014, a final notice was sent to K.B. and B.B., via certified and regular mail, again clearly indicating that – absent receipt of an Answer to the Petition of Appeal within 10 days – each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis. The certified mail return receipt cards indicate that the January 13, 2013 notice was delivered on January 15, 2013.

To date, no Answer has been filed on behalf of K.B. or B.B. Accordingly, petitioner's claim that J.H. was not entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted. It is hereby ordered that K.B. reimburse the petitioner $11,254.80 in tuition costs for J.H.'s ineligible attendance in the District from September 5, 2012 to May 31, 2013.[2]

Sincerely,



David C. Hespe
Acting Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

VIA REGULAR MAIL

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

224-14

CHRISTINE LOPAC,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the respondent Board's decision to terminate her in May 2010 on the grounds that she was not certified to teach the high school courses which she had been assigned. Petitioner asserted, *inter alia*, that she was properly certified; that even if not properly certified by way of her general business studies endorsement she had nevertheless acquired tenure under her elementary education endorsement; and that she was terminated in violation of her tenure rights. During the time that she was employed by the District, petitioner taught for a year and two months in respondent's elementary schools and eight years in the high school. The Board contends that petitioner never earned tenure in its district because she does not hold the technology education endorsement required for the courses she was teaching at the high school, and never served the amount of time required to attain tenure under her elementary education endorsement.

The ALJ found, *inter alia*, that: the issue for determination herein was whether petitioner's general business studies endorsement authorized her to teach any of the high school courses to which she was assigned such that she acquired tenure; petitioner's general business endorsement would have authorized her to teach any "educational technology" course, but not any "technology education" course; the courses petitioner taught that are at issue here are Imaging Technology and Computer Aided Design (CAD), both of which currently require a technology education endorsement; petitioner lacked the appropriate endorsement for authorization to teach these courses; petitioner only taught under her elementary education endorsement during the 2002-2003 school year, and therefore did not serve enough time under that endorsement to acquire tenure; and petitioner had the responsibility to ensure that she held the appropriate instructional certificate for the position(s) she held. Accordingly, the ALJ concluded that the Board did not violate petitioner's tenure rights as she had not acquired tenure under either of her endorsements at the time her contract was non-renewed.

Upon a comprehensive review, the Commissioner concluded that the high school courses petitioner had been assigned to teach during seven of her eight years of her service in respondent's district required a technology education endorsement, which she did not possess, and petitioner had consequently not earned tenure in the district when her contract was non-renewed. The Commissioner also noted that by 2006, petitioner was aware that her credentials may not be adequate for the courses she was teaching, and in 2007 she was advised by the Department of Education that she could not qualify for the technology education endorsement without taking additional coursework. Notwithstanding that it was her responsibility to ensure that she earned the appropriate endorsement(s) for her teaching assignments, petitioner chose not to finish the coursework for the technology education endorsement. In light of the foregoing, the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

May 27, 2014

OAL DKT. NO. EDU 6149-10
AGENCY DKT. NO. 104-5/10

CHRISTINE LOPAC,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is petitioner's claim that respondent's failure to renew her employment was a violation of the laws concerning tenure. Upon review of the record, the Initial Decision of the Office of Administrative Law (OAL), and the parties' exceptions, the Commissioner is not persuaded that petitioner had earned tenure in respondent's district, and cannot, therefore, conclude that a tenure violation occurred when her contract was not renewed.

A teaching staff member is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time. *Spiewak v. Summit Bd. of Educ.*, 90 *N.J.* 63, 74 (1982); *N.J.S.A.* 18A:28-4; *N.J.S.A.* 18A:28-5; *N.J.S.A.* 18A:28-6. Time towards tenure does not accrue unless a teaching staff member secures the standard, provisional or emergency certificate specifically required for the job being performed. *Spiewack, supra,* 90 *N.J.* at 74; *N.J.S.A.* 8A:28-4; *N.J.S.A.* 18A:28-5; *N.J.S.A.* 18A:28-14; *N.J.S.A.* 18A:26-2.

It is undisputed that – at the time that her contract was non-renewed – petitioner had worked in respondent's district for over eight years, in positions for which teaching

certificates are required. The controversy lies in the other requirement of tenure, *i.e.*, that she possess the correct certification for the positions to which she was assigned.

The record indicates that from April 2002 until June 2003, petitioner taught Microsoft Office and general computer skills in grades five through eight under an instructional certificate with an elementary education endorsement. Respondent does not contend that petitioner was ineligible to teach the computer classes in elementary school. However, since the balance of petitioner's employment in respondent's district was at the high school, her service in the elementary school did not continue long enough for her to achieve tenure in an elementary education position.

Further, during the 2003-2004 school year, petitioner taught in the high school, notwithstanding that she possessed – at that time – only an elementary endorsement to her instructional certificate. Thus, neither of the expert witnesses engaged by the parties in this matter contends that her service in 2003-2004 can count toward tenure. The inquiry, therefore, shifts to petitioner's service at the high school after she had earned her general business studies endorsement in August 2004. That high school service covered seven school years, *i.e.*, 2004-2005 through 2009-2010.

It is undisputed that with an endorsement in general business studies,[1] petitioner was qualified to teach educational technology, which is defined in *N.J.A.C.* 6A:9-2.1 as "the implementation of technology as an integral part of the instructional process across all curriculum areas that supports a learner centered environment." This is so because *N.J.A.C.* 6A:9-9.2(a)(8)(i) instructs that:

---

[1] The "General Business Studies" endorsement has been replaced by a range of endorsements identified in *N.J.A.C.* 6A:9-9.2(a)(9)(i). Respondent maintains that the subjects taught under the General Business Studies endorsement were advertising, banking and finance technology, banking and insurance principles, business law, business, mathematics, business organization, clerical office practices, economics/economic geography, finance and investment principles, marketing education, marketing/sales, and transportation/travel marketing.

> [t]here is no separate endorsement for educational technology and tools or for computer and information literacy except where career and technical endorsements occur for the related career clusters and career education and for consumer, family and life skills (see *N.J.A.C.* 6A:9-5.19) The CCCS require that teachers integrate the use of computer and information technology into their instruction.

Thus, petitioner was free to teach educational technology so long as she met the following criteria:

> 1. Demonstrates proficiency in the uses of educational technologies, computers, and other digital tools, and understands their common applications in an educational setting;
>
> 2. Demonstrates knowledge and understanding of the integration of such technologies and digital tools into the curriculum;
>
> 3. Demonstrates understanding of the legal and ethical issues surrounding the use of educational technologies and digital tools in PK-12 schools; and
>
> 4. Holds a CE, CEAS or standard certificate in an instructional field.[2]
>
> [*N.J.A.C.* 6A:9-5.20(c).]

However, respondent maintains that petitioner's assignments at the high school consisted of courses which required a "technology education" endorsement, which petitioner does not claim to possess.[3]

As the Administrative Law Judge (ALJ) explained, in 2004 the Legislature determined that a "technology education" endorsement to the instructional certificate should be created. *See, N.J.S.A.* 18A:26-2.6. "Technology education" is defined in *N.J.A.C.* 6A:9-2.1 as:

> [i]nstruction by a teacher holding the Technology Education endorsement and covering New Jersey Core Curriculum Content Standard (NJCCCS) 8.2 and the International Technology Education Association (ITEA) standards. The ITEA standards are published in "Standards for Technological Literacy," (C)

---

[2] In 2013, *N.J.A.C.* 6A:9-5.19 was recodified as *N.J.A.C.* 6A:9-5.20.

[3] The requirements for earning a technology education endorsement are set forth in *N.J.A.C.* 6A:9-11.13.

> ITEA, incorporated herein by reference, as amended and supplemented and are available at http://www.iteaconnect.org/TAA/PDFs/xstnd.pdf. The ITEA standards recognize the increasing reliance of modern society on a range of technologies, stress the incorporation of technological study into all aspects of the curriculum, and promote experiential learning about technology development, use, maintenance, and impact on the individual, environment, economy, and society as a whole. Examples of the topics that can be taught under NJCCCS 8.2 and the ITEA standards include, **but are not limited to**, the nature of technology; technology and society, engineering and technological design; abilities for a technological world; energy and power; information and communication; and transportation, manufacturing and construction technologies. A technology education endorsement does not provide an endorsement to teach educational technology and/or computer and information skills.[4] (Emphasis added)

To resolve the disagreement about whether petitioner possessed the appropriate endorsement for the courses she taught, each party offered experts who undertook to analyze the respective course contents and measure them against the regulatory definitions of technology education versus educational technology. Since it is undisputed that during petitioner's seven years of service at the high school (excluding the school year during which she possessed only an elementary education endorsement), she was assigned to teach Imaging Technology, Computer Aided Drafting (CAD) I or II, and Mechanical Technology,[5] it was primarily those three courses that were reviewed by the experts.

At the OAL hearing, there was agreement that petitioner did not have the appropriate endorsement to teach Mechanical Technology. However, there was no concurrence about her qualifications to teach the other two courses, *i.e.*, CAD and Imaging Technology. Since the regulatory definition for technology education identifies New Jersey Core Curriculum Content Standard (NJCCCS) 8.2 and ITEA standards as paradigms for technical education

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[4] The technology education endorsement is similarly described in *N.J.A.C.* 6A:9-9.2(a)(8)(ii).

[5] Additionally, in 2004-2005 and 2007-2008 petitioner taught Computer Science at the high school. The parties appear to agree that petitioner's business studies endorsement allowed her to teach Computer Science, however, two years was not a sufficient amount of time for petitioner to earn tenure as a teacher of Computer Science.

courses, a comparison of the course descriptions for CAD and Imaging Technology with NJCCCS 8.2 and the ITEA standards is in order.[6]

Respondent's syllabus for Computer Aided Drafting (CAD) I and II identifies four units. The first unit is an introduction to CAD and AutoCAD; the second is CAD and AutoCAD concepts and techniques; the third is CAD and AutoCAD design and editing; and the fourth unit is an introduction to 3-dimensional concepts and techniques. While the design descriptions for each unit cite to both NJCCCS 8.2 and NJCCCS 8.1 (the standard associated with educational technology), the Commissioner sees little in the CAD course content that aligns with the regulatory definition of educational technology set forth in *N.J.A.C.* 6A:9-2.1, *i.e.*, "the implementation of technology as an integral part of the instructional process across all curriculum areas that supports a learner centered environment." (Emphasis added)

More specifically, analysis of the CAD syllabus – beginning with Unit One, which describes CAD and its uses in various careers, continuing through the second and third units which teach the skills required for 2-dimensional CAD, and ending with the fourth unit which introduces 3-dimensional drafting – leads to the conclusion that CAD is not a tool used in the classroom to enhance learning across all subject areas. Rather, it is a design technology which is its own discipline within the field of engineering and technology – as is, or was, the discipline of manual drafting. This conclusion is buttressed by a comparison of the CAD syllabus with NJCCCS 8.2, in particular NJCCCS 8.2.12.B.2, NJCCCS 8.2.12.E.1, NJCCCS 8.2.12.F.3 and NJCCCS 8.2.12.G.1.

Further, the CAD syllabus reflects the ITEA standards referenced in the definition of technical education, in that it promotes experiential learning about technology development,

[6] It appears undisputed that NJCCCS 8.2 has been the standard for technology education at all times relevant to this case.

use and maintenance. *N.J.A.C.* 6A:9-2.1. Consequently, the Commissioner is persuaded that the technology education endorsement is the required endorsement for teachers of CAD. Since petitioner has never possessed the technology education endorsement, she cannot have acquired tenure as a CAD instructor.

Ascertaining the appropriate endorsement for instructors of imaging technology is more nuanced than identifying the correct endorsement for teachers of computer aided drafting. Respondent's 2004 imaging technology course syllabus repeatedly referred to NJCCCS 8.2 in the Student Proficiencies section, and described goals and tasks that comported with the NJCCCS for technical education. Thus, for at least the time period covered by the 2004 syllabus, a technical education endorsement was required to teach the class. Accordingly, during school years 2004-2005 through 2008-2009, petitioner could not have acquired tenure credit.

Further, while respondent's 2009 imaging technology syllabus does not expressly cite to NJCCCS 8.2, the unit descriptions can be understood to treat photography as a discipline unto itself. Unit one discusses the history of photography, including inventions and technological and cultural changes. Unit two addresses composition, angles and perspective, as well as such technical concepts as lighting, aperture size and shutter speed. The third unit covers editing and copyright issues, and the fourth unit imparts the more multifaceted tasks necessary to produce videography. In the Commissioner's view, the foregoing unit descriptions depict a course that is meant to reach substantially beyond training in photoshop editing software. Were the imaging technology class solely intended to impart a medium for instructional support in other subject curricula, there would be little need for an entire unit on the history of photography. While photography can most likely be employed for the enhancement of learning in a variety of subjects, the depth of respondent's imaging technology syllabus suggests an intention to provide

students with a firm foundation in the discipline of photography and videography *per se.* A general business studies endorsement would not appear to be adequate preparation for teaching the course described in respondent's syllabus.

More importantly, the Department of Education (Department), which is the State Agency charged with establishing standards and regulations relating to education, and whose expertise deserves deference, has published guidance concerning "educational technology" and "technology education." One such guidance explains that "educational technology is a using technology in conjunction with specific teaching strategies within an instructional setting to support students and teachers in a learning process . . . ," whereas "technology education is the study of technology, and its effects on individuals, society and the environment. It is much more than learning about various pieces of hardware and software. It is a study of a body of knowledge, and the systematic application of resources to produce outcomes in response to human desires and needs." Fall 2007 Newsletter jointly issued by the New Jersey State Department of Education's Office of Educational and Informational Technology and Office of Educational Standards and Programs, at 1. (Emphasis added.) (Respondent's Exhibit R-19)[7]

Further, on pages 3-4 of the above referenced newsletter, the goals for instruction in educational technology versus the standards for technology education courses are set forth. (Respondent's Exhibit R-19 at 3-4) Comparison of the technical education standards in the Department newsletter with the syllabi discussed above lead to the conclusion that the CAD and Imaging Technology classes offered by respondent constitute technical education and require teachers who possess technology education endorsements. This conclusion, in fact,

[7] Petitioner dismisses the Department's 2007 guidance. She offers her expert's proposition, grounded in no discernible authority, that the difference between educational technology classes and technical education courses turns on whether the software being taught "is available in the mass market" or whether it is "very career specific technological software." The Commissioner is not inclined to accept this unsupported criterium.

was communicated by the Department's Beverly Hetrick to respondent's superintendent Johanna Ruberto via a memorandum dated March 3, 2010. (Respondent's Exhibit R-7)

The record does not reveal why respondent assigned petitioner to teach CAD, Imaging Technology and Mechanical Technology. However, when the new superintendent learned – during the 2009-2010 school year – that a technical education endorsement was required for those positions,[8] it was incumbent upon respondent to staff them with properly credentialed teachers. Moreover, correspondence in the record indicates that as early as 2006, petitioner was aware that she might need a technical education endorsement to teach the courses. She took some steps to earn the endorsement, but ultimately abandoned the attempt.[9]

While respondent clearly erred in its placement of petitioner in the technical education positions, it is "well established that a teaching staff member is charged with the responsibility to ensure that he or she has earned the appropriate certification for the position which he or she seeks or holds. This is so even where a district has improperly assigned the employee duties for which the employee is not certificated." *Perna v. State-Operated Sch. Dist. of the City of Paterson,* Commissioner Decision No. 2-12, decided January 4, 2012, at 8, citing *Stephen Jennings v. Board of Education of the Borough of Highland Park, Middlesex County*, 1989 *S.L.D.* 1097, 1101, decided February 28, 1989 (petitioner's reliance upon such actions in the face of regulations to the contrary cannot be regarded as reasonable)

It is not possible to ascertain from this record whether petitioner's performance teaching the CAD and Imaging Technology courses did, in fact, meet the appropriate curriculum

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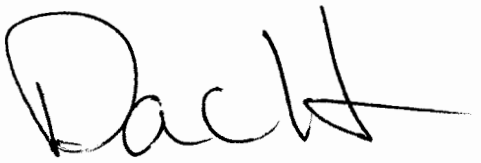
[8] *See,* Respondent's Exhibit R-7.

[9] In September 2006, petitioner applied for a Technical Education endorsement and registered for the PRAXIS examination. In May 2007, the Department advised petitioner that she needed more coursework to qualify for the Technical Education endorsement, but she chose not to pursue it – and advised her principal of same. Respondent's Exhibits R-1, R-2, and R-3; 1T19-20.

standards. However, even if her service met the standards, petitioner did not possess the proper endorsement. She was therefore precluded from accruing tenure credit. It is unfortunate that, even though as far back as 2006, petitioner had had reason to question the adequacy of her credentials, she did not take the steps necessary to ensure that her employment could continue.

In sum, for the reasons articulated *infra,* the Commissioner finds that petitioner did not earn tenure in respondent's district. Accordingly, the petition is dismissed.

IT IS SO ORDERED.[10]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/27/14

Date of Mailing: 5/29/14

[10] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6149-10
AGENCY DKT. NO. 104-5/10

CHRISTINE LOPAC,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,

Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

David Rubin, Esq., for respondent

Record Closed: March 22, 2013 Decided: February 25, 2014

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Christine Lopac (Lopac) appeals from the decision of respondent Board of Education of the Borough of Manville (Manville) to terminate her in May 2010 on the grounds she was not certified to teach the courses she had been assigned. She

asserts that she was properly certified and, even if not properly certified , nevertheless had acquired tenure and was entitled to be retained over all non-tenured elementary teachers and any tenured elementary teachers with less seniority.

On May 22, 2010, Lopac filed a Petition of Appeal with the Department of Education (Department), Bureau of Controversies and Disputes. On June 14, 2010, the matter was filed with the Office of Administrative Law (OAL) for a hearing as a contested case. Notices were sent to all teaching staff potentially affected by a decision in this matter advising them of their right to intervene. None chose to do so. The hearing was held on March 20 and 21, 2012, at the OAL in Mercerville, New Jersey. The record remained open for the submission of additional documentary evidence and post hearing submissions by the parties. The record then closed on March 22, 2013 and extensions of time were granted for the filing of the Initial Decision.

FACTUAL DISCUSSION

The following facts are not in dispute:

1. Lopac was employed as a teacher by Manville from April 2002 to June 2010.

2. During the 2001-2002 and 2002-2003 school years, Lopac taught Microsoft Office and General Computer Skills in the fifth, sixth, seventh, and eighth grades.

3. In October 2002, Lopac received an instructional certificate with an elementary school teacher endorsement (N-8).

4. In August 2004, Lopac received an instructional certificate with a general business studies endorsement.

5. From the 2003-2004 school year through the 2009-2010 school year, Lopac taught Imaging Technology, Computer-Aided Drafting (CAD) I or II, and Mechanical Technology at the Manville High School.

6. During the 2003-2004 school year, Lopac also taught Visual Basic at the high school.

7. During the 2004-2005 and 2007-2008 school years, Lopac taught Computer Science at the high school.

8. In April 2007, the Department of Education advised Lopac that she did not qualify for a technology education endorsement.

9. On May 10, 2010, Dr. Johanna Ruberto, the superintendent of Manville, notified Lopac that she would not be offered a contract for the 2010-2011 school year. Dr. Ruberto cited N.J.A.C. 6A:9-5.20 as the reason for the nonrenewal.

10. In August 2010, Manville hired Timothy McKinnon, who holds an instructional certificate with a technology education endorsement, to teach CAD I, Imaging Technology, and Mechanical Technology.

Lopac and Manville each presented the testimony of two witnesses. Lopac and Martha DeBlieu testified for Lopac, while Randall Kanter and Johanna Ruberto testified for Manville.

Christine Lopac

Lopac was employed as a teacher by the Manville from April 2002 until June 2010. In 1991, Lopac graduated from Seton Hall University with a B.A. in Communications. In 1999, she received a Master's Degree in Business Management from the New Jersey Institute of Technology. In 2010, she received a Master's Degree in Education Leadership from Seton Hall University.

Prior to her employment with Manville, Lopac worked for Johnson & Johnson for nine years. There, she trained employees and executives to use Microsoft Office, PowerPoint, Excel, and Word. After Johnson & Johnson, she briefly taught K-8 computer classes at St. Frances Cabrini School.

In October 2002, Lopac received an instructional certificate with an endorsement in Elementary Education (N-8). In August 2004, she received an instructional certificate with an endorsement in General Business Studies (K-12). During her employment with Manville, Lopac sought an instructional certificate with an endorsement in Technology Education. However, in April 2007, her request for such an endorsement was denied. In 2010, Lopac obtained an administrative certificate with a supervisor's endorsement. From April 2002 until June 2003, she taught Microsoft Office and general computer skills to fourth, fifth, sixth, seventh, and eighth graders. According to Lopac, "the course I taught was Word, PowerPoint, Excel, using computers, how to turn them on, how to save documents, how to file, how to store, basic computer skills, typing."

For the 2003-2004 school year through 2009-2010 school year, Lopac taught high school-level Imaging Technology, Computer-Aided Drafting (CAD) I & II, and Mechanical Technology. In the 2003-2004 school year, she also taught a high school-level Visual Basic Course, and in the 2004-2005 and 2007-2008 school years she also taught a high school-level Computer Science course. All of these courses were part of the high school's Technology Department.

Lopac stated that, in the Imaging Technology course during the 2003-2004 school year, "[t]he students would take the pictures with 35mm cameras and then develop the film in the dark room and we would look at the images that they have [sic] created, the photographs." After the 2003-2004 school year, the dark room was eliminated from the Imaging Technology course because it "became cumbersome or expensive to use so we actually switched to digital cameras and we would take images and then use Photoshop to enhance the images taken by the students with digital cameras." According to Lopac, "[w]e used the Photoshop program or different computer programs [and the students] would put pictures into PowerPoint, into Word, make flyers, that type of thing."

The Mechanical Technology course involved the discussion of "the different aspects of technology where we would purchase different kits for the kids to build models with, for instance, aerodynamics, we would build a plane, hydrodynamics we

would build a boat . . . They would do research on the computer to look up the different areas of technology and then ultimately build that model to display what they had learned." The students used the Internet and Microsoft Word, PowerPoint, and Excel to research and create the models.

The CAD I & II courses involved "a program Autodesk and we used the computer to create drawings and I would teach the students the features of the program, on how to create the drawings and how to manipulate them, change them, design them and color them and copy them to make various images."

The Visual Basic course involved "a type of programming, it was almost like a web design type of course where you can create different types of pages." However, Lopac acknowledged that she did not have a copy of the syllabus or description of that course, and that at the time she taught Visual Basic, she only had an elementary education endorsement.

Finally, the Computer Science course "was a combination of Microsoft Office, so I would teach student skills on PowerPoint, Word, Excel" such as "[h]ow to create flyers, posters, power point presentations, graphic spread sheets, graphs."

According to Lopac all of the courses she taught involved programs or software created by technology companies, like Microsoft Office, AutoDesk, and Photoshop. Neither she nor her students created the software used in the courses.

Throughout her employment with Manville, Lopac also took or presented several professional development classes including computer integration, technology integration, technology, web page design, and Microsoft PowerPoint and Excel.

On cross-examination, Lopac explained that Don Burkhardt, the superintendent during the school years 2003-2004 through 2008-2009, allowed her to teach the high school courses under the elementary education and general business studies endorsements she possessed. Lopac stated that she also did not think that she needed a technology education endorsement to teach the high school courses she taught, but

pursued such an endorsement "[b]ecause technology has been up and coming and it was something that I wanted to be able to broaden my scope of ability to teach additional courses."

Johanna Ruberto, who took over as superintendent in 2009, believed Lopac needed a technology education endorsement to teach the high school courses she taught. And, after Dr. Ruberto raised the issue, Lopac attempted, but failed, to get such an endorsement on an emergency basis.

Martha DeBlieu

Ms. DeBlieu testified for petitioner as an expert in teacher certification. She has been employed by the New Jersey Education Association (NJEA) since 1977. She received her B.A. in Journalism from Temple University in 1975. Ms. DeBlieu explained that NJEA's activities include tracking licensing regulations and statutes. NJEA works with the Department of Education on certification issues, and answers questions its members and the public have about certification.

Since 2009, Ms. DeBlieu has served as NJEA's primary contact for licensing and certification issues. Prior to that, she served as the backup to the primary contact for several years. She stated that she has fielded thousands of licensing inquiries over the years. In answering inquiries about licensing issues, such as what endorsements are appropriate for which courses, Ms. DeBlieu refers to the Department of Education "matrix" or "crosswalk," which, according to her, "identifie[s] endorsements that are no longer issued, or are currently issued and how those, and what areas individuals holding those endorsements may teach." She also refers to Department of Education regulations and memoranda concerning licensing issues.

Ms. DeBlieu testified that the courses that Lopac taught from April 2002 to June 2003 were educational technology courses that are appropriately taught with an elementary education endorsement. Ms. DeBlieu stated that "there are several areas that may be taught by teachers of varying endorsements . . . and one of those areas is in the area of educational technology or computers and the Department indicates that

individuals, anybody who holds a certificate between codes 0000 and 1000 and 2682 and 44199 can teach computer literacy, applications, or programming."

Ms. DeBlieu opined that, under former N.J.A.C. 6A:9-5.20 [now N.J.A.C. 6A:9-5.19], a teacher with a General Business Studies endorsement could "be assigned to provide instruction in the use of educational technologies, computers and other digital tools if they demonstrate proficiency in those technology and tools."

According to Ms. DeBlieu, there is a distinction between technology education and educational technology under the education regulations. Technology education "is more about designing software and hardware and more from the perspective of engineering skills" whereas educational technology "is more involving the use of a computer software, hardware and teaching . . . how to use the hardware and software." She noted that N.J.A.C. 6A:9-2.1 states that "[a] technology endorsement does not provide an endorsement to teach educational technology and/or computer and information skills."

In order to determine what endorsement is appropriate for which courses, Ms. DeBlieu stated that "you don't just look at the title of the course, you look at the content of the course and what is involved in actually teaching that course and what is covered in that course." After Lopac filed her appeal, her counsel asked Ms. DeBlieu to issue a report analyzing the appropriate endorsements for the high school courses Lopac taught. Ms. DeBlieu concluded that Lopac appropriately taught the Imaging Technology course under her General Business Studies endorsement for the majority of her time at Manville. She should not have been able to teach the course in 2003-2004 because "they had a dark room, there was film processing involved and it was a true photography course in that respect because it involved all the components of developing photos, taking photos, cropping photos, doing all those things you did as a photographer which would have required a photography endorsement." However, after the 2003-2004 school year, once the film developing aspect of the course was eliminated, Lopac was authorized to teach Imaging Technology because "it became basically a computer course in which photography was not taught." Instead, the course utilized Adobe Photoshop, which is a "commercially available program and is used to

create, use digital images and use them within the context of applications and other types of uses."

Ms. DeBlieu also stated that Lopac was authorized to teach the Computer Science course under her General Business Studies endorsement because the course involved Microsoft Office, commercially available software which the students used to develop skills for professional purposes. According to Ms. DeBlieu, the Computer Science course was an educational technology course, not a technology education course, because it involved the use of technology, not the development of technology.

Lopac was also authorized to teach the CAD I & II courses because "students were using the software, learning how to do two dimensional, three dimensional drawings and so they were using – how to use the tools of that software and the lessons that were used were basically in terms of becoming proficient in using that software." Thus, in Ms. DeBlieu's opinion, the CAD courses involved educational technology that could be taught under a General Business Studies endorsement.

However, Ms. DeBlieu concluded that Lopac was not authorized to teach the Mechanical Technology course because "it was not really teaching about how to use hardware or software, it included information on the inner workings of hardware and on hardware design, and so it really went beyond the scope of what we would consider in terms of teaching hardware and software." According to Ms. DeBlieu, Mechanical Technology was a technology education course.

On cross-examination, Ms. DeBlieu denied that, under former N.J.A.C. 6A:9-5.19, educational technology involves "technology which is used . . . by teachers in their classrooms to assist them in teaching the content areas that they are teaching." Rather, according to Ms. DeBlieu, educational technology does not involve "only inclusion with a specific subject. It [is] also, in and of itself, the technology itself, as it [is] being instructed. The instruction in the hardware and the software." Ms. DeBlieu relied in part on a July 25, 1985, memorandum issued to school districts by Leo Klagholz, who was then the Department of Education's Director of Teacher Preparation & Certification. The memo included guidelines for teaching computer education courses. According to

the memo, "[t]eachers who hold any instructional endorsement and who have some preparation in computer education may teach courses in this area at the secondary level." However, the memo acknowledged that "your decisions in this regard are not currently regulated by the state, except that your computer education teachers must possess an instructional certificate."

For her opinion on the difference between educational technology and technology education, Ms. DeBlieu also relied on "discussions at the State Board of Education meetings, . . . discussions with Department staff members over the years and . . . I believe there may be an additional Department memo related to [former N.J.A.C. 6A:9-5.20.]" However, Ms. DeBlieu could not identify that memo when asked.

Ms. DeBlieu conceded that if a course syllabus "encompasses the elements of [Core Curriculum Content Standard] 8.2, as outlined as technology education, I would say that that would require a technology education endorsement."

Ms. DeBlieu acknowledged that Lopac could not have properly taught the high school courses to which she was assigned under her elementary education endorsement.

Randall Kanter

For over thirty years, Randall Kanter has worked in various capacities in school personnel administration. He holds a principal endorsement, administrator endorsement, and a teacher of science endorsement. He testified for Manville as an expert "in the field of public school personnel administration" and "in the area of aligning certifications, endorsements and job duties."

At the request of Manville's counsel, Mr. Kanter prepared a report on whether Lopac "was properly certified to teach specific courses being offered by the Manville Board of Education including: Computer Aided Drafting, Imaging Technology, Mechanical Technology and Technology Applications and Design" and "whether the

Teacher of Technology Education is the appropriate certificate for the aforementioned courses." Mr. Kanter's testimony was primarily based on the findings of his report.

Mr. Kanter described his understanding of the difference between educational technology under former N.J.A.C. 6A:9-5.20 and technology education under N.J.A.C. 6A:9-11.13 as follows: technology education "involves the teaching of technology for use in applications in the outside world" while educational technology involves "applications in school to help you be a better student."

According to Mr. Kanter, Lopac was not authorized to teach Imaging Technology because that course fell under the technology education endorsement. Imaging Technology "goes to the art of photography and culture. That is one of the outcomes. That is not- that has nothing to do with Educational Technology. Educational Technology is about the tool, it is not about the subject."

Mr. Kanter also testified that the CAD courses required a technology education endorsement because the courses involved "the impact of [CAD] technology in society and in this technological world" and because the CAD course "wasn't put together to have a cross curricular application in English or History or whatever to help [students] better understand those particular areas."

Mr. Kanter agreed with Ms. DeBlieu that Mechanical Technology was a course that required a technology education endorsement and that Lopac was not authorized to teach the course.

On cross-examination, Mr. Kanter stated that with educational technology "the focus is on the technology being used across the curriculum" and that "there is always going to be some element of Educational Technology in the Technology Education course" because "[t]here is a tool involved." Mr. Kanter acknowledged that the converse could be true, that technology education could be involved in educational technology, but stated that "[o]nce you start talking about Technology Education you are talking about something beyond the scope of Educational Technology, so I would say the converse is not as, it is not weighted that way."

Johanna Ruberto

Dr. Ruberto became superintendent of the Manville school district on July 1, 2009. Dr. Ruberto testified that, in 2010, she had discussions with Lopac about Lopac's ability to teach certain courses without a technology education endorsement. Dr. Ruberto had a member of her staff reach out to the Somerset County office of the Department of Education for guidance on what endorsements were necessary to teach the CAD courses, Imaging Technology, and Mechanical Technology. The county advised that a technology education endorsement was necessary to teach those courses.

Dr. Ruberto stated that she referenced N.J.A.C. 6A:9-5.20 in her May 10, 2010, letter to Lopac regarding the fact that Manville would not offer her a contract for the 2010-2011 school year "[b]ecause that was the regulation that [Lopac] was claiming held her in [her] position." Dr. Ruberto believed that Lopac did not have the proper endorsements to teach the high school courses to which she was assigned.

LEGAL DISCUSSION

The purpose of the teaching staff tenure laws, N.J.S.A. 18A:28-1 to -18, is "to aid in the establishment of a competent and efficient school system by affording teaching staff members 'a measure of security in the ranks they hold after years of service.'" Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 528-29 (App. Div. 1999) (quoting Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949)). In order to acquire tenure, a teaching staff member "must comply with the precise conditions articulated in the [tenure] statute." Zimmerman v. Bd. of Educ. of the City of Newark, 38 N.J. 65, 72 (1962). Thus, a teaching staff member "is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time." Spiewak v. Summit Bd. of Educ., 90 N.J. 63, 74 (1982); N.J.S.A. 18A:28-2; N.J.S.A. 18A:28-4; N.J.S.A. 18A:26-5; N.J.S.A. 18A:28-6.

Under N.J.S.A. 18A:28-5,

> a. The services of all teaching staff members employed prior to the effective date of P.L.2012, c.26 (C.18A:6-117 et al.) in the positions of teacher . . ., which require[s] them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect . . ., shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:
>
> (1) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (2) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (3) The equivalent of more than three academic years within a period of any four consecutive academic years.

It is well settled that "[t]he provisions of the Tenure Act should be construed and administered fairly and sensibly rather than harshly." Canfield v. Bd. of Educ. of the Bor. of Pine Hill, 51 N.J. 400, 402 (1968). However, "the liberal construction must be reasonable in light of the plain language of the controlling statutes." Lammers v. Bd. of Educ. of the Bor. of Point Pleasant, 134 N.J. 264, 272 (1993).

N.J.S.A. 18A:6-38 authorizes the State Board of Examiners ("Board of Examiners") to "issue appropriate certificates to teach or to administer, direct or supervise the teaching, instruction or educational guidance of . . . pupils in public schools." Ibid; N.J.S.A. 18A:26-2; N.J.A.C. 6A:9-5.1. Pursuant to this authority, the Board of Examiners has promulgated "rules governing the preparation, licensure and professional development of those educators required by their positions to be certified."

N.J.A.C. 6A:9-1.1; N.J.S.A. 18A:26-2.7. Under the certification rules, the Board of Examiners shall issue three categories of educational certificates: Instructional, Administrative, and Educational Services. N.J.A.C. 6A:9-5.2(a). Moreover, the Board of Examiners will issue a separate endorsement for each subject area that falls under a specific type of certificate. N.J.A.C. 6A:9-2.1. An endorsement is the specific subject area in which a certificate holder is authorized to serve. Ibid; Nelson v. Old Bridge Bd. of Educ., 148 N.J. 358, 363 (1997).

In 2004, the Legislature directed the State Board of Education to authorize a technology education endorsement to the instructional certificate. N.J.S.A. 18A:26-2.6; N.J.S.A. 18A:26-2.7. "Technology education" is defined as:

> [i]nstruction by a teacher holding the Technology Education endorsement and covering New Jersey Core Curriculum Content Standard (NJCCCS) 8.2 and the International Technology Education Association (ITEA) standards. The ITEA standards are published in "Standards for Technological Literacy," (C) ITEA, incorporated herein by reference, as amended and supplemented and are available at http://www.iteaconnect.org/TAA/PDFs/xstnd.pdf. The ITEA standards recognize the increasing reliance of modern society on a range of technologies, stress the incorporation of technological study into all aspects of the curriculum, and promote experiential learning about technology development, use, maintenance, and impact on the individual, environment, economy, and society as a whole. Examples of the topics that can be taught under NJCCCS 8.2 and the ITEA standards include, but are not limited to, the nature of technology; technology and society, engineering and technological design; abilities for a technological world; energy and power; information and communication; and transportation, manufacturing and construction technologies. A technology education endorsement does not provide an endorsement to teach educational technology and/or computer and information skills.
> [N.J.A.C. 6A:9-2.1; see also N.J.A.C. 6A:9-9.2(a)(8)(ii) and N.J.A.C. 6A:9-11.3.]

"Technology education" is different from "educational technology." "Educational technology" is defined as "the implementation of technology as an integral part of the

instructional process across all curriculum areas that supports a learner centered environment." N.J.A.C. 6A:9-2.1. According to N.J.A.C. 6A:9-9.2(a)(8)(i),

> [t]here is no separate endorsement for educational technology and tools or for computer and information literacy except where career and technical endorsements occur for the related career clusters and career education and for consumer, family and life skills (see N.J.A.C. 6A:9-5.19). The CCCS require that teachers integrate the use of computer and information technology into their instruction[.]

N.J.A.C. 6A:9-5.19, which sets forth the requirements for instruction in educational technology, computers, and other digital tools, states:

> a) Every teacher shall demonstrate knowledge and understanding of computers and other educational technology resources and tools as defined by the Professional Standards for Teachers.
> (b) Every teacher shall integrate into the classroom appropriate educational technology resources and digital tools related to the content area being taught.
> (c) The school administrator may assign an individual to provide instruction in the use of educational technologies, computers, and other digital tools if the individual:
> 1. Demonstrates proficiency in the uses of educational technologies, computers, and other digital tools, and understands their common applications in an educational setting;
> 2. Demonstrates knowledge and understanding of the integration of such technologies and digital tools into the curriculum;
> 3. Demonstrates understanding of the legal and ethical issues surrounding the use of educational technologies and digital tools in PK-12 schools; and
> 4. Holds a CE, CEAS or standard certificate in an instructional field.[1]

The Core Curriculum Content Standards (NJCCCS) are designed to "move beyond a focus on basic competency in core subjects and foster a deeper understanding of academic content at much higher levels by promoting critical thinking,

[1] In 2013, N.J.A.C. 6A:9-5.19 was recodified as N.J.A.C. 6A:9-5.20. 45 N.J.R. 152(a); 45 N.J.R. 1605(a).

problem solving, and creativity[.]" N.J.A.C. 6A:8-1.1(a). The NJCCCS specify expectations in nine academic content areas, including technology. N.J.A.C. 6A:8-1.1(a)(1). The NJCCCS "enable district boards of education to establish curriculum and instructional methodologies for the purpose of providing students with the constitutionally mandated system of 'thorough' public school instruction that promotes college and career readiness." N.J.A.C. 6A:8-1.1(c). Therefore, school districts are "responsible for the review and continuous improvement of curriculum and instruction based upon changes in knowledge, technology, assessment results, and modifications to the CCCS[.]" N.J.A.C. 6A:8-3.1(c). The NJCCS were originally adopted by the State Board of Education in 1996, and were revised for the area of technology in 2004 and 2009. N.J.A.C. 6A:8-1.3; N.J.A.C. 6A:8-2.1.

Parties' Arguments

Lopac argues that "she was properly certified and therefore should have been retained to teach the following courses: PowerPoint/Excel; Microsoft Access; Computer Science II; CAD I and CAD II; and Imaging Technology." She also argues that, "should it be determined that any part of her assignments were improper, that she acquired tenure under her elementary endorsement and that she has tenure rights over all non-tenured elementary teachers and seniority rights over all less senior elementary teachers, as well as tenure and seniority in the courses that she previously taught." Lopac seeks "back pay, all benefits, emoluments, pension credit, and seniority credit which she would have received but for her wrongful termination."

Manville argues that "[a]s a result of Lopac's ineligibility to teach [Imaging Technology, Mechanical Technology, or CAD I and II], she never served the three consecutive academic years plus one day of properly certified service necessary for her to attain tenure pursuant to N.J.S.A. 18A:28-5." According to Manville,

> There is no dispute that her service at the elementary and intermediate school level in school years 2001-02 and 2002-03 accrued toward tenure. However, she acknowledged that she was not certified to teach any High School courses in

> school year 2003-04 because she only possessed an elementary school endorsement until August 2004, when she secured her general business studies endorsement. For school years 2004-05 through 2009-10, with the possible exception of Computer Science which she taught in 2004-05 and 2007-08, she was not certified to teach any other course, and never secured tenure.

The issue here is whether Lopac's general business studies endorsement authorized her to teach any of the high school courses to which she was assigned such that she acquired tenure under N.J.S.A. 18A:28-5. That issue "must be determined by careful reference to the particular curriculum that the district has adopted in a given case." Adler v. Bd. of Educ. of the Twp. of Shamong, EDU 6257-97, State Bd. of Educ. (July 5, 2000) <http://njlaw.rutgers.edu/collections/oal/>. Here, Lopac's general business studies endorsement would have authorized her to teach any "educational technology" course, but would not have authorized her to teach any "technology education" course.

As the regulations and the experts' testimony reflect, it is difficult to discern the difference between "educational technology" and "technology education." Nonetheless, the experts agree that Lopac's elementary education endorsement did not authorize her to teach any of the high school courses to which she was assigned, and that her general business studies endorsement did not authorize her to teach Imaging Technology during the 2003-2004 school year or Mechanical Technology at any point between the 2003-2004 and 2009-2010 school years, because those were technology education courses. However, Manville effectively concedes that Lopac's general business studies endorsement authorized her to teach Computer Science during the 2004-2005 and 2007-2008 school years. Lopac also was not authorized to teach Visual Basic during the 2003-2004, because she only then possessed an elementary education endorsement. Thus, the only courses at issue are Imaging Technology from the 2004-2005 to the 2009-2010 school years and the CAD I and II courses from the 2004-2005 to the 2009-2010 school years.[2]

[2] Since Lopac did not receive her general business studies endorsement until August 2004, she would not have been authorized to teach the CAD I & II courses during the 2003-2004 school year even if CAD I & II were considered "educational technology" courses.

Before undertaking an analysis of the curriculum of each course, it is necessary to note that, while the Department did not add to N.J.A.C. 6A:9-2.1 a definition for "technology education," with its reference to NJCCCS 8.2, until 2009, and the Department issued the NJCCCS in 2004 and 2009, NJCCCS 8.2 was the standard for "technology education" under the NJCCCS for 2004 and 2009.[3] This is necessary to note because Manville issued a curriculum for Imaging Technology in 2004 and 2009, and the only CAD I & II curriculum in evidence is from 2009. Thus, while there were different NJCCCS in effect in 2004 and 2009, any reference in the curricula to NJCCCS 8.2 means "technology education." In addition, NJCCCS 8.1 was entitled "Computer and Information Literacy" in the NJCCCS for 2004 and "Educational Technology" for the NJCCCS for 2009.

In reviewing the curricula of Imaging Technology and CAD I & II, I CONCLUDE that Lopac did not acquire tenure under her general business studies endorsement because Imaging Technology, for most of Lopac's time at Manville, and CAD I & II were technology education courses that only a teacher with a technology education endorsement is authorized to teach. In particular, since N.J.A.C. 6A:9-2.1 specifically states that technology education is "instruction by a teacher holding the Technology Education endorsement and covering New Jersey Core Curriculum Content Standard (NJCCCS) 8.2" and Imaging Technology and CAD I & II covered NJCCCS 8.2 when Lopac taught those courses, Lopac was not authorized to teach those courses without a technology education endorsement.

Imaging Technology

The 2004 curriculum for Imaging Technology supports the conclusion that a teacher of this course needed a technology education endorsement. The "student proficiencies" section of the 2004 curriculum makes repeated reference to NJCCCS 8.2 A (Nature and Impact of Technology), B (Design Process and Impact Assessment), and

[3]For the 2004 NJCCCS for technological literacy, see http://www.state.nj.us/education/cccs/2004/s8_tech.pdf. In 2004, NJCCCS 8.2, "technology education," include three categories: A. Nature and Impact of Technology; B. Design Process and Impact Assessment; and C. Systems in the Designed World.

C (Systems in the Designed World). In 2004, NJCCCS 8.2 was the standard for "technology education" and meant that "[a]ll students will develop an understanding of the nature and impact of technology, engineering, technological design, and the designed world as they relate to the individual, society, and the environment."

In Imaging Technology, students were expected to demonstrate certain abilities, including the ability to "explain the technological developments of photography in the United States and Internationally;" "identify the parts of the camera, inside and out;" "capture perspective in photographs;" and "capture mass, proportion, and relation in photographs." These proficiencies all made reference and reflect the objectives of NJCCCS 8.2. Therefore, I **FIND** that, in 2004, Imaging Technology was understood to be a technology education course, and required a technology education endorsement in order to teach it.

In contrast to the 2004 curriculum, the 2009 curriculum reflects that Manville changed its view of Imaging Technology from a technology education course to an educational technology course. All of the established goals in the 2009 curriculum reference NJCCCS 8.1 A and B. Under the 2009 NJCCCS, section 8.1 is entitled "educational technology," with the stated goal that "[a]ll students will use digital tools to access, manage, evaluate, and synthesize information in order to solve problems individually and collaboratively and to create and communicate knowledge." NJCCCS 8.1 A is entitled "Technology Operations and Concepts" and 8.1 B is entitled "Creativity and Innovation." Thus, while the 2004 curriculum shows that Manville then viewed Imaging Technology as a technology education course, the 2009 curriculum shows that Manville then viewed Imaging Technology as educational technology course. However, in the absence of other proof that Manville changed its view of the nature of the course prior to 2009, I **FIND** that Lopac was only authorized to teach Imaging Technology in 2009 and thereafter under her general business studies endorsement. Thus, Lopac did not accrue tenure under her general business studies endorsement while teaching Imaging Technology during the 2004-2005, 2006-2007, 2007-2008, and 2008-2009 school years.

CAD I & II

The 2009 curriculum for CAD I & II aligned with both NJCCCS 8.1 and 8.2. The goals of the course reference NJCCCS 8.1 A (Technology Operations and Concepts) and B (Creativity and Innovation) and NJCCCS 8.2 B (Design: Critical Thinking, Problem Solving, and Decision-Making). Thus, while CAD I & II involves a mixture of educational technology and technology education, I **FIND** that, because the course covered, in part, NJCCCS 8.2, Manville understood CAD I & II to be a technology education course. As such, and in the absence of other proof that any prior curriculum for CAD I & II showed that it was an educational technology course, the course required a technology education endorsement and Lopac did not accrue tenure while teaching the course under her general business studies endorsement.

I further **CONCLUDE** that Lopac did not acquire tenure under her elementary education endorsement. She received that endorsement in October 2002, and only taught under that endorsement during the 2002-2003 school year. Since she was not authorized to teach the high school courses to which she was assigned from the 2003-2004 through the 2009-2010 school years under her elementary education endorsement, she did not serve enough time under that endorsement in order to acquire tenure under N.J.S.A. 18A:28-5.

Finally, I **CONCLUDE** that Lopac is not entitled to tenure under her general business studies endorsement even though a former superintendent assigned her to teach courses that required a technology education endorsement. As the Commissioner of Education has explained, "it is well established that a teaching staff member is charged with the responsibility to ensure that he or she has earned the appropriate certification for the position which he or she seeks or holds. This is so even where a district has improperly assigned the employee duties for which the employee is not certificated." Perna v. State Operated Sch. Dist. of the City of Paterson, EDU 9761-09, Comm'r (January 4, 2012) <http://njlaw.rutgers.edu/collections/oal/>.

ORDER

Based on the foregoing, I **ORDER** that Manville did not violate Lopac's tenure rights because Lopac did not acquire tenure under her elementary education or general business studies endorsement.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

2/25/14
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency: 2/25/14

Date Mailed to Parties: 2/25/14

/lam

LIST OF WITNESSES

For petitioner:

Christine Lopac
Martha DeBlieu

For respondent:

Randall Kanter
Johanna Ruberto

LIST OF EXHIBITS

For petitioner:

P-1 Teaching Certificate for Elementary School Teacher and Teach of General Business Studies

P-2 5/10/10 Letter from Johanna S. Ruberto, Superintendant of Schools not offering Ms. Lopac a Contract for 2010-2011 School Year

P-3 1/24/08 Letter from Donald J. Burkhardt advising Lopac of her Nomination for the Manville High School's Governor's Teacher of the Year Award

P-4 1/30/07 Letter from Donald J. Burkhardt advising Lopac of her Nomination for the Manville High School's Governor's Teacher of the Year Award

P-5 Petitioner's Interrogatory #14 and Respondent's Answer to Same

P-6 Petitioner's Interrogatory #7 and Respondent's Answer to Same

P-7 Professional Development Documentation

P-8 Martha DeBlieu's Curriculum Vitae

P-9 Marth DeBlieu's Analysis of Relevant Courses

P-10 7/25/85 Memo from the Department of Education re: Guidelines for Teaching Computer Education

P-11 Job Description: Elementary Education Teacher

P-12 Job Description: K-12 Subject Area Teacher

P-13 2006 Technology Curriculum Computer Science II

P-14 Manville School District Mission/Visions Statement CAD I & II Curriculum 2009

P-15 Manville School District Mission/Vision Statement Imaging Technology Curriculum 2009

P-16 2004 Technology Curriculum Imaging Technology

P-17 2004 Technology Curriculum Mechanical Technology

P-18 Courses Taught by Christine Lopac in Manville School District from 2001-2002 school year to 2009-2010 school year.

P-19 Department of Education Matrix, General Education Section

For respondent:

R-1 E-mail from C. Lopac to Pl Galos, dated 2/28/06

R-2 E-mail from C. Lopac to P. Galos, dated 2/20/07

R-3 Letter from NJDPE to C. Lopac, dated 10/26/07

R-4 E-mail from P. Galos to C. Lopac, dated 8/27/09

R-5 E-mail from C. Lopac to J. Ruberto, dated 1/21/10; E-mail from J. Rubeto to C. Lopac, dated 1/22/10

R-6 Facsimile from J. Ruberto to E. Collins, dated 2/18/10

R-7 E-mail from B. Hetrick to J. Ruberto, dated 3/3/10

R-8 Letter from J. Ruberto to C. Lopac, dated 5/10/10

R-9 Letter from J. Ruberto to C. Lopac, dated 5/14/10

R-10 Letter from J. Ruberto to Ben Render, dated 5/27/10

R-11 Class Schedules, 2006-2007 to 2009-2010

R-12 CAD I/CAD II Curriculum

R-13 Technology Applications and Design Curriculum

R-14 Imaging Technology Curriculum (2009)

R-15 Imaging Technology Curriculum (2004)

R-16 Report from Randall Kanter to David Rubin, dated 3/13/12

R-17 Course Description for CAD I & II

R-18 Randall Kanter's Curriculum Vitae

R-19 Department of Education Newsletter on Educational Technology and Technology Education, Fall 2007

R-20 2009 New Jersey Core Curriculum Content Standard 8.1

R-21 2009 New Jersey Core Curriculum Content Standard 8.2

225-14

225-14LM

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Acting Commissioner

May 27, 2014

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Adams, Gutierrez & Lattiboudere
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Newark, New Jersey 07102

Angela Velez, DAG
New Jersey Department of Law and Public Safety
Division of Law
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Trenton, New Jersey 08625

Re: *Board of Trustees of the Greater Newark Charter School, Essex County v. New Jersey Department of Education, David C. Hespe, Acting Commissioner. Agency Dkt. No.108-4/14.*

Dear Counsel,

I have reviewed the materials filed in connection with the petitioner, Greater Newark Charter School's Motion for Reconsideration of the Acting Commissioner's April 17, 2014 decision (April 2014 decision) or a request for a stay pending appeal. The April 2014 decision denied the renewal of the petitioner's charter and directed the petitioner to cease operations on June 30, 2014.

Pursuant to *N.J.A.C.* 6A:3-1.15(b)2, a motion for reconsideration shall be considered based upon the following:

i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
iv. reversal of a prior judgment on which the present matter is based.

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Upon review and consideration of the parties' submissions,[1] I find that the petitioner has failed to satisfy any of the requisites for granting a Motion for Reconsideration specified in *N.J.A.C.* 6A:3-1.15(b)2. The petitioner suggests that the Acting Commissioner erred by non-renewing the petitioner's charter because the April 2014 decision failed to take into account all of the factors set forth in the regulations and guidance materials concerning the standard for renewal of a charter. The petitioner further contends that it was subjected to an arbitrary, capricious and unreasonable process which resulted in an unsubstantiated decision to close the charter school. The argument for reconsideration advanced by the petitioner does not amount to a claim of mistake as envisioned by *N.J.A.C.* 6A:3-1.15(b)2.i; rather, the petitioner simply disagrees with the application of the law and the reasons cited for the non-renewal of the charter that were contained in the April 2014 decision.

I also find that the petitioner has failed to satisfy the requirements for a stay of the April 2014 decision. Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that petitioner has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Here, the petitioner has failed to establish a likelihood of success on the merits. It is undisputed that the Commissioner is authorized to deny the renewal of a charter after a comprehensive review of the school. *N.J.A.C.* 6A:11-2.3(b). There is evidence in the record indicating that the Department thoroughly reviewed all of the information submitted by the petitioner in its renewal application and took the steps necessary to properly evaluate whether the charter should be renewed. As outlined in the April 2014 decision, the petitioner failed to meet seven of nine standards within the Performance Framework in the 2012-2013 school year. Additionally, the Department's review of the school revealed inconsistent student engagement and learning, as well as inconsistent levels of rigor across the classrooms. Further, the Department determined that the board of trustees and school administration lack the leadership and organizational capacity necessary to improve the school. As a result, the petitioner has failed to show that the decision to revoke/non-renew its charter for the reasons outlined in the April 2014 decision was arbitrary, capricious or unreasonable. Therefore, I find that the petitioner has failed to demonstrate a likelihood of success on the merits. In light of the fact that all of the *Crowe* prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors.

[1] The respondent's opposition papers were filed with the Office of Controversies and Disputes on May 12, 2014. In the petitioner's reply papers, it argued that the respondent's opposition papers should not be considered because the petitioner did not receive them until May 13, 2014, one day after the papers were to be filed. The respondent's opposition papers were considered because there was no prejudice suffered by the petitioner. If the petitioner needed additional time to submit a reply brief based upon the fact that it received the respondent's opposition on May 13, 2014, petitioners could have sought such relief from the Office of Controversies and Disputes. However, the petitioner submitted a timely reply without a request for additional time.

Accordingly, the Motion for Reconsideration and a request for a stay of the April 2014 decision are hereby DENIED.[2]

Sincerely,

David C. Hespe
Acting Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

226-14

KELLY LACIK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a non-tenured teacher formerly employed by respondent's school district, appealed the Board's determination not to offer her a teaching contract for the 2011-2012 school year. Petitioner asserted that the actions of the respondent Board were arbitrary, capricious and taken in bad faith, arguing that she had favorable performance evaluations during her final year with the school district. The respondent Board contended that petitioner was not offered a contract for a fourth year of employment because of performance issues in her first three years with the school district.

The ALJ found, *inter alia*, that: petitioner worked in respondent's school district for three years, but had not acquired tenure; local boards of education have virtually unlimited discretion to terminate the services of a non-tenured teacher; petitioner's well-documented performance record, which repeatedly identified ongoing deficiencies in various areas, is plainly more than sufficient to show that the Board's decision not to renew petitioner's contract was not arbitrary, capricious or unreasonable; and the district superintendent had ample grounds to determine that petitioner's nonrenewal was appropriate. The ALJ concluded that the petitioner failed to demonstrate that the Board's actions in terminating her employment were arbitrary, capricious, unreasonable, or taken in bad faith and, accordingly, there is no basis for the Commissioner to interfere with the Board's vast discretion in this matter. The ALJ ordered the petitioner's appeal dismissed.

Upon a full and independent review, the Commissioner concurred with the Administrative Law Judge that petitioner failed to meet her burden to show that respondent acted in an arbitrary, capricious or unreasonable manner, and dismissed the petition.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

May 27, 2014

226-14

OAL DKT. NO. EDU 8821-11
AGENCY DKT. NO. 181-7/11

KELLY LACIK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner, Kelly Lacik, and the Board of Education's (Board) reply thereto.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the Initial Decision – that the Board's decision to non-renew the petitioner for the 2011-2012 school year was not arbitrary, capricious or unreasonable. The Commissioner also finds the exceptions submitted by the petitioner to be unpersuasive, as they largely replicate arguments advanced at the OAL which were fully considered and appropriately addressed by the ALJ in the Initial Decision. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/27/14
Date of Mailing: 5/29/14

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08821-11
AGENCY DKT. NO. 181-7/11

KELLY LACIK,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,
Respondent.

William F. Koy, Esq., and **Robert C. Skiba**, Esq., for petitioner (Law Firm of William Koy, attorneys)

Nicholas Celso III, Esq., and **Jonathan Busch**, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: August 23, 2013 Decided: April 9, 2014

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this matter, petitioner Kelly Lacik contests the nonrenewal of her employment by respondent Board of Education of the Township of Edison (the Board) for the 2011–

2012 school year. Petitioner had been previously employed as a teacher during the 2008–2009, 2009–2010 and 2010–2011 school years. Petitioner filed a Petition with the Commissioner of Education (Commissioner) alleging that the Board's actions were "arbitrary and capricious in its termination" of petitioner and "indicate a showing of bad faith." The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. The hearing was held on February 2, February 7, May 10 and December 5, 2012. After the conclusion of the testimony the record remained open for the receipt of transcripts and post-hearing submissions. The parties submitted briefs in support of their respective positions, and later submitted an exhibit referenced in the parties' Addendum to Joint Stipulation of Facts. The record closed upon receipt of the last submission.

FACTUAL DISCUSSION

At the hearing, petitioner testified on her own behalf and presented testimony by the principal (Melissa Sadin), the supervisor of special services (Linda Gelfand) and a co-worker (Edith Ann Costello) at the school during petitioner's third year of teaching. She also offered testimony by the former acting superintendent (John DiMuzio) and current superintendent (Richard O'Malley). The principal at the school where petitioner had taught during her first and second years (AnnMarie Griffin-Ussak) testified on behalf of the Board. A summary of the documentary evidence and pertinent testimony follows.

2008–2009 School Year

Petitioner began employment as a teaching staff member with the Board on September 1, 2008, and worked as a special education teacher at Washington Elementary School during that school year, where she had previously worked as a substitute teacher. Petitioner holds a bachelor's degree in psychology and special education, a master's degree specializing in reading and mathematics, K through 5, and certificates as a teacher of students with disabilities and an elementary teacher, grades K through 5.

During the 2008–2009 school year, petitioner was assigned to a fourth-grade inclusion classroom at Washington Elementary School. AnnMarie Griffin-Ussak (Griffin-Ussak), who began her career in education as a teacher in 1975, served as the principal at the school from December 2004 to August 2011. Catherine Swayze (Swayze) was the special education supervisor. Five formal classroom observations of petitioner were conducted during that year, four by Griffin-Ussak and one by Swayze. Griffin-Ussak further testified that she frequently visited classrooms for brief periods of time and also had occasion to informally observe petitioner. Griffin-Ussak completed two professional staff performance reports regarding petitioner in November 2008 and April 2009.

On September 23, 2008, Griffin-Ussak conducted her first formal classroom observation of petitioner. She prepared a report regarding the observation, which petitioner signed and a conference was held on September 26, 2008. (R-1.) In the report, Griffin-Ussak commented that petitioner's plan book was "complete"; her "[o]bjectives were well stated"; her plans were "detailed with thoughtful planning for each lesson and reference to the NJCCCS [New Jersey Core Curriculum Content Standards]"; and the "need for differentiated instruction is imbedded" in her lesson plans. She further commented that petitioner "has developed positive relationships with her students"; "[s]he is working with her co-teacher to establish a solid instructional team to support each child's learning"; and "[s]he has created a warm inviting atmosphere in her classroom," which Griffin-Ussak testified was a very positive statement for a teaching staff member. Griffin-Ussak informed petitioner in the report that her lesson "was presented to students who learn best in small group setting"; "[i]t is important to design the setting to maximize the effectiveness of your instruction and therefore the learning impact for the student"; and during petitioner's instruction time at the large board "several students were distracted and therefore not benefiting from [her] instruction." Griffin-Ussak testified that based on her observation there were a few things that needed to be brought to petitioner's attention and needed to be worked on, but that petitioner "was doing a fairly good job" and "it was a fairly good observation." The principal explained that she considers the teacher's years of experience in

connection with her observation and does not expect a first-year teacher, who is being observed for the first time, to practice the same way as a teacher with five to ten years of experience. As to some of the areas where petitioner did well, Griffin-Ussak stated that petitioner was "very warm" with the children and had "carefully decided what she was going to work on instructionally." As to the areas that petitioner needed to work on, Griffin-Ussak testified that petitioner "needed to be very careful about how she placed the kids," "making sure she had their attention . . . and being sure that she was aware . . . that they understood the learning." Petitioner acknowledged that the report was discussed during their conference and she had the opportunity to ask questions. She further acknowledged that Griffin-Ussak provided feedback in the report regarding what petitioner might consider doing and petitioner did not write a rebuttal to the report.

Griffin-Ussak prepared a Professional Staff Performance Report for the period ending November 2008, which petitioner signed on November 25, 2008. (R-2.) The report indicates that it was prepared with input from the special education supervisor, and Griffin-Ussak testified that she had a verbal conversation with Swayze regarding petitioner's performance. The Assessment of Teaching Performance section of the report states that it shall "include but not be limited to performance areas of strength and areas needing improvement based upon the job description." In this section it is reported that petitioner had demonstrated instructional proficiencies in creating a climate of mutual respect and providing a safe, positive and open classroom environment in which children and teachers take risks, and learn by trial and error. The report further informed petitioner in this section that she must increase her professional performance in various areas. The listed areas included petitioner's "[k]nowledge of effective instructional strategies designed to support growth for all students"; her "[k]nowledge and understanding of the fourth grade curriculum and its relationship to the NJCCS and the School Level Plan"; and her "[c]ollaborative planning with colleagues." Griffin-Ussak testified that at this point petitioner had demonstrated positive aspects of teaching in some areas, such as a warm and good relationship with the children in the classroom. However, petitioner needed to work on and grow in "her use of effective instructional strategies to make sure that all of her special [education] students were growing," and she needed to develop knowledge of effective instructional

strategies, along with an understanding of the fourth-grade curriculum and the content standards. Petitioner acknowledged that she had the opportunity to discuss the identified areas in which she must increase her professional performance with the principal during the conference. In response to whether Griffin-Ussak expressed to her that there were concerns about her abilities, petitioner responded, "Not really concerns, just these are things that you need to do."

Griffin-Ussak conducted a classroom observation of petitioner's language arts class on December 15, 2008. She prepared a report of her observation, which petitioner signed and a conference was held on December 23, 2008. (R-3.) In the report, Griffin-Ussak commented that "[m]odifications and adjustments for the targeted students are stated in generalities" in petitioner's plan books; they "must be made specifically for each student to support their needs and growth"; and the "[p]lans must include the specific strategies used to meet these needs along with alternate tests, organizers, study guides, etc." Petitioner agreed that the principal provided her specific feedback and suggestions in this section of the report. In the report, Griffin-Ussak noted that, although students were immersed in the learning during the mini-lesson on informational text, when the students returned to their desks for independent work, "many appeared confused not by the information presented but by the task itself." She further informed petitioner that "it appeared every student was using the identical graphic organizer"; "[t]he amount of information required on this organizer was daunting for most of [her] students"; it was "absolutely imperative" for petitioner "to create appropriate and effective tools" for her students; and "[f]or this assignment, [petitioner] should have foreseen the difficulty this would have presented to several of her students." Petitioner acknowledged that the principal was again giving her some specific criticisms and suggestions in this portion of the report. The report further advised that the "informational text available to [petitioner's] students did not appear to be at their independent level," which "creates a frustrating learning environment and does not support understanding and development of the intended skill," and "also indicates a lack of good planning on [petitioner's] part." Petitioner was informed that part of the planning to teach a skill involving any kind of text involves gathering the appropriate materials; students must have access to a variety of materials involving

informational text; baskets of appropriately leveled books should have been made available to her students; and "[i]t was disheartening to watch a struggling reader trying to work through a difficult passage in an encyclopedia when interesting and appropriately leveled materials were readily available." In the report, the principal directed petitioner to schedule an appointment with the curriculum resource teacher (CRT) "[t]o address the areas of concern," and noted that petitioner "must address proper planning including appropriate modifications" when she meets with the CRT and schedule a time for the CRT to provide coaching within the classroom setting. Griffin-Ussak testified that "the use of some of the tools in the classroom, such as a graphic organizer and the way it was done and planned at the time was not the most effective way" for the students to understand what petitioner had intended them to learn. The informational text that petitioner was using was also not at the students' level, and other materials could have been used that would have given them less frustration and more ability to attain the knowledge. Although petitioner did not recall the specific discussion during the conference, she recalled discussing the principal's comment regarding the students being confused, which was a concern of the principal for this lesson.

Petitioner testified that she scheduled an appointment with the CRT, Colleen Hamrah, after this report, and she met "frequently" with her that year. Griffin-Ussak explained that the CRT is a non-evaluative position and a coach whose responsibility is to support teachers and help them with the curriculum, instructional strategies and ways to support the students. According to petitioner, she found the CRT to be knowledgeable, "very helpful," non-threatening and positive, and the CRT made constructive comments and offered assistance to her, including providing her with specific resources or materials, throughout her first and second years of teaching.

On January 21, 2009, Swayze performed a classroom observation of petitioner's language arts class. Swayze prepared a report, which petitioner signed and a conference was held on January 29, 2009. (R-4.) In the report, Swayze informed petitioner that her "lesson plans were not up to date"; the activity identified in her plans "did not occur"; and Swayze would like to discuss petitioner's planning process during the post conference, stating that "[p]lanning is critically important to effective instruction

in the in-class resource room." Swayze further advised petitioner that "[a]ccommodations and modifications were not available for each student for the lesson," and petitioner "must" "utilize the content standards as her primary resource for selecting content to be learned," she "must" "effectively co-plan with the general education teacher so that content can be coordinated with the appropriate learning and instructional strategies that meet the learning needs of her students," and she "must" "provide daily in-class resource lesson plans with accommodations and modifications as per the IEP." Swayze noted that petitioner should have stopped more frequently at key information when working with four students in order to allow the students to process the information before moving on; that other active reading strategies could have been reinforced as well (e.g., making personal connections), which occurred on a few occasions but needed to happen more often during the lesson; and that petitioner must structure her lessons in order to be able to use kinesthetic responses, visual representations, and hands-on materials, which would permit her to enhance student understanding by promoting a multi-sensory delivery to best accommodate her students' individual learning modality strengths in the in-class resource room. Swayze's report informed petitioner that she would like to discuss at their conference the paraprofessional's role in petitioner's classroom, petitioner's role as the in-class resource instructor, and the progress of her students, along with "the role of the Inclusion Facilitator to assist [petitioner] with implementing effective strategies in the in-class resource setting." Petitioner was also directed that she "must work closely with her Supervisor, Inclusion Facilitator, and grade level colleagues throughout the year to enhance her instructional ability." Petitioner acknowledged that she had the opportunity to discuss the comments stated in the report during the conference. According to petitioner, she worked with her inclusion facilitator, who met with petitioner, watched petitioner teach a lesson and gave her suggestions, and petitioner found this individual to be helpful and pleasant and did not feel threatened or intimidated by her. Petitioner acknowledged that by this point, she had the opportunity to work with the CRT and the inclusion facilitator, and availed herself of those opportunities to try to improve.

On January 29, 2009, Griffin-Ussak performed a classroom observation of petitioner's language arts instruction and prepared a report, which petitioner signed and

a conference was held on February 6, 2009. (R-5.) In the report, Griffin-Ussak reiterated comments made in her December 15, 2009, observation report regarding petitioner's plan books (i.e., modifications and adjustments for the targeted students were stated in generalities, they must be made specifically for each student, and the plans must include the specific strategies used to meet these needs, along with alternate tests, organizers, study guides, etc.), and further commented that petitioner's "objectives for the scheduled lesson did not appear to match the observed lesson." She commented that petitioner used an effective instructional strategy and students presenting with difficulty attending were provided with assistance while petitioner was reading. Griffin-Ussak further informed petitioner that using a structure such as cloze format for retelling a story or passage would have provided more support in developing understanding of the story, and that they would discuss additional strategies and structures to more effectively accomplish her goal at the conference. She instructed petitioner to continue to meet with the CRT to ensure effective instructional strategies for her students and to schedule additional time for the CRT to provide coaching within the classroom setting. Griffin-Ussak testified that petitioner "needed to have a better sense of working with the students" and "the materials and the strategies that were best able to help them, and some of the things that she needed to work on to become more proficient were not evident in here." She explained that, although petitioner "spent some quality time here with some students," she could have done things to more effectively help the students gather what she intended them to learn, such as using a cloze format structure. Griffin-Ussak discussed her observations and where petitioner needed to grow at the conference, along with instructional strategies and structures, and suggested that petitioner meet with the CRT. Griffin-Ussak, who had served as a CRT, testified that she envisioned that the CRT would provide petitioner with support and knowledge in effective instructional strategies, and petitioner told her that she saw the CRT. Petitioner testified that she again continued to avail herself of the CRT resource. As to whether, based on the January 2009 observation, petitioner was where she should have been at this point in her career, Griffin-Ussak stated that she "had some concerns, but at this time, I was still watching her . . . [and] wanted to see what growth would happen." Petitioner acknowledged that she did not submit a rebuttal to this observation.

On March 13, 2009, Griffin-Ussak performed a classroom observation of petitioner's math instruction and prepared a report, which petitioner signed and a conference was held on March 18, 2009. (R-6.) In the report, the principal commented that petitioner's plan book was "complete" with "well stated" objectives; petitioner's "plans were detailed with thoughtful planning for each lesson and reference to the NJCCS"; and the "need for differentiated instruction is imbedded" in the lesson plans. She also reiterated her prior comments regarding petitioner's "positive relationships with her students" and "warm inviting atmosphere in her classroom." Griffin-Ussak commented that petitioner "presented students with several opportunities to manipulate the data" during the lesson; she was "also able to closely monitor the levels of understanding for each child"; and they would discuss during the conference students seeing the relevance of skills in their lives by the use of real-time scenarios and data, which Griffin-Ussak testified that she did not recall seeing as a negative, but just a typical thing one would want a teacher to do, which was discussed at the conference. Griffin-Ussak testified that during this observation she "was starting to see some things that [she] liked" and "some positive aspects of implementing the strategies that [petitioner] had been asked to do." Petitioner acknowledged that she had an opportunity to discuss the report during the conference and did not submit any rebuttal to the report.

Griffin-Ussak prepared a Professional Staff Performance Report, which petitioner signed on April 13, 2009. (R-7.) She explained that this is the summative and final professional staff performance report for the year for nontenured teachers. The report indicates that "[t]he instructional proficiencies expected are beginning to become evident in [petitioner's] planning, delivery of instruction, student assessment and classroom management," and "[s]ome improvement has been noted since the previous performance report." It lists some of the support that petitioner had received, including ongoing coaching, instruction and demonstration lessons from the CRT, who had met continually with petitioner regarding lesson planning, differentiating instruction and understanding her role as a co-teacher; visitation with experienced co-teachers to view effective implementation of effective co-teaching strategies and implementation of IEP

goals in an inclusive setting; and ongoing work with an experienced mentor, who the principal testified was a very experienced special education teacher. The report informed petitioner that during the coming school year she "must demonstrate professional growth" in various areas, including her "[c]onsistent use of effective instructional strategies for all students in her care"; her "[c]onsistent use of effective co-teaching strategies"; her "[k]nowledge and understanding of the NJCCS"; her "[a]bility to develop effective IEP goals"; her "[u]nderstanding and implementation of differentiated instruction"; her "[e]ffective classroom management skills"; and her "[e]ffective parent communication." Attached to the report is petitioner's 2009–10 professional development or improvement plan, which Griffin-Ussak explained is authored with input from the teacher, "every teacher needed one, and it's specific to areas where [petitioner] needed to grow" and to "improve." Petitioner testified that it set forth her plan for the upcoming year and she agreed with the plan. That plan listed areas of professional development such as "[d]evelop understanding of the elements and implementation of Writer's Workshop"; "[c]ontinue to participate in programs to deepen understanding of the curriculum, the core curriculum standards, and instructional strategies"; and "[d]evelop understanding of effective strategies to differentiate instruction in all areas of the curriculum in order to best meet the needs of all students." Griffin-Ussak explained that, in preparing the performance report, she uses all the knowledge that she has regarding the performance of the teacher, including prior reports of observations, and she used prior reports by herself and supervisory staff to construct this document. The principal noted that, apart from the supports listed, she also worked with petitioner on some of the matters through discussions and conferences. She testified that at this point the area of differentiation in instruction was a "theme" with respect to the criticism of petitioner's performance, and it was "an important one" because it is "the crux of instruction" and "an area where she needed to grow." Griffin-Ussak stated that the "biggest piece" of the areas of professional growth that she felt petitioner could improve was "consistent use of effective instructional strategies." Additionally, since petitioner was in a co-teaching situation, working with a co-teacher was a strategy that she had to become more proficient in, along with her knowledge of the curriculum, the standards and the students' IEP goals. Griffin-Ussak recommended petitioner for a second year, and she testified that she "wanted to give

[petitioner] a second year, because [she] thought that . . . while she had areas to work in, that she deserved a second year." She agreed that the sum total of the evaluations she did in year one were positive and culminated in her recommendation for a second year. Petitioner acknowledged that she had an opportunity to review the report before she signed it and did not submit any rebuttal to the report. According to petitioner, the principal did not express the listed areas in the report as a "concern," but areas where she needed to grow the following year. She further described this year as a "learning experience" for her, noting that she had not previously taught in an inclusion classroom.

2009–2010 School Year

Petitioner continued to work as an inclusion teacher at Washington Elementary School during her second year, but was moved to the third-grade level. Six formal classroom observations of petitioner were conducted during that school year, five by Griffin-Ussak and one by Swayze, and petitioner received three professional staff performance reports in November 2009, February 2010 and April 2010.

Griffin-Ussak performed a classroom observation of petitioner's language arts instruction on October 8, 2009, and prepared a report concerning her observation, which petitioner signed and a conference was held on October 13, 2009. (R-8.) In the report, the principal reiterated the comments in her September 23, 2008, and March 13, 2009, reports regarding petitioner's plan book and lesson plans, along with her earlier comments regarding petitioner's positive relationship with the students and warm inviting classroom atmosphere. Griffin-Ussak informed petitioner in the report that the strategy she used (i.e., chunking) enabled students to focus on target areas of the story; petitioner must "[b]e sure students understand the purpose of the text to self strategy"; and some students may not increase their ability to comprehend through the use of this strategy. She further advised that "[i]t is imperative to assess effectiveness of all strategies with individual students," and in petitioner's "supportive role" she must always "be prepared to differentiate the learning to meet the needs and IEP goals of each student in her care." Griffin-Ussak testified that petitioner used a strategy that was effective for some students, but it is "important to use strategies for each of the

did not discuss this statement with petitioner before the performance report. The areas identified in the report in which petitioner must increase her professional performance were concerns of the principal. Griffin-Ussak acknowledged that they were not expressed as concerns in the written observation report that preceded the performance report, but noted that several observation reports included similar statements to that in the performance report regarding that it is imperative that petitioner continue to develop increasingly effective instructional strategies. Griffin-Ussak acknowledged that she was on the township council and that there was a municipal election between her October observation report and the November performance report, but testified that this "absolutely" did not influence her construction of the performance report. She further testified that she was not aware whether petitioner's father was active in that election, she never heard of his involvement with the community, she was not aware of his involvement in any community endeavor or activity, and she did not know him. Petitioner acknowledged that she did not submit a rebuttal to the report and testified that she continued to work with the CRT as suggested and continued to find that person helpful.

Griffin-Ussak issued a "Memo of Concerns" to petitioner regarding the evaluation conference on November 24, 2009. (R-10.) The document reflects that it was copied to petitioner's personnel file and Swayze. The memo states that, as discussed, petitioner "must demonstrate increased understanding of the needs of each student with an I.E.P." Petitioner also "must demonstrate student growth through documentation of assessment data." She "must develop keen understanding of the Third Grade curriculum and develop lesson plans matching the Core Curriculum Content standards." Petitioner further "must increase [her] understanding and implementation of effective instructional strategies for all students." Griffin-Ussak explained that the memo "highlights specific areas for focus" and the areas that "stood out the most." She issued the memo to memorialize what had been discussed during their conference and to "highlight" the areas where petitioner needed to grow and to "make sure it was understood." The principal was "concerned at this point," and informed petitioner that she was concerned. Petitioner acknowledged that she

interpreted the listed items as "concerns" based on the title of the document and she did not write a rebuttal to the report or challenge it in any way.

Griffin-Ussak performed a classroom observation of petitioner during a language arts period on December 15, 2009, and prepared a report, which petitioner signed and a conference was held on December 22, 2009. (R-11.) In the report, the principal commented on the learning objectives in petitioner's lesson plans, which would be discussed during their meeting, including the fact that "[n]o indication of the intended learning is noted." She further informed petitioner that the reference material she "used was not sufficient for [the students'] use and for easy recall," and that it was "imperative" for petitioner "to continually monitor and adjust [her] instruction to meet the needs of each student." She instructed petitioner to meet with the CRT "to assist in choosing appropriate materials and designing effective instructional strategies to meet the needs of [her] students." Griffin-Ussak testified that this was not a positive observation. She explained that petitioner used a comprehension strategy to help the students, but it was not "necessarily used in the most effective manner," and some of the students were not understanding what she meant and they were not getting the objective. According to petitioner, she met with the CRT and again found her to be helpful.

Griffin-Ussak issued a "Memo of Concerns" to petitioner dated December 23, 2009, which depicts that a copy had been sent to Swayze, the director of curriculum and petitioner's personnel file. (R-12.) The memorandum informed petitioner that, as discussed in the post-observation conference of December 22, 2009, her "professional performance thus far is unsatisfactory" and "[d]emonstration of effective instructional design and practice must become evident immediately if continued employment is to be recommended." It instructed petitioner that "[t]he following critical areas must be addressed immediately:" (1) "Deep understanding of effective instructional strategies"; (2) "Ability to effectively differentiate instruction for students with IEPs"; (3) "Use of appropriate instructional material for the students"; (4) "Ability to plan lessons addressing the NJCCCS and the learning needs of each student"; and (5) "Effective use of support personnel." The memo further informed petitioner that she must contact

the CRT, the special education supervisor, the inclusion facilitator and the special education staff development trainer "for support in addressing the areas of concern in addition to other areas to assist [her] professional growth." Griffin-Ussak testified that the memo memorialized the discussion at the conference "so that we were clear on . . . the critical areas that needed to be addressed," and she documented it in a separate memo so that it was clear what the principal was expecting and the way they could help support petitioner. The principal described that she does this type of memo often because she wants teachers to clearly understand her expectations and understand that it is important for them to grow in a way so as to effectively support the students in the classroom. At this point, Griffin-Ussak continued to be concerned about petitioner's differentiation of instruction and, in her view, petitioner was not consistently demonstrating effective instruction as a special education teacher. Petitioner acknowledged that she did not submit a rebuttal to the report or challenge it in any way. According to petitioner, she contacted Swayze for assistance, they had a conference, and she referred petitioner to the CRT and the inclusion facilitator. Petitioner testified that she had met with the inclusion facilitator a few times, who came into her classroom on one occasion, and she continued to find her helpful. Petitioner acknowledged that, at this point, halfway through her second year, she was receiving resource support from the CRT, the special education supervisor to a lesser extent, the inclusion facilitator and the special education staff development trainer. According to petitioner, when she received the memo, she availed herself of the resource individuals provided to her, each helped her in different areas, she was satisfied with the assistance she received, and she felt that she improved in her third year as a result of that assistance.

Griffin-Ussak conducted a classroom observation of petitioner's language arts instruction on January 21, 2010, and prepared a report, which petitioner signed and a conference was held on February 1, 2010. (R-13.) In the report, petitioner was informed that her plans included objectives and some modifications, and petitioner should bring her plan book to the conference to discuss her objectives, how she designed the modifications for the lesson and what she planned to ensure that the students understood the concept. Griffin-Ussak further informed petitioner, "This lesson was redundant and a poor use of instructional time. Nearly fifty percent of the

instructional time was spent on the read-aloud and identifying the type of question asked. The material used by the students was focused primarily on the open ended response however the instruction was not. When designing lessons, it is imperative to focus on your learning objective and ensure instruction to support student understanding." Petitioner was also advised that "[l]earning occurs best through enthusiastic and motivating instruction"; "[a]s a new teacher, your instruction is surprisingly lacking in these areas," and she "must create a learning environment conducive to student growth." In the report, the principal further commented that petitioner's instruction did "not show evidence of a deep understanding of effective instructional strategies or the creation of an effective learning environment for [her] students," and petitioner was directed to meet with the CRT "to address these areas and improve [her] instructional capacity." Griffin-Ussak testified that the report expressed her concerns. She stated that petitioner's plans did not reflect what was happening in the classroom during the observation. The principal's "biggest concern" was that the "learning objective was not achieved through the instruction." She noted that "[n]early 50 percent of the instructional time was spent on reading and identifying types of questions rather than understanding why the questions were done" and it was not an "effective use of a strategy." Griffin-Ussak did not see petitioner's instruction showing a deep understanding of effective instructional strategies. She explained, "I was just not seeing what I expected at this point in her knowledge of effective instructional strategies and the students to be able to put that together and have a great outcome for her kids." Griffin-Ussak also did not see petitioner's enthusiasm and motivational skills during the observation and she was "disappointed in her lack of affect." Petitioner acknowledged that she did not submit a rebuttal to the report.

Swayze conducted a classroom observation of petitioner's language arts instruction on January 22, 2010, and prepared a report that petitioner signed and reflects that a conference was held in February 2010. (R-14.) The report states that petitioner's plan book contained measurable objectives and procedures and listed individual accommodations and modifications, but that individual accommodations and modifications must be listed for each lesson, which would be discussed at the conference. The report informed petitioner that Swayze "did not observe any concepts

of differentiated instruction" and petitioner "must use differentiation to meet the needs of all learners, especially student[s] with IEPs." It further indicated that they would discuss at the conference how petitioner could have differentiated the lesson according to the students' IEPs, and recommended that petitioner observe other in-class resource settings in the school or the district. Swayze also informed petitioner in the report that during her observation "many of the students were disinterested in the task at hand," petitioner "was very monotone and lacked motivation," and she "needs to be more animated and motivated." Petitioner acknowledged that she did not write a rebuttal to this observation and testified that she observed another in-class resource center, which she believed was before the end of this school year.

Griffin-Ussak prepared a Professional Staff Performance Report for the period ending February 1, 2010, which petitioner signed on February 8, 2010. (R-15.) In the report, she informed petitioner that "[f]ormal and informal observation indicate [that] she struggles with classroom management, effective lesson planning, ability to effectively implement IEP goals, and understanding of the learning needs of students." The report informed petitioner that Griffin-Ussak had "serious concerns" pertaining to petitioner's instructional proficiencies with regard to "[l]lesson planning and structure"; "[e]ffective modifications of content and instructional strategies"; "[s]trategies to support student learning"; "[s]tudent evaluation"; "[c]lassroom structure and management"; "[e]ffective support for students growth"; and "[u]nderstanding of content knowledge." It further detailed prior observation reports and memos that set forth the instructional and professional proficiencies in need of improvement as well as strategies/resources for improvement, and noted that beginning September 2008 and continuing through January 2010, petitioner had received the support of ongoing coaching, instruction and demonstration lessons from the CRT, who "has met continually with [petitioner] regarding lesson planning, classroom management, understanding the curriculum, effective modifications, as well as co-teaching strategies." Petitioner acknowledged that she did not file a rebuttal to this report.

Griffin-Ussak conducted a classroom observation of petitioner's math instruction on March 8, 2010, and prepared a report, which petitioner signed and a conference was

held on March 10, 2010. (R-16.) In the report, the principal commented that petitioner's plans included objectives and some modifications, and the plans reflected the learning needs and IEP goals of the students. She further stated that the students were engaged in their learning and were excited and enthusiastic about the work. The principal commented that petitioner "must continue to create a learning environment conducive to student growth," which "involves a deep understanding of the curriculum, effective learning strategies and an enthusiastic teaching manner," and directed petitioner to meet with the CRT "for strategies to support consistent improvement in these areas."

Griffin-Ussak conducted a classroom observation of petitioner's language arts instruction on March 18, 2010, and prepared a report, which petitioner signed and a conference was held on March 25, 2010. (R-17.) In the report, the principal commented that petitioner's plans included objectives and some modifications, they reflected the learning needs and IEP goals of the students, and several structures were planned to support her students' learning. She also commented that "[i]n reviewing your lesson plans, it is noted that this lesson was not an introduction to non-fiction"; "[a]ssessing students' prior knowledge connects them to the text in a meaningful way"; and "[i]n the lesson observed, this critical instructional component was absent." It further stated that "[g]uided reading must include silent reading with teacher assessment"; "[f]luency and comprehension must be monitored individually"; "[w]hen students are reading aloud, other students are not actively engaged"; "[a]ctive engagement increases learning"; and petitioner should meet with the CRT and staff development personnel for "strategies to support consistent improvement in these areas." Griffin-Ussak testified that the instruction listed in the lesson plans was not reflected in the actual lesson observed, and petitioner did not use guided reading, a structure that supports students effectively. She further testified that at this point she was "very concerned" about petitioner's performance as a teacher, she "did not see the growth" that she would have expected at this point, she was "very worried," and she did not think she could give petitioner a third year. Petitioner acknowledged that she did not file a rebuttal to the report.

Griffin-Ussak prepared a Professional Staff Performance Report for the period ending April 1, 2010, which she explained was a summative report for the entire year, and which petitioner signed on April 21, 2010. (R-18.) In the report, the principal noted in the "Assessment of Teaching Performance" section that the "instructional proficiencies expected are not evident in [petitioner's] planning, delivery of instruction and student assessment." The report further advised that petitioner "has not shown significant improvement since the previous performance report" and "[h]er ability to consistently deliver effective instruction is not evident." The report indicated that observations on October 8, 2009, December 15, 2009, January 21 and 22, 2010, and March 18, 2010, note "planning lacking clear objectives, instructional strategies and procedures," and "[a]lso noted was ineffective delivery of instruction and little evidence of a supportive learning environment for all students." It lists supports that petitioner had been given beginning in September 2008 and continuing through March 2010, which included ongoing coaching, instruction and demonstration lessons from the CRT, who had met continually with petitioner regarding lesson planning, effective instructional strategies, understanding third-grade curriculum and time management; formal and informal meetings with the elementary supervisor; co-teaching with an experienced teacher; coaching from the inclusion specialist and staff development specialist; district in-service on mandated curriculum initiatives; visitation with experienced special education teachers to view effective instruction and implementation of curriculum; and district staff development program with coaching. Griffin-Ussak stated in the report that petitioner "continues to struggle with the implementation of effective instructional strategies to support student learning"; petitioner's "ability to effectively support student learning is not evident," which "negatively impacts student growth"; petitioner's "[l]earning activities do not consistently support the instructional goals or engage students in meaningful learning"; and petitioner "has not demonstrated ability to create a strong connection between lesson plans, instruction and IEP goals." Petitioner was informed that "[s]ignificant improvement with regard to instructional behaviors and other expectations has not been noted since the performance report dated 2/1/10" and Griffin-Ussak was forwarding a recommendation to the superintendent for nonrenewal of her contract. Griffin-Ussak testified that she did not recommend petitioner for renewal for a third year because she "couldn't afford another year," the principal comes

to a point where she must look at what is most important for the students, and it was "important for [her] to make sure that those kids had the best teacher." Petitioner acknowledged that she did not submit a rebuttal to the report. According to Griffin-Ussak, she later learned through the Board's minutes that petitioner had been assigned to another school for the next school year, which the acting superintendent did not discuss with her.

Petitioner testified that her team during her second year consisted of three long-term substitutes and herself, and that the CRT was out on leave for a majority of the year. She stated that, although she received negative comments from her principal, she received a lot of positive comments from her students' parents, who asked if she would be teaching fourth grade because they would like their children to have another year with her. According to petitioner, CRT Hamrah also gave petitioner a lot of positive feedback and did not understand where some of the principal's negative comments were coming from. Petitioner described that she "felt very uncomfortable" during her second year and felt intimidated by Griffin-Ussak, who was "very cold" to her. According to petitioner, the principal would not acknowledge her in the hallway and would tell petitioner "I've already given you an answer" when she went to her with questions. Petitioner testified that she had not written rebuttals to Griffin-Ussak's reports because she had been advised by older teachers that doing such might rub the principal the wrong way, and petitioner did not want to get her angry where she would look for more negative things and things would get worse for her. In describing when she learned of her nonrenewal, petitioner stated that Griffin-Ussak informed her that she did not see significant growth and she was not recommending petitioner for a third year, and they did not review the report. Petitioner testified that Hamrah was "shocked" when she told her what happened, she advised petitioner to speak with her union representative, which petitioner did, and that representative suggested that petitioner make an appointment with the acting superintendent to discuss the matter.

The Meeting and Determination of the Acting Superintendent

John DiMuzio (DiMuzio) served as acting superintendent from approximately November 2007 to July 1, 2010. In a letter dated April 21, 2010, DiMuzio informed petitioner that, "[b]ecause the total number of positions available cannot be determined at this time due to staff members who may be returning from various leaves of absence, enrollment trends and financial constraints of the Edison Township Board of Education, you are hereby notified, in accordance with N.J.S.A. 18A:27-10, that you will not be offered a contract for the 2010–2011 school year." (R-19.)

DiMuzio testified that he had received a nonrenewal recommendation from petitioner's principal. He explained that at the time, teachers who were not recommended for renewal were given the opportunity to meet with the superintendent, and petitioner indicated through his secretary that she would like to discuss the nonrenewal letter that she received. According to DiMuzio, in advance of the meeting he received the outline marked as P-10, which he reviewed. He acknowledged that there was no name on P-10 and he did not know if it was accompanied by a transmittal letter. DiMuzio believed that he met with petitioner in April or May, but could not state whether it was before or after his April 21, 2010, letter. He testified that he met with petitioner in his office for approximately one half hour, they reviewed petitioner's outline, he "felt kind of bad that in [petitioner's] second year, she really didn't have the opportunity to work with the cooperating teachers that she was supposed to work with" because the teachers were out on leave, and he felt that "for her to grow as an individual in her second year, she would have needed the guidance not only of her mentor, but of a cooperating" teacher. DiMuzio stated his belief that petitioner indicated to him that she possibly could do a lot better if she taught in a different location. He did not give petitioner a decision at that meeting, and described conducting an investigation.

DiMuzio testified that in conducting his investigation, he met with Swayze for thirty to forty minutes. As to this conversation, DiMuzio could only recall that they discussed whether petitioner should have a third year and could be successful teaching

in another school. He had no recollection of the specifics concerning the discussion, except telling Swayze that if he decided to do that and petitioner was not successful in her third year, petitioner probably would not be recommended for tenure. According to DiMuzio, Swayze relayed that she thought petitioner should have a third year and could be successful in another school. DiMuzio acknowledged that he did not read Swayze's performance report about petitioner; he did not ask Swayze about the report, which he did not think she brought to the meeting; and he had no idea what comments or observations were in her report. He also admitted that he had no knowledge that one of the criticisms Swayze made about petitioner related to the use of differentiated instruction; he did not discuss Swayze's observation that petitioner's students were distracted and petitioner was very monotone and lacked motivation; and he made his determination without knowledge of these deficiencies. DiMuzio stated his belief that he also received a one-page memo from Hamrah about petitioner's teaching in her second year. He did not remember if he contacted Hamrah or whether she sent the memo unilaterally, and he did not meet with her. DiMuzio did not retain a copy of the memo and did not remember what he did with the memo after he received it. According to DiMuzio, Hamrah indicated that she thought petitioner did a very good job in the inclusion setting at the school, and she mentioned a number of events that petitioner had attended and that petitioner was going to pursue her master's degree in special education. DiMuzio could not state whether he contacted or met with Griffin-Ussak about petitioner or whether he read her observation reports during petitioner's second year, but he acknowledged that he did not read petitioner's first-year documentation. DiMuzio concluded that petitioner should be given another chance in another school. He denied any contact with petitioner's family members prior to his decision, but acknowledged that he plays golf with petitioner's father, which he began doing in July or August 2010, and after he retired on July 1, 2010.

Petitioner testified that she called DiMuzio's secretary in April 2010 to set up an appointment, and she met with him in his office a week or two later, accompanied by her union representative. She believed that the meeting was before DiMuzio's April 21, 2010, letter, and she did not recall seeing a letter regarding her nonrenewal. Petitioner testified that she gave P-10 to DiMuzio at the meeting, which included different parts of

her observations throughout the year and her version of the observations. According to petitioner, DiMuzio noticed that there were many inconsistencies; he felt as though there was "no backbone to the grade" since it included three long-term substitutes and a new teacher; and he indicated that he would look further into the situation. Petitioner had no later contact with DiMuzio. She described receiving a letter in June indicating that she had been given a contract for a third year and an assignment at John Marshall Elementary School and later receiving a telephone call in or around August advising of her Menlo Park Elementary School assignment.

2010–2011 School Year

Petitioner was assigned to the Menlo Park Elementary School during her third year. She was a third-grade resource room teacher for language arts and mathematics and provided in-class support in science and social studies. During that year, petitioner was supervised by Melissa Sadin (Sadin), the principal of the school, and Linda Gelfand (Gelfand), the supervisor of special services. Sadin had served in administration for fourteen years, as a teacher for approximately twelve years, and as the principal at the school for over two years, a position from which she had resigned as of her testimony. Gelfand has approximately forty-two years in education with approximately twenty-three years of teaching experience and approximately seven years as the supervisor of special services. Four formal classroom observations were conducted that year, three by Sadin and one by Gelfand. Performance reports were also prepared during that school year.

Sadin conducted a classroom observation of petitioner's writing class on October 19, 2010, and prepared a report, which petitioner signed and a conference was held on October 25, 2010. (P-2; R-20.) In her report, Sadin commented that students were engaged throughout the lesson, petitioner's lesson plans were up to date and related to the NJCCS, and her objective was measurable and connected to the curriculum. She further informed petitioner that she should ask the students to tell her what they remember from the previous lesson in order to obtain data about their understanding prior to the lesson and build on what they know, and that petitioner is required to wear

her name tag at all times. Sadin commented in the report that petitioner must validate the children's ideas to encourage them to write from what they know and should not tell them, "We are not talking about that." In addition, Sadin advised that if the students require a picture to begin their writing, petitioner should be sure to use the picture frequently when completing a graphic organizer and continually refer back to it to keep them on topic. She further informed petitioner that she should wait until all children are looking at her before she begins speaking because she must have them focused when she delivers important information. Sadin commented in the report that petitioner was asking children not to call out and then responding to their comments, and if she did not wish to have students call out, petitioner must stop reinforcing the behavior by responding. Sadin indicated in the report that they would discuss at the conference strategies for creating a responsive environment. As to this observation, Sadin testified that petitioner was warm with the children and had a sunny and positive disposition. However, petitioner was not presenting a lesson using the "Writer's Workshop" program, and Sadin expressed a desire for petitioner to become familiar with that program. In addition, Sadin testified that she was concerned about petitioner's classroom management, which she believed she discussed with petitioner, and she monitored throughout the year. Petitioner acknowledged discussing the comments in the report with Sadin. She further testified that she felt comfortable with Sadin, who was positive, supportive and helpful, and petitioner took her suggestions as constructive criticism.

Sadin prepared a Professional Staff Performance Report for the period ending November 2010, which petitioner signed on November 9, 2010. (P-5; R-21.) In the Assessment of Teaching Performance section, Sadin listed the following areas of good instructional practices: effective and up-to-date lesson plans that were aligned with the NJCCCS; modeled using the four-square graphic organizer; used effective pacing to present information in manageable segments; a learning environment is created which allows the students to respond in the way that is most appropriate for them; used positive reinforcement to enhance classroom management; and worked well with co-teacher. She further indicated in this section that to continue to grow professionally petitioner should concentrate on implementing the Writing Workshop model in the

resource center; seek advice on the workshop model from colleagues; submit lesson plans to administrator every other week; and read "The Power of Words" and discuss it with the administrator in December 2010. Sadin testified that the purpose of this document "was to summarize [petitioner's] performance for the observation cycle that was concluding" using any and all documents that had been presented to her or authored by her, and she discussed the document with petitioner. She indicated that the points regarding seeking advice on the workshop model from colleagues and submitting lesson plans to the administrator every other week were "significant to [her], because that indicates to [her] that the teacher needs support." With regard to the circle around "Recommended" in the "Employment Recommendation" section of the report, Sadin stated that she failed to remove the circle that was on this document on her computer, and testified that this was the first cycle in which she was doing these things as a new principal and she was struggling with learning how to navigate this process.

Gelfand conducted an observation of petitioner's language arts instruction on November 29, 2010, and prepared a report, which petitioner signed and a conference was held on December 10, 2010. (P-2; R-22.) In the report, she commented that petitioner's lesson plans were current, organized, detailed, aligned to the NJCCS, and met the district requirements by including objectives, instructional strategies and modifications, and they were written in an effective, organized manner, which was shown in the way in which the classroom was managed. According to the report, the lesson objectives were indicative of the activities taking place in the classroom and reflected a developmental level appropriate for the students in the class. Gelfand further commented that petitioner individualized the instruction to each student's level of expertise by providing one-to-one assistance at the level required for each student; the students were generally on-task and engaged for the duration of the observation period; petitioner had a warm and supportive attitude as she worked with the students; the students responded positively in their willingness to engage in the activities and challenges presented; and questions were readily answered and assistance was provided as needed. She also informed petitioner in the report that the lesson ended without a closure activity, and students need to process information before moving on in

order for it to be retained. In addition, she stated that the class consists of students with varying challenges and abilities and, as a result, requires incorporating some behavioral controls in order to keep them on task; they would discuss during the conference clarifying the exact behaviors required to remain in the "green" zone; and students should only be given one warning if they are demonstrating behaviors that will cause them to move to the "yellow" zone so that they know it is not just a threat. The report directed that petitioner "should continue to work with the CRT, administration, peers and on her own, in order to become familiar with the reading workshop and how to support our special education students best in an effort to improve instruction."

Gelfand testified that Sadin mentioned to her prior to the observation that she had some concerns about the way petitioner was using the reading program. Gelfand observed petitioner during a writing, not a reading, lesson. She described her evaluation of petitioner as "fair." Petitioner's "biggest strength" was that she was "a very warm and supportive teacher" and the "children seemed to respond well to her." She also had well planned lesson plans that were organized. Gelfand testified that there were "some weaknesses evident" and things petitioner needed to work on, as noted in her report. Gelfand stated that she discussed her observation and expressed her concerns to petitioner during the conference. She believed that she clearly communicated those concerns. Gelfand testified that she also discussed classroom-management concerns with the principal, she was in petitioner's classroom for informal brief walk-throughs or visits after this observation, and she observed during those informal visits that "[t]here were still some behavior-management issues" and the students "were not as focused as they should have been." Petitioner described that she felt comfortable with Gelfand and found her to be helpful, accommodating, supportive and competent, and petitioner had no problem with her ability as a supervisor. Sadin testified that she discussed with Gelfand her observation report, which Sadin read, after Gelfand had met with petitioner, as is her practice with all teachers with whom she shares supervision. Sadin similarly testified that Gelfand expressed concern about petitioner's classroom management, which Sadin at some point discussed with petitioner.

Sadin conducted an observation of petitioner's reading class on January 10, 2011, and prepared a report, which petitioner signed and a conference was held on January 28, 2011. (P-2; R-23.) In the report, Sadin commented that petitioner's lesson plans were up to date, connected to the curriculum and the NJCCCS, and indicated relationships to the IEPs. In addition, the physical space and furniture in the room was arranged in such a way to support instruction; petitioner's manner with the children was warm and encouraging; her learners were actively engaged throughout the lesson and developing increasing complex levels of understanding, as evidenced by the quality of their questions; petitioner effectively used prior knowledge to build background information; petitioner's effort to learn more about the reading workshop was clearly illustrated in the lesson; and the workshop was appropriately modified to meet the individual needs of her learner. She further advised that when petitioner shares a personal story to use for questioning, the story should be written on the easel ahead of time because her students need to be exposed to materials using many modalities at the same time; when a student asks how to spell a word she should ask the student to sound it out and avoid spelling words for students, as it reinforces dependence and interferes with risk taking; she should identify two to three students who will share before the students move to the carpet; and she should also dedicate space on her wall for a writing and reading center. Sadin commented that petitioner should also spend more time comparing and contrasting "thick and thin questions" and less time on the actual answers to the questions, noting that "[t]he point of developing a thick question may have gotten lost in the middle of your mini-lesson as students focused on the answers to the questions and not the components of the question that made it thick." She further noted that petitioner's closing question did not restate the objective. Petitioner acknowledged discussing Sadin's comments at the conference and not submitting a rebuttal to the report.

Sadin prepared a Professional Staff Performance Report for the period ending January 2011, which petitioner signed on January 24, 2011. (P-5; R-24.) In the report Sadin reiterated the good instructional practices listed in her earlier November report (except the comment as to modeling using the four-square graphic organizer) and added that petitioner demonstrates growing understanding of both reading and writing

workshops. As to the listed areas that petitioner should concentrate on to grow professionally, Sadin indicated that she should continue to implement the Writing Workshop model in the resource center, seek advice on the workshop model from colleagues, and continue to use empowering teacher language that places the responsibility of the learning and behavior on the students. Sadin acknowledged that the report did not state that petitioner was in need of improvement in any facet of her teaching, and the reference that she should continue to use empowering language was a directional comment for professional development.

Sadin conducted a classroom observation of petitioner's reading instruction on March 22, 2011, and prepared a report that petitioner signed and the conference was held on March 25, 2011. (P-2; R-26.) In the report, Sadin commented that petitioner's lesson plans were up to date and aligned with the district curriculum and the NJCCCS. She commented in the report that the mini-lesson was of appropriate length; the objective was broken down to accommodate the levels of her learners; there was appropriate active engagement during the mini-lesson; the learners were engaged in authentic activities throughout the lesson; petitioner provided the students with positive and specific feedback; the classroom furniture and physical resources were arranged in a way that supports student interaction and learning activities; the graphic organizer was differentiated to account for the vastly different learners; and the share was directly connected to the objective. She also informed petitioner that, as to her lesson plans, she should use the elements of the Reading Workshop to more define the procedures and must be sure to include a statement about closure. In addition, petitioner should "[t]ell the children what you want to see them doing, not what you don't want to see them doing." Sadin testified that "[l]ooking at [the document] now after another whole year as a principal with more guidance in that role, this looks like a positive document that's not clearly indicative of all my thoughts about [petitioner and] [i]t's an inadequate document." She stated that she has learned a lot in her past year as principal and improved her ability to observe teachers and to write reports that more accurately reflect her observations. Sadin agreed that she did not express any concern about petitioner's teaching ability in the comment section, and it was a "positive document." Petitioner acknowledged that she did not submit a rebuttal to this report.

Shortly after that conference, Sadin authored a Professional Staff Performance Report for the period ending April 2011, which petitioner signed on March 30, 2011. (P-3; R-27.) In the report, she noted the following good instructional practices: the mini-lesson was of appropriate length, the objective was broken down to accommodate for the levels of her learners and there was appropriate engagement during the mini-lesson; the learners were engaged in authentic activities throughout the lesson; petitioner provided them with positive and specific feedback, she accepted approximation to the skill and the students were free to take risks necessary for learning; the classroom furniture and physical resources were arranged in a way that supports student interaction and learning activities; the graphic organizer was differentiated to account for the vastly different learners in the group; and the share was directly connected to the objective and children were given the opportunity to share strategies used to use clues to make an inference. It further states that to continue to grow professionally petitioner should concentrate on the following: continue to implement appropriate parts of the reading and writing workshop in the resource center; reach out to the CRT for support; and continue to use empowering teacher language that places the responsibility of the learning and behavior on students. In the Assessment of Additional Professional Performance section it indicates that petitioner was willing to help when needed and asked, she collaborates with colleagues and she has worked well in her class support role. In the section regarding a Summary of Available Indicators of Pupil Progress it is reported that a review of petitioner's grade book, district assessments and/or standardized tests as well as formal observation demonstrates that her students are achieving at district standards; petitioner uses regular, ongoing assessment and uses the results of the assessment to monitor and adjust instruction; and she provides appropriate modifications and uses differentiated instruction to meet a wide range of learners' needs. In the Professional Development Plan section, the report refers to petitioner's participation in State-approved development programs during the 2011–2012 school year. The report also includes a circle around "Recommended" in the "Employment Recommendation" section.

Sadin testified that in constructing this report she used Gelfand's observation of petitioner for input, along with her own evaluations, and she did not speak or meet with Gelfand or any other administrator. She stated that the listed "good instructional practices" were her accurate thoughts of petitioner at the time, the listed continue-to-grow areas were professional-development statements and areas that she wanted petitioner to continue to work on, and no entries state that petitioner "needs improvement." When questioned about the professional development plan section, Sadin testified, "[a]t this point, I was concerned about [petitioner's] overall progress in the year" and "I was concerned about whether or not she would meet the standard for recommendation for tenure, but I was confused and ill-informed as to how to proceed with that concern as an administrator in the district." She indicated that the word "recommended" is circled because she had "left the circle on the document the way it was on [her] computer." The circle was on the document template that Sadin had been using; she had never been through the final evaluation cycle in Edison; and she did not know that she was supposed to remove it. Sadin further "understood that [she] was going to go to a progress monitoring meeting with the personnel director and the superintendent, and [she] was going to express her concerns [and] [s]he was not aware at that time that she was making a recommendation for tenure" or recommending petitioner for another year. Sadin held a conference with petitioner prior to April 1, gave petitioner her performance report, and recalled that the meeting was "pleasant." Sadin indicated that she followed the Observation and Evaluation Procedures (P-15) to the best of her ability. As she understood it, Sadin followed the provision requiring her, in the preparation of performance reports, to confer first with all personnel who came in contact with the teacher on a supervisory basis. Sadin understood that she was to confer with Gelfand because she was the only other individual who had observed petitioner, and Sadin conferred with Gelfand after her November 2010 observation. She did not recall whether she conferred any further with Gelfand prior to the preparation of her performance reports, including P-3. Sadin stated that she also followed to the best of her ability as to each performance report the provision that the report shall not contain any material unless it was brought to the teacher's attention. As to her evaluation of petitioner throughout the year, Sadin testified that there were things that she spoke with petitioner about when they met after each observation that she did

not put in writing in the document, and that she completed her evaluations to the best of her ability and in good faith.

Gelfand testified that Sadin did not meet with her prior to April 1, 2011, regarding her input for petitioner's evaluation, Gelfand had no direct input in the preparation of P-3, and Sadin did not discuss the document with her. Prior to the later meeting with the superintendent, Gelfand had not seen P-3 and was not aware that Sadin had recommended petitioner for renewal.

Meeting with the Superintendent

Richard O'Malley began his service as the district superintendent on February 7, 2011. He previously served as superintendent of schools in the Matawan-Aberdeen Regional school district and in the Mountainside school district for approximately three years, respectively. He also previously served as principal for two school districts, as an assistant principal in another district, and taught for three years. O'Malley holds a master's degree in teaching and a master's degree and doctorate in educational administration.

On April 7, 2011, O'Malley held meetings with the principals and supervisors of several elementary schools, including the Menlo Park School, which Sadin and Gelfand attended. The meeting regarding the Menlo Park School, along with the scheduled meetings as to other schools on the same and other days, is noted on R-25, entitled "Edison Township Schools Renewal/Non-Renewal/End of Year Timeline" for the "Spring 2011." O'Malley explained that the meetings were held because he had only been in the district for thirty-eight days and "was not part of any of the evaluation procedure or process or how it was distributed or . . . conducted [and he] wanted to make sure that [he] had a good idea of how [his] principals were evaluating, because they would present to [him] the documentation" and he ultimately made the recommendation to the Board for any teacher moving forward. He explained that a procedure was set up in which "all the principals would come before [him], assistant superintendents, special [education] directors and supervisors to review every staff member that was

nontenured, and they were to bring their performance reports, any documentation if they would be recommended for tenure, and any previous staff reports or any other documents they use in the evaluation process." O'Malley noted that "this allowed the process to take place where we had documentation and dialogue regarding individual staff members." O'Malley explained that he held the meetings on April 7, 2011, due to the "time frame that [he] walked into" in terms of when final evaluations had to be completed and when recommendations had to be made to the Board. Although he was aware that principals were handing evaluation reports out to teachers on or prior to April 1, O'Malley testified that the principals were "told not to make any recommendations for future employment," and "specifically told [by him] that they should not make any recommendation for the ensuing year prior to coming to [the scheduled] meeting [with him]." He gave this directive at an elementary-principal meeting approximately one month before the April 7, 2011, meeting.

O'Malley described that the principals brought the evaluation forms for the year and any prior year to the meeting, and he went down a list of nontenured staff members for each building. They discussed the teacher's status and performance, any recommendations, and/or any issues during the course of the year, and O'Malley went through a series of questions. O'Malley testified that "[i]t was clearly communicated verbally to the staff that the standard for tenure is very high" and he stressed to all administrators that he wanted the best teachers in the district. He further described that when the district offers an individual tenure it is about the individual's three years in the district, and the purpose of the meeting was for him to get an idea of the staff member for the member's entire term, including whether the teacher was good for his or her classroom, the school and the overall district.

O'Malley testified about the events regarding petitioner at that meeting. When petitioner's name came up, he went through a series of questions. O'Malley indicated that in his dialogue with Sadin, he "didn't get the feeling that Ms. Sadin was very strong in her recommendation" of petitioner and that "she felt comfortable," so he asked her "some deeper probing questions" regarding petitioner and Sadin's recommendations at that time. O'Malley testified that Sadin hesitated when he asked if petitioner was the

best candidate, he "didn't get a good feeling that she was making a recommendation," and he asked Sadin if she brought some of the evaluations or other documentation. Sadin shared her most recent evaluation (P-3), along with some past evaluations, which O'Malley reviewed. He asked Sadin why she circled "recommended" in petitioner's most recent evaluation, because his directive had been not to make any recommendation for the ensuing school year since he had not had a chance to review it with her. Sadin was one of two people who did not follow his directive. O'Malley noted the principal's nonrenewal recommendation during the prior year, they discussed petitioner's previous years, and he asked how two principals could have such differing opinions on evaluations. According to O'Malley, there was some conversation regarding petitioner knowing certain Board members, and it appeared to him that Sadin did not feel comfortable not recommending petitioner because of petitioner's or her parent's relationship with Board members, and being a nontenured principal she felt that her job would be in jeopardy. In discussing whether petitioner was the best teacher Edison could obtain, Sadin and Gelfand described petitioner as an average teacher. O'Malley indicated that he questioned the administrators as to why the written documents were different than their oral discussion, and conveyed that it was very confusing for someone who has been in the district for only thirty-eight days to make a decision on an individual's employment in view of the conflicting reports from year to year, as well as in their dialogue and what they wrote in the observations. O'Malley testified that he informed them, "You need to make a recommendation to me," and directed them "to go back, reflect on our conversation, and make a decision and a recommendation" to him regarding petitioner's future employment. O'Malley stated that he was very clear to them that he wanted the best candidate, they needed to make the best decision for the students, and he did not want any outside influences (e.g., Board members, parents, other political influences, etc.) to affect their decision. He stated that he wanted them to make the decision based upon what they saw and he would support their recommendation for or against petitioner's future employment.

Sadin testified that she understood that the purpose of the meeting was to review with the superintendent all of the nontenured teachers in her building. She described that O'Malley asked her at the meeting whether there was a nontenured

teacher that she had concerns about, and Sadin indicated that she had concerns about petitioner. O'Malley asked Sadin what her concerns were, and she expressed them. He also asked why there was a circle around "recommended" in the report, and Sadin responded that she had not understood the document; the circle was on the template and she left it there. Sadin described that O'Malley asked whether she recommended petitioner for tenure, she indicated her concern that petitioner did not meet the standards for tenure as he described them during the meeting a month earlier, and she told him that she did not recommend petitioner for tenure. According to Sadin, O'Malley informed her that her final evaluation needed to be a three-year look back, and he directed her to create and give him a document that had a three-year look back. Sadin took that to mean that it was a clarification of procedure for her that the final evaluation for nontenured staff needs to be a summary of all three years, and the document she previously authored was only for petitioner's third year. Sadin understood that she was to view the documents and observations during petitioner's first two years and create a three-year picture of petitioner's progress.

Gelfand testified that she discussed her recommendation regarding petitioner at the meeting. She recalled O'Malley giving some direction at the meeting, but did not recall his exact direction, except that he told Gelfand to meet with Sadin and petitioner and to review a revised report or to have petitioner sign a revised document. Gelfand testified that O'Malley directed Sadin to revise the report, but Gelfand did not remember his exact words and was unsure of the specific directions given to Sadin.

The Superintendent's Determination

Sadin testified that she spoke with Gelfand after the meeting about the writing of a three-year look-back report. According to Sadin, after the meeting she read petitioner's file, including documents by Griffin-Ussak and her own documents, and she attempted to create a document that accurately depicted her concerns about petitioner based on a three-year look back. Sadin prepared a second Professional Staff Performance Report for the period ending April 2011, which petitioner signed on April 8, 2011. (R-28.) The report states that it was prepared with input from the special

education supervisor and it "replaces the document dated 3/31/10." In the report, Sadin listed four of the six areas of good instructional practices that had been listed in her earlier March report. In the pupil progress section, it indicates that a review of petitioner's grade book, district assessments and/or standardized tests, as well as formal observation, demonstrates that some of petitioner's students are making satisfactory progress. The report further lists the various supports that petitioner had received that year (i.e., formal and informal instructional meeting with the principal, repeated instruction to meet with the CRT, co-teaching with an experienced teacher, regular meetings regarding writing lesson plans, district in-service and district staff development, and a copy of the "Power of our Words"). In the report, Sadin stated that petitioner "continues to struggle with classroom management" and "[h]er ability to consistently manage classroom behavior significantly deters her ability to deliver effective instruction. " She further indicated that petitioner "has not made a sufficient connection with the CRT despite repeated suggestion to do so," and it was reported that petitioner was "inattentive and disengaged in the workshop" during a recent staff-development opportunity. The report also indicates that "[s]ignificant improvement with regard to classroom management and other expectations has not been noted since the performance report dated 12/10/10," and Sadin was "forwarding a recommendation to the superintendent for non-renewal."

Sadin testified that she did not recall when she gave the report to Gelfand or the input Gelfand provided. She recalled sending a draft of the document to Gelfand via email for review and requesting her input, but did not recall getting a draft back from Gelfand or communicating with her to discuss the draft. She had included in the report reference to Gelfand's ongoing concerns about classroom management. Sadin testified that she recalled Gelfand arriving early so that they could review the document before petitioner entered the room, and discussing it before petitioner entered. As to certain items that she omitted from the report that had been in the earlier report, Sadin explained that she was creating a three-year look back and a document that "better demonstrated [her] legitimate concerns for petitioner's performance" and why she was not recommending petitioner for tenure. According to Sadin, the presenter of the workshop, who is also the CRT, discussed the fact that petitioner was inattentive and

disengaged with Sadin at the conclusion of the workshop, which Sadin discussed with petitioner. Sadin described that she prepared the report recommending nonrenewal to the best of her ability and in good faith, without coercion or threats from anyone, and of her own free will and volition.

Gelfand testified that she signed the performance report that included the nonrenewal recommendation, which she understood Sadin had written. According to Gelfand, she was not involved in the direct preparation of the document and did not provide any verbal input. The only written document that she provided to Sadin was her observation report, and Sadin incorporated information from that report with regard to petitioner's classroom management. Gelfand described that she did not speak with the principal prior to the meeting with petitioner, and she saw the report for the first time when they met with petitioner, which is when she signed it. Gelfand testified that she did "not completely" feel comfortable signing the document because she "really didn't give input into it." Although she thought the procedure of being asked to sign the document was "uncomfortable," Gelfand agreed with the outcome. Although she did not give verbal input with regard to the preparation of the report, she "didn't disagree with it." Although she did not read the document at the meeting, she did know that "the final result was that [petitioner] was not going to be recommended to continue, which [she] believe[d] was the right decision" and petitioner "was not ready to be a tenured teacher in Edison." Gelfand agreed then, and as of her testimony, with the recommendation not to renew petitioner based on her experience in education and direct observation of petitioner's performance in the classroom. Gelfand stated that she was not under any pressure by anyone to conform to Sadin's final recommendation not to renew petitioner, and her agreement with that recommendation was at the time, and as of her testimony, of her own free will and volition.

O'Malley testified he, not the principal, has the final decision-making authority with respect to making a recommendation on renewal or nonrenewal to the Board. He was not aware of any regulation or Board policy that limits a superintendent's renewal considerations and determination to only the last year's evaluations and observations. O'Malley testified that he read many documents from the current school year and the

previous school year before making his recommendation regarding petitioner. He reviewed observation reports of petitioner during the April 7 meeting and the evaluation from the prior year, which had not recommended petitioner for employment for the period ending April 2010. O'Malley made his decision not to renew petitioner based upon the items noted in her observations and summative evaluation as in need of improvement. (See R-30.) He testified that his decision not to renew petitioner was free from outside influence and made in good faith. O'Malley articulated his belief that it was a deliberate and reasonable decision after receiving the input that was available to him, and not arbitrary or capricious.

By letter dated April 28, 2011, O'Malley informed petitioner that pursuant to N.J.S.A. 18A:27-10 her employment contract would not be renewed for the 2011–2012 school year. (P-6; R-29.) Subsequently, in a letter dated May 24, 2011, O'Malley responded to petitioner's request for a statement of reasons for the decision to nonrenew her employment contract, and stated that "the decision was based upon the items noted in [her] observations and summative evaluation as in need of improvement." (P-7; R-30.) O'Malley testified that the Board was aware of the change that occurred as to the two evaluations. Petitioner was afforded an informal appearance before the Board on June 8, 2011, and, by letter dated June 9, 2011, the Board Secretary informed petitioner that, after careful consideration of the presentation made during her informal appearance, the Board did not take action to offer her reemployment for the 2011–2012 school year. (P-8; R-31.)

Petitioner testified that year three was "a very positive year" for her. She was assigned to a third-grade resource room for the majority of the day, where she provided extra support to a group of third graders in math and language arts. She co-taught science and social studies with another teacher, who petitioner described as a "fantastic teacher" and a "great resource" because they shared the same preparation period and because that teacher was a former special education teacher and CRT in Menlo Park. Petitioner described that she found her to be "very useful," "very helpful" and "always willing," and she went to this individual more than the CRT during the year. Petitioner stated that her interactions with Sadin during that year were "very positive," her reviews

were "good," "[e]verything was a positive comment," and Sadin would tell her how "proud" she was of petitioner's progress and that petitioner was a "great asset" to the school. She found Sadin to be "approachable" any time petitioner had a question, Sadin gave her "a lot of positive feedback" about how petitioner was running the resource room, petitioner enjoyed having conferences with Sadin, and she would "always walk out feeling great." According to petitioner, during those conferences Sadin never expressed any concerns to her or expressed that she may be at risk of being terminated. Petitioner testified that Gelfand conveyed a lot of positive things during her post-observation conference. According to petitioner, Gelfand informed her that her lesson was very good; it was on the students' level; she was proud of her; she really liked how petitioner managed her classroom; and petitioner managed the school lockdown that occurred during the observation "very well." Petitioner testified that Gelfand also complimented petitioner's behavioral plan, but suggested that petitioner expand it to include the behavior of the class as a whole, and did not express any concerns during that conference about her teaching abilities. She further stated that Sadin and Gelfand would discuss their comments with her during the post-observation conference, and neither evaluator expressed any concerns, negative comments or that she was in need of improvement.

Petitioner testified that after looking at all of her observations and the positive feedback, she believed that she would be recommended for a fourth year. According to petitioner, during her first meeting with Sadin, Sadin told petitioner, "I'm really proud of you this year. I enjoyed working with you." Sadin relayed many positive remarks and turned over her evaluation that was on the table in her office and said, "Congratulations. I'm recommending you for a fourth year." According to petitioner, on April 8, 2011, Sadin came to her classroom, they went to her office, where Gelfand was present, and Sadin with tears in her eyes told petitioner, "I'm sorry. The superintendent will not let me—will not grant you tenure. I have to change your evaluation." According to petitioner, Sadin put the performance report on the table and told her, "I'm so sorry. You know, I'm so proud of you. You did so good this year." Petitioner testified that both Sadin and Gelfand indicated that they would provide her recommendations to go to another district, and Gelfand advised her not to give up on teaching and that she was

going to be a great teacher. Petitioner described that she had signed the report prior to reading it, she read the document in her car, and she noticed that there were things that were not true and previously positive comments were taken out and substituted with negative comments. Petitioner disputed that she was "inattentive and disengaged during the workshop," and testified that she was taking notes and acting professional. She also offered testimony from a former colleague, Anne Costello, who sat across from her and testified that petitioner did not speak and her behavior was fine throughout the entire workshop.

DISCUSSION AND CONCLUSIONS

Chapter 27 of the school laws governs "employment and contracts," including provisions addressing the renewal of teaching staff members. Teaching staff members are employed under a one-year contract with the board of education. N.J.S.A. 18A:27-3. Pursuant to N.J.S.A. 18A:27-10, "[o]n or before May 15 in each year, each nontenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either . . . [a] written offer of a contract for employment from the board of education for the next succeeding year" or "[a] written notice from the chief school administrator that such employment will not be offered." N.J.S.A. 18A:27-4.1 sets forth the procedure to be used with regard to renewal determinations and provides in pertinent part:

> A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. A nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed. Prior to notifying the officer or employee of the nonrenewal, the chief school administrator shall notify the board of the recommendation not to renew the officer's or employee's contract and the reasons for the recommendation . . . .
>
> [N.J.S.A. 18A:27-4.1(b).]

N.J.S.A. 18A:27-4.1(b) also sets forth the rights of a nonrenewed employee:

> An officer or employee whose employment contract is not renewed shall have the right to a written statement of reasons for nonrenewal pursuant to [N.J.S.A. 18A:27-3.2] and to an informal appearance before the board. The purpose of the appearance shall be to permit the staff member to convince the members of the board to offer reemployment.

In short, "[a]ny teaching staff member receiving notice that a teaching contract for the succeeding school year will not be offered may, within 15 days thereafter, request in writing a statement of the reasons for such nonemployment which shall be given to the teaching staff member in writing within thirty days after the receipt of such request." N.J.S.A. 18A:27-3.2. In turn, the employee has ten calendar days following receipt of the board's statement of reasons to request in writing an informal appearance before the board. N.J.A.C. 6A:10-8.1(a). This appearance before the board is not "an adversary proceeding," but for "[t]he purpose of . . . provid[ing] the staff member the opportunity to convince [the] board . . . to offer reemployment," and the employee shall be notified in writing within three days of the informal appearance of the board's final determination. N.J.A.C. 6A:10-8.1(c) and (i). See Donaldson v. N. Wildwood Bd. of Educ., 65 N.J. 236 (1974). In the within matter, petitioner does not dispute that the Board complied with these procedural requirements.

Our courts have recognized that a nontenured teaching staff member has no legitimate claim of entitlement to continue employment and "is fully" aware when engaged that he or she "is serving a probationary period and may or may not ultimately attain tenure." Donaldson, supra, 65 N.J. at 245. It is well established that a board of education has "virtually unlimited discretion" in renewing the contract of a nontenured teaching staff member. Dore v. Bedminster Bd. of Educ., 185 N.J. Super. 447, 453 (App. Div. 1982); see Wise v. Trenton Bd. of Educ., EDU 160-00, State Bd. of Educ. (January 3, 2001), <http://njlaw.rutgers.edu/collections/oal/>; Pratt v. Butler Bd. of Educ., EDU 7948-96, State Bd. of Educ. (January 6, 1999), <http://njlaw.rutgers.edu/collections/oal/>; Kufel v. Union Cnty. Vo-Tech Bd. of Educ.,

96 N.J.A.R.2d (EDU) 446, 447 (State Bd. of Educ.), aff'd, 97 N.J.A.R.2d (EDU) 317 (App Div. March 27, 1997); Eisenberg v. Fort Lee Bd. of Educ., EDU 3049-04, Comm'r (March 11, 2010), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, No. A-3810-09 (App. Div. July 15, 2011), <http://njlaw.rutgers.edu/collections/oal/courts/>; Martin v. Asbury Park Bd. of Educ., EDU 6349-04, Initial Decision (September 13, 2004), adopted, Comm'r (October 15, 2004), appeal dismissed, State Bd. of Educ. (March 2, 2005), <http://njlaw.rutgers.edu/collections/oal/>; Bruder v. Plainfield Bd. of Educ., 97 N.J.A.R.2d (EDU) 55, 60. Indeed, in describing the breadth of this discretion, the Appellate Division has said, "absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board." Dore, supra, 185 N.J. Super. at 456; see also Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 578 (2009) (recognizing a board's "clear statutory right to decline to renew [a nontenured teacher's] contract"); Wyckoff Twp. Bd. of Educ. v. Wyckoff Educ. Ass'n, 168 N.J. Super. 497, 501 (App. Div.), certif. denied, 81 N.J. 349 (1979) (recognizing a board's "right not to renew the contracts of nontenured teachers"). Equally settled is a board's right to base its decision not to re-employ on matters beyond the employee's formal evaluations and the "right to reach its conclusion about a nontenured teacher on a broad base of input received from a variety of people, including members of the public, parents of students and a board member's own knowledge of a teacher . . . ." Dore, supra, 185 N.J. Super. at 453–54.

A board of education has "discretionary authority to decide whether any particular teacher should or should not be reengaged." Donaldson, supra, 65 N.J. at 246. It is firmly established that actions within a school board's authority are entitled to a presumption of validity and will not be overturned in the absence of an affirmative showing that the decision was arbitrary, capricious or unreasonable. See Dore, supra, 185 N.J. Super. at 453; Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966); Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960); Eisenberg, supra, EDU 3049-04, Comm'r (March 11, 2010), <http://njlaw.rutgers.edu/collections/oal/>. Indeed, it is recognized that "action of the local board which lies within the area of its discretionary powers may not be upset

unless patently arbitrary, without rational basis or induced by improper motives." Kopera, supra, 60 N.J. Super. at 294. When the challenged action is one that lies within the discretionary authority of the board, the Commissioner employs a limited scope of review; "[t]he scope of the Commissioner's review is . . . not to substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions." Id. at 296; see Martin, supra, EDU 6349-04, Comm'r (October 15, 2004) (upholding dismissal of petition "since petitioner has failed to meet the limited standard entitling non-tenured, non-renewed teaching staff members to relief, as established by the Appellate Division in Dore and Kopera"). The State Board of Education has also stated, "where a non-tenured teacher challenges a district board's decision to terminate his employment on the grounds that the reasons provided by the board are not supported by the facts, he is entitled to litigate that question only if the facts he alleges, if true, would constitute a violation of constitutional or legislatively-conferred rights." Kufel, supra, 96 N.J.A.R.2d (EDU) at 447; Wise, supra, EDU 160-00, <http://njlaw.rutgers.edu/collections/oal/>; see also Pratt, supra, EDU 7948-96, <http://njlaw.rutgers.edu/collections/oal/>.

The cases further make clear that the burden of proof rests upon the petitioner to show that the school board's discretionary determination was arbitrary, capricious or unreasonable. See Kopera, supra, 60 N.J. Super. at 297; Pratt, supra, EDU 7948-96, <http://njlaw.rutgers.edu/collections/oal/>; Tuck-Lynn v. State-Operated Sch. Dist. of Newark, EDU 3181-08, Comm'r (November 20, 2009) <http://njlaw.rutgers.edu/collections/oal/>, aff'd, No. A-2072-09 (App. Div. March 3, 2011), <http://njlaw.rutgers.edu/collections/oal/courts/>; certif. denied, 207 N.J. 189 (2011); Kondratick v. Hamburg Bd. of Educ., EDU 11195-07, Comm'r (September 29, 2009), <http://njlaw.rutgers.edu/collections/oal/>. As recognized by the Administrative Law Judge in Martin, "Kopera places an extremely high burden on someone seeking to overturn a board decision not to renew," and to meet that standard the petitioner "must demonstrate that the board's decision not to renew her contract was so far afield, so outside the realm of rational, evidentially based decision-making as to fail to even stand as a reasonable determination." Martin, supra, EDU 6349-04, Initial Decision (September 13, 2004), <http://njlaw.rutgers.edu/collections/oal/>.

Sadin had intended to circle this section and advised petitioner of such a recommendation as petitioner claims, it is clear that the superintendent, not the principal, has the final decision-making authority as to a recommendation regarding an employee's nonrenewal, subject to appeal to the Board. And, given petitioner's documented shortcomings, the superintendent's determination that petitioner's contract should not be renewed cannot be said to be without a reasonable and rational basis. Nor does the credible evidence support that the evaluations that were conducted were arbitrary or fatally flawed because they did not follow the district's procedures or the provisions in the Agreement between the Board and the Edison Township Education Association. See also Dore, supra, 185 N.J. Super. 447 (upholding a nontenured teacher's nonrenewal even where the statutory requirements for teacher evaluations had not been followed).

Overall, the documentation and credible testimony by petitioner's supervisors establish that petitioner was meticulously and consistently observed and evaluated throughout her three probationary years of service. Succinctly stated, while petitioner performed well in certain areas, there were several other areas in which she was adequately placed on notice of her less than satisfactory professional performance and the need to show improvement in her performance. It further reveals the extensive support and assistance that had been afforded to petitioner over the years toward improving her teaching performance. That petitioner had been given a second chance by the former acting superintendent after her second year does not operate to preclude the consideration of petitioner's first- and second-year evaluations or render the superintendent's consideration of petitioner's performance throughout her entire three-year career arbitrary, capricious, unreasonable or otherwise improper. See Bruder v. Plainfield Bd. of Educ., 97 N.J.A.R.2d (EDU) 55. Indeed, a local board may consider a variety of input beyond formal evaluations so long as the circumstances in total are not arbitrary and capricious. See Dore, supra, 185 N.J. Super. at 453–54. Apart from this, the evaluations that were completed in petitioner's third year included comments regarding deficiencies in petitioner's performance and areas in need of improvement. (See e.g., R-20 (report of classroom observation on October 19, 2010, informing petitioner, "You are asking children not to call out and then responding to their

comments. If you do not wish to have students call out, then you must stop reinforcing the behavior by responding"); R-21 (Professional Staff Performance Report for November 2010, pointing out several areas that petitioner should concentrate on, including implementing the Writing Workshop model, seeking advice on the workshop model from colleagues, and submitting her lesson plans to the administrator every other week); R-22 (report of classroom observation on November 29, 2010, advising, that the lesson ended without a closure activity, and students need to process information before moving on in order for it to be retained); R-23 (report of classroom observation on January 10, 2011, noting problems with having a story written on the easel, asking the students to sound out words, dedicating space on the wall for a writing and reading center, spending more time comparing and contrasting thick and thin questions, and making sure her closing question restates the objective); R-26 (report of classroom observation on March 22, 2011, advising that, as to her lesson plans, petitioner needed to use elements of the Reading Workshop to define the procedures and include a statement about closure, and petitioner should tell the children what she wanted to see them doing, not what she did not want to see them doing); R-28 (Professional Staff Performance Report recommending nonrenewal and stating that petitioner continues to struggle with classroom management; her ability to consistently manage classroom behavior significantly deters her ability to deliver effective instruction; she has not made a sufficient connection with the CRT despite repeated suggestions to do so; it was reported during a recent staff development opportunity that petitioner was inattentive and disengaged in the workshop; and significant improvement with regard to classroom management and other expectations has not been noted)).

The evaluations of petitioner throughout her career establish that in classroom observations several students were distracted, confused or disinterested during petitioner's instruction time and petitioner failed to use effective instructional materials to enable them to benefit from her instruction. (See, e.g., classroom observations on September 23, 2008 (R-1), December 15, 2008 (R-3), December 15, 2009 (R-11), and January 22, 2010 (R-14); and Memo of Concerns dated December 23, 2009 (R-12).) In other classroom observations, the evaluators found that petitioner presented a lesson that was redundant and a poor use of instructional time (see classroom observation on

determine that the ongoing concerns regarding petitioner's performance were of such a nature that her contract should not be renewed, and thereby granted tenure. Stated differently, there is rational and reasonable basis for the nonrenewal action, even if that decision could have been determined differently by others. I **CONCLUDE** that petitioner has failed to demonstrate that the decision not to renew her contract was arbitrary, capricious, unreasonable, taken in bad faith or otherwise improper. Accordingly, there is absolutely no basis for the Commissioner to interfere with respondent's vast discretion in this matter.

ORDER

Based upon the foregoing, I **ORDER** that petitioner's appeal be and hereby is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 9, 2014
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: April 9, 2014

Date Mailed to Parties: April 9, 2014

jb

APPENDIX

LIST OF WITNESSES

For Petitioner:

Kelly Lacik

John DiMuzio

Edith Ann Costello

Richard O'Malley

Linda Gelfand

Melissa Sadin

For Respondent:

AnnMarie Griffin-Ussak

LIST OF EXHIBITS IN EVIDENCE

Joint:

J-1 Joint Stipulation of Facts

J-2 Addendum to Joint Stipulation of Facts

For Petitioner:

P-1 Employment Contracts

P-2 Classroom Observation Reports for observations on October 19, 2010, November 29, 2010, January 10, 2011, and March 22, 2011

P-3 2010–11 Professional Staff Performance Reports for the period ending April 2011

P-4 2010–11 Professional Staff Performance Report for the period ending April 2011

P-5 2010–11 Professional Staff Performance Reports for the periods ending November 2010 and January 2011

P-6 Letter from Richard O'Malley, Ed. D., to Kelly Lacik dated April 28, 2011

P-7 Letter from Richard O'Malley, Ed. D., to Kelly Lacik dated May 24, 2011

P-8 Letter from Daniel Michaud to Kelly Lacik dated June 9, 2011

P-9 Memorandum from Catherine Swayze to AnnMarie Griffin-Ussak dated April 28, 2008

P-10 Undated memorandum

P-11 Memorandum from Richard O'Malley, Ed. D., regarding Professional Development Hours

P-12 Letter from AnnMarie Griffin-Ussak to Kelly Lacik dated June 7, 2010

P-13 Lesson Plan Feedback Sheets dated March 2011, April 2011, February 2011, and September 21, 2010

P-14 Agreement for Professional Employees Between Board of Education Edison Township and Edison Township Education Association, July 1, 2008–June 30, 2011

P-15 2009–10 Observation and Evaluation Procedures

For Respondent:

R-1 Classroom Observation Report for observation on September 23, 2008

R-2 2008–09 Professional Staff Performance Report for the period ending November 2008

R-3 Classroom Observation Report for observation on December 15, 2008

R-4 Classroom Observation Report for observation on January 21, 2009

R-5 Classroom Observation Report for observation on January 29, 2009

R-6 Classroom Observation Report for observation on March 13, 2009

R-7 2008–09 Professional Staff Performance Report for the period ending April 1, 2009

R-8 Classroom Observation Report for observation on October 8, 2009

R-9 2009–10 Professional Staff Performance Report for the period ending November 2009

R-10 Memo of Concerns from AnnMarie Griffin-Ussak to Kelly Lacik

R-11 Classroom Observation Report for observation on December 15, 2009

R-12 Memo of Concerns from AnnMarie Griffin-Ussak to Kelly Lacik dated December 23, 2009

R-13 Classroom Observation Report for observation on January 21, 2010

R-14 Classroom Observation Report for observation on January 22, 2010

R-15 2009–10 Professional Staff Performance Report for the period ending February 1, 2010, and memorandum from AnnMarie Griffin-Ussak to John DiMuzio

R-16 Classroom Observation Report for observation on March 8, 2010

R-17 Classroom Observation Report for observation on March 18, 2010

R-18 2009–10 Professional Staff Performance Report for the period ending April 1, 2010

R-19 Letter from John A. DiMuzio to Kelly Lacik dated April 21, 2010

R-20 Classroom Observation Report for observation on October 19, 2010

R-21 2010–11 Professional Staff Performance Report for the period ending November 2010

R-22 Classroom Observation Report for observation on November 29, 2010

R-23 Classroom Observation Report for observation on January 10, 2011

R-24 2010–11 Professional Staff Performance Report for the period ending January 2011

R-25 Renewal/Non-Renewal/End of Year Timeline for Spring 2011, and schedule

R-26 Classroom Observation Report for observation on March 22, 2011

R-27 2010–11 Professional Staff Performance Report for the period ending April 2011

R-28 2010–11 Professional Staff Performance Report for the period ending April 2011

R-29 Letter from Richard O'Malley, Ed. D., to Kelly Lacik dated April 28, 2011

R-30 Letter from Richard O'Malley, Ed. D., to Kelly Lacik dated May 24, 2011

R-31 Letter from Daniel Michaud to Kelly Lacik, dated June 9, 2011

R-32 Job Description for Curriculum Resource Teacher

R-33 Job Description for Staff Development Trainer

R-34 Job Description for Special Education Inclusion Facilitator

R-35 No document in evidence

R-36 Essential Instructional Behaviors

R-37 No document in evidence

R-38 Diagram

OAL DKT. NO. EDU 4514-14
AGENCY DKT. NO. 89-4/14

BILLY CHESTER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
MARGARET SNYDER AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.[1] Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/28/14
Date of Mailing: 5/29/14

[1] The petitioner's exceptions to the recommended Order were not considered because the regulatory provisions do not provide for exceptions to Orders on Emergent Relief. *N.J.A.C.* 1:1-18.4

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 04514-14

AGENCY DKT. NO. 89-4/14

BILLY CHESTER,

Petitioner,

v.

MARGARET SNYDER AND THE BOARD OF EDUCATION OF THE TOWNSHIP OF PENNSAUKEN, CAMDEN COUNTY,

Respondents.

Matthew S. Wolf, Esq., for Billy Chester, petitioner

Timothy J. Higgins, Esq., for Margaret Snyder, respondent

Frank Piarulli, Esq., for Pennsauken Board of Education, respondent

Record Closed: April 17, 2014 Decided: April 28, 2014

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

Billy Chester (petitioner) filed a petition for due process seeking a determination that respondent Margaret Snyder (respondent Snyder) had a conflict of interest at the time she was sworn in as a member of the Board of Education of the Township of Pennsauken (respondent Board) and that her assumption of office is void ab initio. In the current proceeding, petitioner seeks an order on emergent relief removing respondent Snyder from respondent Board pending the due process proceeding.

PROCEDURAL HISTORY

On April 11, 2014, petitioners' petition of appeal was filed with the Office of Controversies and Disputes of the New Jersey Department of Education, along with a request for emergency relief. On April 15, 2014, the emergent matter was filed along with the due process request with the Office of Administrative Law. The emergent relief request was scheduled for oral argument, which was held on April 17, 2014.

FACTUAL DISCUSSION

The petitioner filed a petition which contained the following enumerated alleged facts:

1. Petitioner Billy L. Chester is a tax paying resident of the Township and School District of Pennsauken. He voted in the election which is the subject of this dispute. He is the president of the Pennsauken Republican Club.

2. Respondent Snyder was employed by the Pennsauken Board of Education and gave written notice of her retirement on or about March 1, 2013.

3. At the time of her retirement, respondent Snyder had a claim against the Board of Education for her unused sick time.

4. Respondent Snyder's retirement was effective July 1, 2013.

5. Respondent Snyder claimed entitlement to a payment of $14,129.00 from the Board of Education.

6. On June 4, 2013, while respondent was still employed by the Board of Education, she filed a nominating petition to run for the Board of Education. She is a registered Democrat.

7. On November 5, 2013, respondent Snyder received the most votes in the election.

8. The voting result of the top four candidates for three contested positions were as follows:

Respondent Margaret Snyder	2192
Nicholas Perry	2041
Plaintiff JoAim Young	1326
Plaintiff Michael E. Stargell	1296

9. On November 12, 2013, respondent Snyder emailed to School Board members Matthew McDevitt, District Superintendent Marylin Martinez, Director of Personnel Curt Wrzeszczynski and the Board of Education Solicitor with a request to resolve her claim for compensation.

10. On November 14, 2013, respondent Snyder submitted a letter dated November 13, 2013 to McDevitt, with copies to all Board of Education members regarding her claim for compensation.

11. In her letter dated November 13, 2013, respondent Snyder referred to her employment contract, the collective bargaining agreement, her retirement and the election.

12. In her letter dated November 13, 2013, respondent Snyder made a claim against the Board of Education, wherein she stated, on the second page:

> . . . I feel that paying me the accrued sick time prior to assuming office will cure the conflict, and be in keeping with the collective bargaining agreement. Also, the payment is a one-time payment and would be paid in January 2014, the same month I would assume office.

13. Respondent Snyder goes on to state:

> . . . it is now incumbent upon Pennsauken Board of Education to seek to cure the conflict. I am requesting that the Board move and approve a resolution that the one-time payment of my accrued sick time is made prior to my being sworn into office as a member of the Board of Education. Payment can be made up until the day before the reorganization meeting; therefore, curing the matter.

14. On November 14, 2013, respondent Snyder met with Board President Matt McDevitt, board member Carlos Rodriguez, Solicitor Piarulli, Superintendent Martinez and the Board of Education Business Administrator, Celeste Rickets, "to discuss resolving my unused sick time payout request."

15. Respondent Snyder refers to her claim as a "petition."

16. On November 21, 2013, the Pennsauken Board of Education denied respondent Snyder's "petition."

17. On December 5, 2013, respondent Snyder made a claim on the Pennsauken Board of Education to reconsider its November 21,

2013, decision not to pay respondent Snyder's sick time in the manner in which she sought to have it paid, i.e, before she took her oath of office.

18. Respondent Snyder's letter requesting reconsideration, Exhibit D to her certification, makes the following statement:

> . . . I am again respectfully requesting that the Board reconsider their previous decision and issue payment to me for unused sick pay by December 20, 2013, the last pay date of this calendar year as published on the payroll website.
>
> Please be advised that in addition to exercising the teacher option set forth in Article X1I(A)(6), that is, receiving accumulated sick time payment in my retirement year, I am also requesting payment by December 20 to avoid and cure any potential or perceived conflict that a payout delay may create under N.J.S.A. § 18A:12-2.

19. The request to make payment by December 20, 2013, was denied at the Board of Education's December 12, 2013, meeting.

20. On January 7, 2014, respondent Snyder executed a document which purported to transfer the claim against the Board of Education to her daughter (see attached assignment).

21. On January 7, 2014, respondent Snyder took the oath of office, certifying that she was qualified to take office.

22. On January 7, 2014, respondent Snyder had a conflict of interest in violation of N.J.S.A. 18A:12-2, which provides:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county.

23. On January 23, 2014, the Pennsauken Board of Education approved the payment of Snyder's accumulated sick leave, which payment was made to respondent Snyder's daughter.

Many of the facts do not appear to be disputed, and the nature of the dispute is apparent. The parties do not dispute that the claim existed or that it would have been disqualifying. What is at issue is the effect of respondent Snyder's assigning of her claim to her adult daughter who is not a member of her household, specifically, whether that assignment cured the inconsistent interest. Additionally, respondent board has asserted that the identical facts were already heard before the Superior Court of New Jersey, Camden Vicinage as presented and argued by the same attorney and that after losing a motion for summary decision, the same matter was brought before the Commissioner with a different plaintiff.

LEGAL DISCUSSION

The standards which must be met by the moving party in an application for emergent relief in a matter concerning a special needs child are embodied in N.J.A.C. 1:1-12.6 and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the relief is not granted;
2. The legal right underlying the petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner must satisfy all four prongs of the Crowe test.

N.J.S.A. 18A:12-2 provides that "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county."

The parties do not dispute that respondent Snyder was elected to the respondent board and had an outstanding claim for a sick leave payout at that time. What is in dispute is whether or not respondent Snyder's assigning of her claim to her daughter, who is not a member of her household, on the date of respondent Snyder's taking of the oath of office effectively cured the conflict. Respondent Snyder and respondent Board believe it did, while petitioner maintains that it did not and that an indirect interest remained.

Petitioner argues that irreparable harm will exist if emergent relief is not granted in that respondent Snyder would be continuing to serve in an office which she is not eligible to hold. I am aware of no controlling authority which stands for the proposition that failure to remove a person from an office to which they were elected by the voting public while a challenge to their eligibility is litigated after they have assumed office on its face constitutes irreparable harm. Accordingly, I **CONCLUDE** that petitioner has failed to demonstrate that either he, or the public, will suffer irreparable harm if emergent relief is not granted.

As to the second and third prongs, petitioner argues that the law is well settled and that petitioner will likely succeed on the merits because petitioner had a disqualifying conflict which was not cured by her assigning of her claim. Respondents both argue that the assignment did cure the conflict, prior to the oath of office being administered and therefore petitioner is unlikely to succeed on the merits.

Neither view takes into account the complete set of circumstances before us. It is undisputed that respondent Board paid out on the underlying claim to respondent Snyder's daughter on January 23, 2014, after respondent Snyder took the oath of office yet before petitioner brought this challenge. The parties each spent considerable time discussing the Commissioner of Education's decision in Township of Barnegat, Ocean County, v. Robert A. Houser, EDU 22948-07, Initial Decision (May 23, 2007), modified, Comm'r (July 30, 2007), <http://njlaw.rutgers.edu/collections/oal/>. Petitioner points to the fact that the Commissioner held that the outstanding claim in the hands of a family member did render a board member's assumption of office void ab initio, while respondent's point to the fact that the family member was also a member of the Board Member's household, which is not the case in the present matter.

What was also noted in Houser is that the Commissioner indicated a reluctance to undo the results of an election and to remove a member of the board who had been duly elected and had been serving when the inconsistent interest was cured and the challenge brought after assumption of the office (and after the claim was settled), and held that the matter was best rectified by readministering the oath to Houser.

No doubt Houser represents a very specific fact pattern and deals with time frames that are much longer than those present in the current matter. There is no guarantee that the result would be the same but the fact pattern is similar enough that even if the undersigned were to determine that the assignment of the claim to respondent's Snyder did not cure the inconsistent interest, the ultimate likelihood of success by either party could possibly still be an open question. Houser may not present a perfect or even an appropriate analogy but the facts are similar enough to warrant an analysis.

Viewed through the prism of the current emergent relief application, the legal question is at best unsettled and accordingly, I **CONCLUDE** that petitioner has failed to demonstrate that he has a likelihood of succeeding on the merits of the underlying claim.

As to the fourth and final prong, each party argues that they will suffer greater harm if they do not prevail on the question of emergent relief. Considering the forgoing, it is apparent that if emergent relief is denied, petitioner still will have the opportunity to be heard and possibly obtain the relief he seeks upon conclusion of a plenary hearing. The same cannot be said for respondent Snyder, who would be forced to vacate a seat to which she was duly elected and possibly have the vacancy created by her departure filled by the County Executive Superintendant even though she may ultimately prevail at plenary hearing. Essentially it would be to undo an election in which the victor was seated before ever hearing the matter on the facts which allegedly disqualify her. Accordingly, I **CONCLUDE** that the balance of equities argument favors respondents, and that petitioner has **FAILED** to satisfy this prong.

Consequently, the petitioners' request for emergency relief is **DENIED**.

ORDER

For the foregoing reasons, I **CONCLUDE** that petitioner is not entitled to the requested emergent relief and that the petitioner's request for emergency relief is **DENIED**. The matter will now be scheduled for plenary hearing on the underlying due process petition.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

April 28, 2014
DATE

ELIA A. PELIOS, ALJ

EAP/mel

227-14L

227-14

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Acting Commissioner

May 29, 2014

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Stuart and Jerilyn Palmer, *Pro se*
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Re: *Stuart and Jerilyn Palmer v. Board of Education of the North Hunterdon-Voorhees Regional High School District, Hunterdon County, et al. OAL Dkt. No. EDU 14857-13, Agency Dkt.* 228-9/13.

Dear Parties,

I have considered the papers filed in connection with respondents' request for interlocutory review of Administrative Law Judge (ALJ) Scarola's May 12, 2014 Order granting in part and denying in part respondents' motion to dismiss. Upon full consideration of all of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, the respondents' request for interlocutory review is hereby denied.*

Sincerely,

David C. Hespe
Acting Commissioner

c: Honorable Susan M. Scarola
County Superintendent
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* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON MOTION TO DISMISS
OAL DKT. NO. EDU 14857-13
AGENCY DKT. 228-9/13

STUART AND JERILYN PALMER,
Petitioners,
v.
BOARD OF EDUCATION OF THE NORTH HUNTERDON-VOORHEES REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY; CHARLES M. SHADDOW, SUPERINTENDENT; RON PETERSON, PRINCIPAL, VOORHEES HIGH SCHOOL; AL STUMPF, ATHLETIC DIRECTOR; ELIZABETH NEMETH, HIB[1] SPECIALIST; RICK KURZ, TEACHER/COACH; and STEVEN SCHULTZ, DISTRICT HIB COORDINATOR,
Respondents.

Stuart and Jerilyn Palmer, petitioners pro se

Rita Barone, Esq., for respondents (Purcell, Mulcahy, Hawkins, Flanagan and Lawless, attorneys)

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[1] Harassment, intimidation and bullying.

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners Stuart and Jerilyn Palmer ("petitioners") filed a complaint on September 18, 2013, with the Commissioner of Education, Bureau of Controversies and Disputes, (Commissioner) seeking relief against respondent Board of Education (Beverly Thorne, Board president) of the North Hunterdon-Voorhees Regional High School District ("District" or "Board"), and named individual respondents Charles M. Shaddow, superintendent; Ron Peterson, principal, Voorhees High School; Al Stumpf, athletic director; Elizabeth Nemeth, HIB specialist; Rick Kurz, teacher/coach; and Steven Schultz, District HIB coordinator.

Petitioners request that the Commissioner (1) overturn the District's reappointment in February 2013 of Christopher Mattson as the high school varsity baseball coach, (2) discipline Kurz for violating the District's Policy 3281 by failing to report inappropriate conduct of Mattson, and (3) hold responsible and accountable Shaddow, Thorne, Peterson, Stumpf, Nemeth, and Schultz for also violating the District's Policy 3281 in regards to their investigation of harassment complaints involving Mattson and his retention as baseball coach.

On October 16, 2013, respondents filed a motion to dismiss the Petition in its entirety in lieu of an answer because (1) petitioners lack standing to assert their claims; (2) the Petition is untimely; (3) the issues are moot because the requested relief cannot be granted; (4) the Commissioner lacks jurisdiction to grant the requested relief; (5) the Commissioner lacks jurisdiction to decide issues under the New Jersey Ethics Act; and (6) the petitioners have failed to set forth a cause of action in the Petition. By letter dated December 30, 2013, the petitioners were notified that they had until January 10, 2014, to respond to the motion. The petitioners replied on January 9, 2014, and indicated their opposition to the motion.

FACTUAL DISCUSSION

Based upon a review of the allegations in the Petition and the respondents' motion to dismiss, the relevant facts at issue can be summarized as follows:

Petitioners are residents within the boundaries of the North Hunterdon-Voorhees Regional High School District. Petitioners have two sons, M.P., who was a senior at North Hunterdon-Voorhees Regional High School ("VHS") for the 2012–13 school year, and G.P., who was a junior at VHS during the same school year. M.P. played varsity baseball his sophomore and junior years. G.P. played junior-varsity baseball his sophomore year. The head baseball coach at VHS for the relevant period of time was Mattson.

The petitioners contend that the respondents ignored and failed to properly investigate alleged incidents of harassment, intimidation, and bullying by Mattson. Petitioners cite two alleged incidents involving M.P. in support of their claim. First, petitioners allege that on April 23, 2012, after the VHS baseball team lost a game and returned to the locker room, Mattson, in anger over the defeat, allegedly intimidated and humiliated M.P. in front of the team, by saying that M.P. had a poor attitude, and then ordered M.P. to play on the junior-varsity team for a couple of weeks as punishment. M.P. was emotionally distraught by the experience but the petitioners did not file a formal complaint at the time, beyond speaking with Stumpf, the athletic director, because they feared that Mattson would retaliate, not allow M.P. back on the varsity team, deny him playing time, and/or give him a negative recommendation to prospective colleges. Second, petitioners allege that on June 24, 2012, after a play during a baseball game in which M.P. was thrown out while running to third base, Mattson charged out of the dugout and physically assaulted M.P. by grabbing him by the throat while berating his performance. M.P. was very shaken by the incident.

By letter dated June 29, 2012, petitioners completed separate formal complaints on official VHS HIB reporting forms for the incidents of April 23, 2012, and June 24, 2012, and submitted them to Peterson, the VHS principal. On July 3, 2012, petitioners and Peterson met to discuss the complaints. By letter dated July 12, 2012, Peterson

notified petitioners that the investigation of their complaints was completed and that the District found no evidence that M.P. was the target of the investigated act of harassment, intimidation, or bullying. By letter dated July 20, 2012, petitioners appealed the findings of the investigation and requested a hearing before the Board.

By letter dated August 9, 2012, Shaddow, the District superintendent, notified petitioners that he was ordering a second investigation based on information in the petitioners' July 20, 2012, letter that had not been previously addressed and that warranted review and consideration. The superintendent referred the matter to the Board's legal counsel to conduct the investigation. By email dated August 16, 2012, Thorne, the Board president, notified petitioners that the Board would not take any action on this matter until the superintendent's investigation was complete. The results of the superintendent's investigation are not contained in the record of this matter. However, petitioners allege that an attorney, named Ms. Liss, conducted the investigation and provided a summary of her report to them on November 26, 2012. According to petitioners, the report substantiates that Mattson made physical contact.

Despite the findings by the Board's counsel, at a meeting of the Board on February 26, 2013, the Board accepted the superintendent's recommendation and voted to retain Mattson as head baseball coach for VHS. On March 1, 2013, G.P. attended tryouts for the junior-varsity baseball team but was sent home by Mattson, who told G.P. that his registration and medical paperwork were not complete. The petitioners contend that Mattson's action conflicted with information received from the school nurse, who had assured G.P. when he submitted his paperwork on the morning of the tryouts that he was good to go. G.P. felt intimidated by Mattson. The petitioners then concluded that G.P. would not be safe with Mattson running the baseball program and would not permit him to play baseball.[2]

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[2] Mattson was no longer the head baseball coach at VHS after September 24, 2013, when the Board voted to name Cory Kent as the head baseball coach.

LEGAL ANALYSIS

I. STANDING

The petitioners have standing to pursue this matter because they have a son who is a current student at VHS and who seeks to play baseball but does not do so out of concern for his safety around Mattson.

As an initial matter, the issue of standing and jurisdiction must be determined in order for the OAL to hear and decide this case. The Commissioner of Education has "jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. In performing his duties, the Commissioner must determine whether a school board's actions are violative of the law, and if so, "the proper discharge of his duty requires corrective action." Kopera v. Bd. of Educ. of W. Orange, 60 N.J. Super. 288, 296 (App. Div. 1960) (citing Masiello v. State Bd. of Exam'rs, 25 N.J. 590, 607 (1958)).

The Petition does not clearly cite which school laws the petitioners allege the respondents violated. Nonetheless, the Petition clearly alleges incidents that, if substantiated, may violate New Jersey anti-bullying laws. Such a claim undeniably arises under the school laws since the New Jersey Legislature has conferred authority to enforce the anti-bullying statutes set forth in N.J.S.A. 18A:37-15, et seq., upon the Commissioner of Education. L.W. ex rel. L.G. v. Toms River Reg'l Sch. Dist., 381 N.J. Super. 465, 498 (App. Div. 2005), modified in part, affirmed in part, and remanded, 189 N.J. 381 (2007). Therefore, to the extent that the Petition alleges that Mattson, a District employee, engaged in harassment, intimidation, and bullying conduct, the Commissioner has jurisdiction to hear the controversy, make factual findings, and ensure that the District's response complied with the State's HIB policies and procedures.

Next, for petitioners to pursue this action, the threshold consideration is whether petitioners have standing. The concept of standing requires that "a particular litigant must have sufficient interest in the subject of the litigation so that a genuine clash between opposing viewpoints will be presented." U.K. and G.K. ex rel. D.K. v. Clifton

Bd. of Educ., 93 N.J.A.R.2d (EDU) 71, 73 (citations omitted). To establish standing, a litigant must show (1) that he has "a sufficient stake in the outcome of the proceedings," and (2) that his position is "truly adverse to the opposing party." Ibid. (citing Home Builders League of S. Jersey v. Berlin Twp., 81 N.J. 127, 132 (1979)). New Jersey courts and administrative agencies have been liberal when recognizing standing and have permitted individuals even with only "tangential interest to assert a claim." Ibid. Nevertheless, the courts have declined to entertain proceedings brought by parties "'who are mere intermeddlers' or 'merely interlopers or strangers to the dispute.'" Ibid. (citing Crescent Park Tenants Ass'n v. Reality Equities Corp., 58 N.J. 98, 107 (1971)).

Restrictions on standing are applicable to those who initiate administrative proceedings before the Commissioner. To have the requisite standing pursuant to the New Jersey Administrative Procedure Act, the Commissioner has clarified through regulation as well as case law that only an "interested person," one who "will be substantially, specifically, and directly affected by the outcome of [the] controversy," may initiate such proceedings. N.J.A.C. 6A:3-1.2; Bedminster Educ. Ass'n v. Bedminster Twp. Bd. of Educ., EDU 6720-05, Final Decision (June 16, 2006), <http://njlaw.rutgers.edu/collections/oal/>; U.K., supra, 93 N.J.A.R.2d (EDU) at 73. Consequently, petitioners must show that they will "be affected by the outcome in a direct and meaningful way" before they may proceed in a contested case. U.K., supra, 93 N.J.A.R.2d (EDU) at 73. An evaluation of standing must also be guided by the New Jersey tradition of liberal application of criteria regarding standing. See Crescent Park Tenants Ass'n v. Reality Equities Corp., supra, 58 N.J. at 101 (citations omitted) ("New Jersey cases have historically taken a much more liberal approach on the issue of standing"). In the education context, it is well settled in New Jersey that parents have standing in an administrative hearing to bring a case to secure a safe and secure learning environment for their own child. See U.K., supra, 93 N.J.A.R.2d (EDU) at 73 (discussing relevant case law).

To reiterate, to establish standing litigants must show that they have a sufficient stake in the outcome of the proceedings. Further, the Commissioner has indicated that an interested party must be substantially, specifically, and directly affected by the outcome of the controversy. In this matter, the respondents contend that petitioners

lack standing to the extent that they are acting on behalf of the North Hunterdon-Voorhees community or bringing this action on behalf of M.P., who is over the age of eighteen and graduated from VHS in 2013. However, this narrow view ignores the fact that the petitioners' other son, G.P., remains a student at VHS and desires to play baseball but does not do so due to safety concerns with Mattson. Accordingly, petitioners have demonstrated that they have standing because they have a sufficient stake in the outcome of the proceedings, or would be directly affected by the outcome of the controversy, as it relates to the ability of G.P. to safely participate in the baseball program.[3]

II. TIMELINESS OF PETITION

While the Petition was filed beyond the 90-day limitation, enforcement of the rule must be relaxed in this case because there is an allegation that a teaching staff member has engaged in HIB behavior.

Respondents next contend that the Petition should be dismissed for being untimely because it was not filed until September 18, 2013, which is more than 90 days after all of the events occurred upon which the petitioners base their claims, specifically, the final action of the Board to reappoint Mattson on February 26, 2013. When a petitioner desires the Commissioner's review of a school board action, the petitioner must file an appeal "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3(i). In Kaprow v. Board of Education of Berkeley Township, 131 N.J. 572, 582 (1993), the New Jersey Supreme Court held that the Commissioner has the authority to establish a time limitation for the resolution of disputes arising under the school laws and addressed the public-policy reasons behind the 90-day rule:

> The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. . . . The limitation period gives school

[3] Conversely, for the record, petitioners do not have standing to bring any claims on behalf of other students that may have been victims of HIB conduct. See U.K., supra, 93 N.J.A.R.2d (EDU) at 73.

> districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days.

However, while public policy favors providing school districts with a measure of repose, this must be weighed against the discretionary authority of the Commissioner to relax the 90-day rule, pursuant to N.J.A.C. 6A:3-1.16, under exceptional circumstances. See Kaprow, 131 N.J. at 590–91 (citation omitted) ("the Commissioner [is authorized] to relax procedural rules in his discretion 'where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice'"). Recognizing that relaxation of this rule is invoked rarely, it remains that strict application of the rule in this matter would be inappropriate where there is an allegation that a teaching staff member engaged in HIB behavior. In this specific case, the public policy favoring enforcement of the 90-day rule must yield to the Commissioner's ultimate duty to ensure compliance with the school laws relative to student and staff safety. See "Anti-Bullying Bill of Rights Act," N.J.S.A. 18A:37-13 et seq.

III. MOOTNESS

The removal of Mattson from his coaching position does not render the present controversy moot because resolution of the HIB claim is needed to ensure that students are not exposed to inappropriate behavior in another setting.

Respondents request that the Petition be dismissed as moot because the requested relief of reversing the Board's action to reappoint Mattson cannot be granted since he no longer occupies the head coach position. The doctrine of mootness is a judicially-created tool utilized for reasons of judicial economy and restraint as well as the fundamental principle that courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interests. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976). An issue is moot when the decision sought in a matter, when rendered, "can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257–58 (App. Div. 2006). Finally, the New Jersey Supreme Court has recognized that such court-fashioned doctrines for handling litigation are applicable to administrative proceedings. City of Hackensack v. Winner, 82 N.J. 1, 29 (1980).

Here, while the respondents are correct that Mattson no longer occupies the head coach position and, therefore, this specific relief is no longer available, the Petition also contains an inherent request that the Commissioner find that Mattson engaged in HIB conduct as a prerequisite to granting the requested relief. The Commissioner has recently made clear that where a teaching staff member may still be employed by a school district, resolution of an HIB claim is needed, regardless of whether the employee has been relieved of the staff position at issue. See J.M. ex rel. T.M. v. Bd. of Educ. of Tinton Falls, EDU 7871-13, Initial Decision (Dec. 12, 2013), <http://njlaw.rutgers.edu/collections/oal/>, remanded, Comm'r (Jan. 23, 2014), <http://www.nj.gov/education/legal/>. In Tinton Falls, the petitioner alleged that the school's cheerleading coach bullied T.M., who wished to be a cheerleader. The administrative law judge (ALJ) initially granted summary decision to the school district after finding that the controversy was moot as a result of the removal of the cheerleading coach from her coaching position. However, the Commissioner remanded the matter for a hearing after determining that the removal of the coach did not render moot the petitioner's request for a finding that the coach engaged in HIB conduct. In this situation, the Commissioner instructed that the ALJ should conduct the necessary fact-finding, and if the petitioner's allegations were supported, "a finding of HIB should be entered into [the employee's] personnel file and reported to the Department of Education, and corrective measures should be taken so that students are not exposed to inappropriate behavior by [the employee] or other coaches and teaching staff." Conversely, if the facts do not support an HIB determination, there should be an express finding of such in an Initial Decision. Accordingly, for the same reasons articulated by the Commissioner in Tinton Falls, the removal of Mattson from his coaching position does not render the present controversy moot, and a fact-finding determination relative to the HIB allegations must be made.

IV. DISCIPLINE

The Commissioner does not have jurisdiction to adjudicate a claim for discipline against district personnel in a petition filed by individual citizens.

Respondents also request that the Petition be dismissed because the Commissioner does not have the authority to grant the request that disciplinary actions should be imposed on employees of the school district. The Commissioner has expressly addressed this issue by affirming an Initial Decision that held that the Commissioner does not have jurisdiction to adjudicate a claim for discipline against district personnel in a petition filed by individual citizens. See A.T. and M.T. ex rel. M.T. v. Bd. of Educ. of Carlstadt, EDU 7129-10, Initial Decision (Sept. 13, 2010), aff'd, Comm'r (Oct. 21, 2010), <http://njlaw.rutgers.edu/collections/oal/>. In Carldstadt, the Commissioner affirmed that only a board of education may forward disciplinary charges to the Commissioner for a hearing pursuant to N.J.S.A. 18A:6-11. The cited statute instructs that a charge against a school employee under tenure must be filed with the board in writing and then, "[i]n the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then [the board] shall forward such written charge to the commissioner for a hearing . . . ." N.J.S.A. 18A:6-11. Accordingly, since the Board has not referred any charges in this matter, the Commissioner does not have jurisdiction to grant the requested relief imposing any disciplinary action upon Mattson, Kurtz, or any other District employee. That portion of the Petition requesting any such relief must be dismissed.

Furthermore, having determined that there is no jurisdiction to discipline District personnel, the individual respondents identified in the Petition must be removed as parties to this action because, even if it is ultimately determined that they violated any HIB policy in the investigation and reporting of the allegations against Mattson, the Commissioner has no jurisdiction to discipline them in a case filed by individual citizens. Specifically, named individual respondents Charles M. Shaddow, Beverly Thorne, Ron Peterson, Al Stumpf, Elizabeth Nemeth, Rick Kurz, and Steven Schultz must be

removed, with the result that the only respondent is the Board.[4] In this matter, jurisdiction is limited to making the factual findings relative to the allegations involving Mattson and, if necessary, ordering corrective action if it is ultimately determined that any of the State's anti-bullying laws were violated. See Tinton Falls, supra, EDU 7871-13, Initial Decision (Dec. 12, 2013), <http://njlaw.rutgers.edu/collections/oal/>, remanded, Comm'r (Jan. 23, 2014), <http://www.nj.gov/education/legal/>; Kopera, supra, 60 N.J. Super. at 296.

V. ETHICAL VIOLATIONS

The Commissioner does not have jurisdiction to adjudicate the claims in this matter arising under the School Ethics Act because the School Ethics Commission has exclusive jurisdiction over this issue.

Respondents contend that the petitioners' claim that respondents violated portions of the New Jersey School Ethics Act, N.J.S.A. 18A:12-21 et seq., should be dismissed because the Commissioner does not have jurisdiction to adjudicate this claim. As previously discussed, the Commissioner's jurisdiction is defined by statute, and is limited to "controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. While the School Ethics Act is codified under Title 18A, which contains the school laws, the Act established the School Ethics Commission and vested that Commission with jurisdiction to hear and decide violations of the Act. N.J.S.A. 18A:12-27. The implementing regulations direct that, in order to achieve the goals of the Act, the School Ethics Commission was created "specifically for the purpose of enforcing those ethical standards through a procedure for reviewing complaints of ethical violations," and "[t]he School Ethics Commission shall have jurisdiction over matters arising under the Act." N.J.A.C. 6A:28-1.1(b); N.J.A.C. 6A:28-1.4(a).

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[4] Mattson is not a named party to this matter. To the extent that his participation is needed is a matter for the parties to decide, recognizing that petitioners have the burden to prove their claims by a preponderance of the credible and competent evidence. See In re Polk License Revocation, 90 N.J. 550, 561(1982); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Mattson is not an indispensible party, as that phrase is defined at N.J.A.C. 6A:3-1.2, to the resolution of the controversy between petitioners and the Board.

Simply put, pursuant to the statutory and regulatory framework, a complaint alleging a violation of the Act must be filed with the Commission, which ultimately determines whether the conduct complained of constitutes a violation of the Act. See N.J.S.A. 18A:12-29. The Commissioner has re-affirmed the School Ethics Commission's exclusive jurisdiction over conduct proscribed by the School Ethics Act, and that the "review and adjudication of allegations of Code of Ethics for School Board Members violations is solely within the jurisdictional purview of the School Ethics Commission." Castriotta v. Bd. of Educ. of Roxbury, EDU 9217-10, Final Decision (May 18, 2011), <http://www.nj.gov/education/legal/>, rev'd on other grounds, 427 N.J. Super. 592 (App. Div. 2012). Accordingly, that portion of the Petition alleging a violation of the School Ethics Act must be dismissed.

VI. FAILURE TO ASSERT CLAIMS UNDER WHICH RELIEF CAN BE GRANTED

The Petition gives respondent adequate notice of the alleged conduct by Mattson as violating the State's HIB laws.

Respondents contend that the Petition must be dismissed because it fails to assert claims under which relief may be granted. In light of the preceding analysis, having dismissed all claims relative to discipline of any school district employee and any claim alleging violation of the School Ethics Act, the only remaining identifiable claim is whether Mattson engaged in HIB conduct and whether the District failed to follow the State HIB policy regarding investigating and reporting such claims. A plain reading of the Petition apprises respondent of these allegations. Accordingly, for the same reasons outlined by the Commissioner in the Tinton Falls remand, this matter must proceed so that the necessary fact-finding, specifically, whether the allegations are supported and whether the State's HIB laws involving investigation and reporting were violated, can be conducted.

CONCLUSION

Respondents' motion to dismiss shall be granted in part and denied in part. Respondents' motion to dismiss the claims related to disciplining school district employees and the claims arising under the School Ethics Act will be granted. The

individually named respondents shall be removed for lack of jurisdiction. The remainder of respondents' motion shall be denied. The matter shall proceed to a hearing to determine whether the petitioners' allegations are supported regarding whether Mattson or the District violated New Jersey's anti-bullying laws.

ORDER

It is hereby **ORDERED** that the application of the Board of Education (Beverly Thorne, Board president) of the North Hunterdon-Voorhees Regional High School District and named individual respondents Charles M. Shaddow, superintendent; Ron Peterson, principal, Voorhees High School; Al Stumpf, athletic director; Elizabeth Nemeth, HIB specialist; Rick Kurz, teacher/coach; and Steven Schultz, District HIB coordinator, is hereby **GRANTED IN PART** and **DENIED IN PART**. The motion to dismiss the claims related to disciplining school district employees and the claims arising under the School Ethics Act is **GRANTED**. The named individual respondents shall be removed as parties. The motion to dismiss the petitioners' allegations that Mattson or the Board of Education violated New Jersey's anti-bullying laws is **DENIED**. The matter shall proceed to a hearing against the respondent Board of Education of the North Hunterdon-Voorhees Regional High School District on this remaining issue.

This order may be reviewed by the **COMMISSIONER OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

May 12, 2014
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

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231-14

IN RE PETITION FOR EQUITABLE MODIFICATION OF THE COST APPORTIONMENTS FOR THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

The Borough of Oradell (Oradell), one of two constituents comprising the River Dell Regional School District (River Dell), asked the Commissioner to reallocate the respective contributions that Oradell and the Borough of River Edge (River Edge) pay to operate River Dell. River Edge opposed any modification to the existing property value-based cost apportionment formula. The instant petition followed earlier unsuccessful attempts by Oradell to withdraw from the River Dell district. In it, petitioner asserts that application of the principles articulated in *In the Matter of the Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon School District from the Passaic County Manchester Regional High School District, North Haledon Board of Education and Borough of North Haledon v. Passaic County Manchester Regional High School District et al.*, 181 *N.J.* 161 (2004) (*North Haledon*) requires the relief it seeks. The Commissioner submitted the matter to the OAL as an uncontested case, with instructions to "...make recommendations concerning whether Oradell has established that its situation is substantially similar to North Haledon's situation in *Manchester Regional* so as to entitle it to the extraordinary relief directed by the Supreme Court in that case." The Report and Recommendation (OAL Report) was issued in April 2013.

The ALJ found, *inter alia,* that: the issues in this matter were substantially the same as those in *North Haledon*; the fundamental issue in *North Haledon* was the disparity in per-pupil costs among the municipalities, which could not be remedied through statutory withdrawal from the district because of constitutional implications upon the racial demographics of the district; subsequent guidance from the Attorney General's Office stated that the Commissioner may revise cost apportionments where the relative tax burden is inequitable and dissolution or withdrawal of constituent districts would implicate the constitutional rights of students to a thorough and efficient education; petitioner was precluded from withdrawing from the district due to the constitutional obligation of maintaining thorough and efficient public schools; the Commissioner possesses the authority to develop an equitable cost apportionment scheme for the district notwithstanding *N.J.S.A.* 18A:13-23, and this is the only mechanism presently available in instances where a municipality believes it bears a disproportionate tax levy, unalterable due to the "effective veto" result of *N.J.S.A.* 18A:13-23; the growing disparity between River Edge and Oradell's costs per pupil is significant and demands a more equitable method of apportioning costs that excludes both 100% property valuation and 100% per pupil methods. The ALJ ultimately recommended a cost apportionment formula based on 20% property valuation/80% per pupil, to be implemented over a period of two years.

Upon review, the Commissioner rejected the OAL Report, finding, *inter alia*, that: the instant case is neither constitutionally nor equitably similar to the situation in *North Haledon*; *North Haledon* cannot be interpreted as establishing a blanket rule that the Commissioner has the authority to perform the function of *N.J.S.A.* 18A:13-23 in any and all cases; unofficial advice from the Division of Law is not binding nor precedential; the ALJ – in proposing an 80% per pupil/20 % property valuation formula – appears not to have taken into account that property values, not per pupil counts, has been regarded by the Supreme Court as the most equitable basis for school funding; and the ALJ's formula is not sufficiently supported. The Commissioner noted that under more compelling circumstances than are present in the instant case, extraordinary relief such as petitioner sought herein might be desirable. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 6/02/14

OAL DKT. NO. EDU 1022-12
AGENCY DKT. NO. 12-1/12

IN RE PETITION FOR EQUITABLE MODIFICATION OF THE COST APPORTIONMENTS FOR THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Borough of Oradell (Oradell), whose school district is one of the two constituents comprising the River Dell Regional School District (River Dell) in Bergen County, asks the Commissioner to reallocate the respective contributions which Oradell and the Borough of River Edge (River Edge) pay to operate River Dell. For the reasons that follow, the Commissioner declines Oradell's request.

The history of this matter has been largely recounted by the Appellate Division in *In re Petition for Authorization to Conduct a Referendum on the Withdrawal of the Borough of Oradell from the Riverdell Reg'l Sch. Dist.*, 406 *N.J. Super.* 198 (App. Div. 2009) (*In re Dissolution of River Dell*). Briefly stated, River Dell educates 7th through 12th grade students from Oradell and River Edge. Because the equalized value of Oradell's real property is higher than that of River Edge, it pays a higher proportion of River Dell's expenses, in keeping with the school funding policy approved in such cases as *Robinson v.Cahill,* 62 *N.J.* 473 (1973) and its progeny, and as reflected in various statutes and regulations governing school funding. If Oradell's and River Edge's contributions to River Dell were divided by the respective number of students they send to River Dell, the results would generally show a difference of $5000-6000 between what Oradell pays per student and what River Edge pays.

Dissatisfied with its higher contribution, in December 2006 Oradell retained an expert – James L. Kirtland – to produce a study (Kirtland Report) addressing the feasibility of Oradell's withdrawal from River Dell, including the ramifications for both Oradell and River Edge.[1] Kirtland concluded that withdrawal was feasible so long as River Edge agreed to enter into a send-receive relationship with Oradell. In April 2007, the then-Bergen County Superintendent of Schools, Aaron Graham (Graham), issued a report which articulated about twice as many disadvantages as advantages to the dissolution of River Dell.

Notwithstanding Graham's conclusion that a dissolution would be disruptive to the students and costly to taxpayers, Oradell petitioned for withdrawal in May 2007. River Edge opposed the petition and the matter went to the Board of Review (Board). In response to the Board's request for more information, River Edge submitted two expert reports. The first one, produced by Vincent D. Yaniro (Yaniro Report), found, *inter alia,* that dissolution would leave River Edge with an excessive debt burden due to its possession of a middle school that had not been updated since 1968 and needed renovations which would cost more than River Edge's borrowing capacity. (By way of contrast, Oradell would be left with a high school which had been undergoing renovations that were likely to be completed before a dissolution could be effectuated.) The other report, by Karen Lake (Lake Report), concluded that dissolution would produce staffing shortages at River Dell high school and, more importantly, would leave neither district capable of operating independent K-12 school districts. James Kirtland subsequently submitted a second report, responding to the reports of Yaniro and Lake.

In October 2007 the Board of Review denied Oradell's petition for withdrawal from River Dell. An apt summary of its reasons was set forth in *In re Dissolution of River Dell*:

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[1] Since River Dell consists of only two school districts, Oradell's withdrawal would constitute dissolution of the district.

[D]issolution of River Dell would produce an excessive debt burden for the constituent districts. The 2005 Long Range Facilities Plan for River Dell anticipates over $ 24 million in renovations to the middle school in the next few years, which would cause River Edge to exceed its debt limit. Oradell contends that it is likely the repairs would be made prior to the completion of the dissolution process, and that in any event, the need for repairs is speculative at this point. However, it cannot be disputed that the resulting debt limitations would severely constrain River Edge's ability to make the necessary repairs to the middle school.

The ... impact of this excessive debt would be compounded by the tax implications of the proposed dissolution.

....

[T]he configuration proposed by Oradell, whereby the Oradell district would be comprised of K-6 and 8-12, and River Edge would be limited to a K-8 is not in existence anywhere else in the State of New Jersey, would clearly have been designed for no other purpose than addressing Oradell's concerns with the apportionment of River Dell's costs. Moreover, the sending-receiving agreement upon which the entire proposal rests, and which Oradell itself acknowledges as being critical, is one that River Edge does not consent to. The . . . fact that Oradell itself concedes that the dissolution could not be effectuated without such an agreement, supports the view that an efficient school system could not be maintained in either district upon dissolution. In favor of its position, Oradell asserted that River Edge would not have any alternative choice but to acquiesce to a send-receive agreement in the event of a dissolution. The Board was not persuaded by this reasoning.

Additionally,....dissolution of River Dell in favor of two districts that would remain dependent upon each other would be in opposition to the aims of recent legislation, *N.J.S.A.* 18A:7-8(h), which was enacted to promote the elimination of these types of districts in favor of regional districts over the course of the next three years.

....

Oradell's suggestion that the regional district be dissolved for the sole purpose of realizing a financial benefit is inconsistent with the trend toward consolidation, and ultimately does not further the primary objective of ensuring a Thorough and Efficient Education. The parties are in complete agreement that the River Dell has enjoyed great history of success in educating their students. Oradell's current proposal seeks to dismantle that district for no other purpose but to reduce its costs. However, Oradell may seek a referendum on modification of the apportionment of costs through the mechanism provided by statute at *N.J.S.A.* 18A:13-23.3, without seeking the dissolution of the Regional School District.

In re Dissolution of River Dell, 406 *N.J. Super.* at 204-05 [Emphasis added.]

Oradell appealed the Board of Review's determination, but the Appellate Division affirmed same on April 1, 2009, stating "the Board complied with the statutory requirements, and considered appropriate factors. Its decision was supported by substantial evidence in the record, and was not arbitrary, capricious or unreasonable. We affirm substantially for the reasons expressed by the Board." *In re Dissolution of River Dell,* 406 *N.J. Super.* at 212

In April 2011, two years after the above referenced Appellate Division decision, a referendum was held on the question of whether the cost allocation formula for River Dell should be changed. Because a majority of River Edge residents voted against such a reallocation, the referendum failed to provide Oradell with the relief it sought.

Nine months later, in January 2012, Oradell filed the petition which instituted this proceeding, asking the Commissioner to use his authority to revise the contribution formula for the River Dell constituents. Oradell alleges that the Commissioner would be justified in exercising such an extraordinary remedy because Oradell's circumstances are the same as those which led the Supreme Court to direct the Commissioner to fashion a reallocation formula in *In the Matter of the Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon School District from the Passaic County Manchester Regional High School District, North Haledon Board of Education and Borough of North Haledon v. Passaic County Manchester Regional High School District et al.,* 181 *N.J.* 161 (2004) (*North Haledon*).

After receiving River Edge's answer to the petition, the Commissioner sent the matter to the Office of Administrative Law (OAL) for fact finding. The OAL delivered its Report and Recommendation (OAL Report) to the Commissioner in April 2013, proposing that the

Commissioner reallocate Oradell's and River Edge's contributions to River Dell and, further, suggesting that the new formula be based 20% upon property valuation and 80% upon per-pupil cost. River Edge was granted permission to file exceptions to the OAL Report, and Oradell was allowed to respond to the exceptions – which it did on May 14, 2013.

The Commissioner has carefully considered all of the foregoing. At the outset, he does not see in *North Haledon* the creation by the Supreme Court of a blanket rule that the Commissioner has the authority to perform the function of *N.J.S.A.* 18A:13-23 – *i.e.,* the reallocation of contributions among the constituents of regional districts – in any and all cases. Further, the Commissioner cannot agree with petitioner and the Administrative Law Judge (ALJ) that the considerations which underlay the Supreme Court's holding in *North Haledon* are substantially present in this matter.

First, a review of *North Haledon* reveals that before the Supreme Court ordered the creation of a new formula for Manchester Regional,[2] the per-pupil cost which North Haledon had been paying to send its students to Manchester Regional had risen to $18,400, while Haledon's had decreased to $5,300 and Prospect Park's had decreased to $3,400. The $5000-$6000 disparity between the per-pupil costs of Oradell and River Edge is far less severe than were the differences of $15,000 and $13,000 which existed between North Haledon and the other constituents of Manchester Regional.

Second, whereas North Haledon had met the threshold requirements for withdrawal from a district – *i.e.*, the voters had authorized the withdrawal in a referendum, pursuant to *N.J.S.A.* 18A:13-58 – Oradell had not. Thus, the analysis employed by the Board of

[2] The Commissioner notes that the Supreme Court had hoped that a reallocation could have been effectuated by means of agreements among the parties to the controversy.

Review in its rejection of Oradell's application for withdrawal from River Dell was not congruent with the Supreme Court's reasons for reversing the Board of Review's approval of a referendum on North Haledon's withdrawal from Manchester.

Because education is so crucial to a child's chances of surviving and thriving, it can be said that every act performed by the Department of Education and its subdivisions throughout the State has constitutional implications. However, the Commissioner cannot treat as a constitutional issue every business decision required for the operation of a school district. For example, while the quality of teaching in the public schools could certainly implicate the educational mandate in the State constitution, controversies over teacher renewal, promotion, tenure or dismissal will not be regarded as constitutional unless there is a showing that they have been made upon independent, unconstitutional grounds. Similarly, while State constitutional implications could, under some circumstances, attach to a district's provision, *vel non,* of the goods and services needed to run its schools, it is probable that most disputes regarding the procurement of said goods and services will be resolved based upon statutes and regulations which are designed to protect the administration of education. In other words, not every dispute which arises in relation to the administration of education must be framed as a direct constitutional contest.

As regards the present case, the Commissioner does not find that the dispute over the advisability of the proposed breakup of River Dell, in and of itself, poses a direct constitutional question. Oradell was precluded, first and foremost, from withdrawing from River Dell because, to save itself some money, it had proposed 1) the dismantling of a high functioning school district, and 2) the creation of two districts, neither of which could independently

function. Thus, unlike the situation in *North Haledon,* the Board of Review's rejection of Oradell's petition was an exercise of simple ministerial prudence and common sense.

Further, an equitable difference exists between the present case and *North Haledon.* In *North Haledon,* there was no finding that – aside from the issue of student diversity – either the regional district or North Haledon would be unable to deliver to their students a satisfactory education after a North Haledon withdrawal.[3] The constitutional issue arose by way of a demographic circumstance beyond the control of North Haledon, which circumstance would have created racial imbalance in Manchester Regional High School had North Haledon withdrawn. Since levy reallocation was not available to North Haledon via *N.J.S.A.* 18A:13-23, the Supreme Court directed the Commissioner to use his powers to lessen North Haledon's very disparate contribution to Manchester Regional's operating expenses.

By way of contrast, in the present case, the record reveals no issue of racial imbalance or any other specific constitutional risk to River Dell's constituent school districts. The only possible threat to the State constitutional mandate of a thorough and efficient education for River Dell's children would be one created by Oradell – in attempting to reduce its taxes by replacing a healthy school district with two unhealthy ones. This is not a goal for which the Commissioner is compelled to or inclined to exercise his authority to bestow extraordinary remedies.

Because the instant case is neither constitutionally nor equitably similar to the situation in Manchester Regional, the Commissioner need not further analyze the respective financial statistics which have been offered regarding Oradell and River Edge. However, the Commissioner cannot fail to note the following. First, the ALJ does not appear to have taken

[3] North Haledon had already entered into a consensual send-receive relationship with Midland Park, contingent only upon North Haledon's successful withdrawal from Manchester Regional.

into account that property valuation, not per-capita counts, has been regarded by the Supreme Court as the most equitable basis for school funding.[4] Second, while the OAL Report's statement of facts recites some figures concerning the parties' property values and median incomes, Report at 6-7, it includes no in-depth analysis of same during its very brief discussion of the appropriate allocation formula for River Dell.[5] (Report at 17) Absent the kind of analysis of a broad range of factors which the Commissioner conducted in *In the Matter of the Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon School District from the Passaic County Manchester Regional High School District, Passaic County,* Commissioner Decision No. 304-13 (August 29, 2013), the 80% per-pupil/20% property-valuation formula suggested by the ALJ is not sufficiently supported.

Finally, the Commissioner must register puzzlement at petitioner's and the OAL's reliance upon unofficial advice provided in a letter to the Commissioner from his counsel, the Division of Law, dated September 21, 2004 and annexed to the petition as Exhibit A. *See, e.g.,* pages 8, 9, 11, 13 and 15 of the OAL Report. The letter neither binds the Commissioner herein nor, generally, holds any precedential value. See *WWP Dist. v. Bd. Of Educ. of Delran,* 361 *N.J. Super.* 488, 493-494 (App. Div. 2003).

The Commissioner understands that under the current legislation, which favors the continuation of established regional districts, it is difficult for a constituent district to terminate its participation in a regional district. In the Commissioner's view, extraordinary relief such as petitioner seeks herein might be desirable where circumstances have drastically changed

[4] Robinson v. Cahill and its progeny.

[5] ALJ looked to some legislative reports for guidance in sorting out the issues raised by petitioner. However, the ideas expressed in the cited reports were not implemented, making them unhelpful in discerning the true legislative intent concerning the issues at bar. Nor does the ALJ's speculation about future willingness of districts to regionalize provide an adequate basis for adjudicating the matter at hand.

over time through no fault of a petitioning district. However, grounds for relief would have to be substantially more compelling than the situation in the instant case.

That being said, petitioner in the instant case may certainly follow the prescribed legal procedure for gaining relief from statutory mandates, *i.e.* urge the Legislature to amend the law. As was explained in *Borough of Seaside Park et al. v. Commissioner, New Jersey Department of Education, et al.*, 432 *N.J. Super.* 167, 208f (App. Div.), *certif. denied 216 N.J.* 367 (December 3, 2013)[6]:

> [a party's] recourse is to lobby the Legislature to change the statutory mechanisms for dissolving or withdrawing from a regional school district, or for revising its funding formula.

Accordingly, the Report and Recommendation of the OAL is rejected and the petition is dismissed.

IT IS SO ORDERED.[7]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/02/14

Date of Mailing: 6/03/14

[6] Noting that Seaside Park – unlike North Haledon – had not had a successful referendum permitting withdrawal, the court concluded that there was no basis to invoke the extraordinary remedy directed by the Court in the Manchester Regional case.

[7] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

REPORT AND RECOMMENDATION
OAL DKT. NO. EDU 01022-12
AGENCY DKT. NO. 12-1/12

IN RE PETITION FOR EQUITABLE MODIFICATION OF THE COST APPORTIONMENT FOR THE RIVER DELL REGIONAL SCHOOL DISTRICT, BERGEN COUNTY.

Vito Gagliardi, Jr., Esq., for Petitioner Borough of Oradell (Porzio, Bromberg & Newman, attorneys)

Francis J. Campbell, Esq., for Respondent Borough of River Edge (Reussille Law Firm, attorneys)

Record Closed: January 2, 2013 Issued: April 5, 2013

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, the Borough of Oradell, petitioned the Commissioner of Education to create a new equitable cost-apportionment formula, based at least in part on a per-pupil calculation, to fund the River Dell Regional School District pursuant to the Commissioner's authority to order such modification outlined in In re Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon School

District from the Passaic County Manchester Regional High School District, 181 N.J. 161, 164 (2004) (hereinafter "North Haledon"). Respondent, the Borough of River Edge, the other constituent municipality in the River Dell Regional School District, opposes any modification to the existing property-value-based cost-apportionment formula. The then-Acting Commissioner of Education transmitted this matter to the OAL as an uncontested case in accordance with N.J.A.C. 1:1-21.1. The hearing took place on July 16 and 17, 2012. The parties agreed to a post-hearing briefing schedule to commence upon receipt of transcripts of the hearing; however, the due dates for briefs were extended following Superstorm Sandy and the two or more weeks of loss of power suffered at the law offices as a result. The record in this matter closed on January 2, 2013, and the issue date was initially February 19, 2013; however, an extension was required due to the nature of the matter and the voluminous caseload of the undersigned. As a result, the time for filing the Report and Recommendation was extended until April 5, 2013.

BACKGROUND – THE NORTH HALEDON CASE

In North Haledon, a Board of Review, established under N.J.S.A. 18A:13-56, authorized a referendum to determine whether the Borough of North Haledon should be permitted to withdraw from the Passaic County Manchester Regional High School District. North Haledon, supra, 181 N.J. at 171–72. Having the highest property-tax base in the district, North Haledon had assumed a disproportionate share of the costs, and by 1994, North Haledon was paying over half the district's operating costs while supplying just above 28 percent of the student body. Id. at 165–66. Between 1995 and 2001, North Haledon experienced a $5,700 per-pupil increase, while the other constituents of the district, Haledon and Prospect Park, both saw their per-pupil obligations decrease. Id. at 169.

The authorization for a referendum regarding North Haledon's withdrawal was reversed by the Appellate Division, and that decision was subsequently affirmed by the New Jersey Supreme Court, due to anticipated constitutionally unsound racial imbalances. Id. at 184. However, North Haledon's "disproportionate tax burden" of

over $2.5 million led the Court to bypass N.J.S.A. 18A:13-23's[1] requirement for a special election to approve reapportioning costs for a regional district. Id. at 186. After analogizing the situation in North Haledon to that presented in Jenkins v. Morris School District, 58 N.J. 483 (1972), in which the vote requirement of N.J.S.A. 18A:13-34 was "not applicable" in the context of a compulsory merger ordered by the Commissioner, the Court found N.J.S.A. 18A:13-23 "not applicable" to the Commissioner's authority to "determine cost allocations among and between [the constituent municipalities]." Id. at 185–86. The Court directed the Commissioner of Education to devise an "equitable cost apportionment scheme[.]" Id. at 186.

STATEMENT OF FACTS

River Dell Regional School District ("the District") is a limited-purpose regional school district that educates students in grades 7–12. (Statement of Undisputed Material Facts at 1, ¶ 1, dated October 12, 2012.) Students of Oradell and River Edge attend their respective municipal schools for grades K–6. In 2006, Oradell investigated the feasibility of withdrawing from the District due to educational tax burdens it considered unfairly disproportionate. (Id. at 3–4, ¶¶ 7–11; see also Appendix to Petition, Ex. B (consisting of Petitioner's preliminary study on the feasibility of Oradell's withdrawal from the District, dated December 2006).) Oradell pursued, and was denied, both a petition for a referendum on dissolution and a subsequent request for creation of an equitable tax-apportionment formula based in whole or in part on a per-pupil-based formula. (Statement of Undisputed Material Facts at 4–5, ¶¶ 12–15, ¶¶ 26–27; see also Appendix to Petition, Ex. D (consisting of the Board of Review's amplification of its oral decision to deny the petition for a referendum on Oradell's withdrawal from the District); Appendix to Petition, Ex. E (consisting of Commissioner of Education Lucille Davy's decision to decline to exercise her authority to reapportion the costs in the District in 2009).) Being a dual-municipality regional district, Oradell's withdrawal would effectively dissolve the District. See N.J.S.A. 18A:13-63 (providing that a regional school district

[1] N.J.S.A. 18A:13-23 provides that regional school districts' appropriations "shall be apportioned among the municipalities included within the regional district, as may be approved by the voters of each municipality at the annual school election or a special school election" based upon (a) an entirely property-value-based formula, (b) an entirely per-pupil-based formula, or (c) a combination of the two formulas. At the same time, N.J.S.A. 18A:13-23.3 governs when an existing regional school district may modify the existing apportionment scheme.

shall be dissolved if left with only one constituent school district following another constituent school district's withdrawal). To account for this dissolution, Petitioner had proposed a sending-receiving agreement for grades 7–8, with Oradell and River Edge continuing to educate their own K–6 students, and Oradell receiving River Edge's 9–12 students. (See Appendix to Petition, Ex. D at 6–7.)[2]

In its denial of a referendum, the Board of Review cited the excessive debt burden the proposed sending-receiving agreement would bring to River Edge, due to River Edge assuming stewardship of a middle school in need of $24 million in renovations—a figure in excess of River Edge's debt limit. (Id. at 10.) The Board additionally alluded to River Edge's 22 percent increase in tax levy, drastic cuts necessary to facilitate dissolution, the "current trend throughout the state towards [district] consolidation[,]" and stifling of the "primary objective of ensuring a Thorough and Efficient Education." (Id. at 11–12, 15–16.) The Board found that "an efficient school system could not be maintained in either [Oradell or River Edge] upon dissolution[,]" and also concluded that Oradell sought to "dismantle" a district that "enjoyed great history of [educational] success" for "no other purpose but to reduce its costs." (Id. at 15–16.)

The Appellate Division affirmed the Board's decision in April 2009. In re Petition for Authorization to Conduct a Referendum on the Withdrawal of the Borough of Oradell from the River Dell Reg'l Sch. Dist., 406 N.J. Super. 198, 212 (App. Div. 2009) (hereinafter "Oradell"). It also cited River Edge's $16 million borrowing limit as insufficient to fund the $24 million renovation to the middle school and the effect of Oradell's withdrawal on what is presently a K–12 district amidst the Legislature's calling for all districts to be K–12 districts by 2010. Id. at 208–12. The Appellate Division affirmed the Board's finding that "factors one and two of N.J.S.A. 18A:13-56(b) were present" because Oradell's withdrawal would result in an excessive debt burden and would "interfere with maintenance of an efficient system of education[.]" Id. at 208, 212.

[2] Consideration of the merits of that sending-receiving agreement proposal are not raised in this matter, but were considered by both the Board of Review and the Appellate Division. (See P-14 (consisting of the letter from Acting Commissioner of Education Christopher Cerf requesting that the OAL conduct an uncontested case and defining the parameters of the issues in this matter).)

In September 2009, Petitioner filed a petition with the Commissioner requesting reapportionment of the tax formula; however, the Commissioner declined to intervene and stated that N.J.S.A. 18A:13-23.3, which permits the alteration of an apportionment scheme subject to a majority vote of constituent districts, was the proper redress for Petitioner's grievance. (Appendix to Petition, Ex. E at 1–2.) The Commissioner also noted that the disparities in per-pupil costs between Oradell and River Edge—$17,800 vs. $12,200 in 2007–2008 and $19,000 vs. $13,200 in 2008–2009—do not approach the "extreme level of disparity" in North Haledon which justified "the extraordinary remedy of direct Commissioner intervention." (Ibid.) In contrast, North Haledon's per-pupil cost had risen from $12,700 to $18,400 in six years, while Haledon's decreased from $5,708 to $5,300 and Prospect Park's fell from $3,875 to $3,400. North Haledon, supra, 181 N.J. at 169. Though it was acknowledged that pursuit of a referendum under N.J.S.A. 18A:13-23 is not a required precondition for obtaining reapportionment directly from the Commissioner, the disparity at issue between Oradell and River Edge was thought to be of the "type and degree" specifically suited for the referendum envisioned by N.J.S.A. 18A:13-23.3, then-unpursued by Petitioner. (Appendix to Petition, Ex. E at 2.)

The Commissioner found that the effective tax rates at issue are actually higher for River Edge, to the extent that a $500,000 home in River Edge would generate approximately $6,300 per year in school taxes, compared with $5,700 for a home of equivalent value in Oradell. (Id. at 1.) Additionally, the Commissioner believed that the benefits expected to flow from the School Funding Reform Act of 2008, including the guarantee of a minimum 2 percent increase of State aid to all New Jersey school districts, would forestall the need for further action on the issue. (Id. at 2.)

Following then-Commissioner's Davy's denial, Oradell obtained a referendum to explore alterations in the cost-allocation method for River Dell Regional; however, although the referendum was approved by a majority of the voters of Oradell, the referendum was defeated by the voters of River Edge. (See Statement of Undisputed Material Facts at 8–9, ¶¶ 27–29.) Petitioner again petitioned the Commissioner of Education to create an equitable cost-apportionment formula for the District pursuant to his powers described in North Haledon. (See Petition at 10, ¶ 52.) On January 24,

2012, Acting Commissioner Cerf transmitted the matter to the Office of Administrative Law as an uncontested case with the specific request to

> make recommendations concerning whether Oradell has established that its situation is substantially similar to North Haledon's situation in Manchester Regional so as to entitle it to the extraordinary relief directed by the Supreme Court in that case, and if so, to recommend what would be an equitable funding formula for the River Dell Regional district.
>
> [P-14 at 1–2.]

Apportioned on a per-pupil basis, Oradell paid $16,100 versus River Edge's $10,550 in 2003–2004, for a per-pupil disparity of $5,550. (See Petition at 8, ¶ 43.) During 2007–2008 Oradell paid "roughly" $17,800 per pupil versus River Edge's $12,200, for a per-pupil disparity of $5,600. (Id. at 9, ¶ 44.) By 2011–2012 the figure would be $20,360 compared with River Edge's $14,330, for a per-pupil disparity of $6,030. (Id. at 9, ¶ 45.) During the 2012–2013 school year, Petitioner paid approximately $20,350 per student while River Edge paid approximately $14,001; this amounts to a per-pupil disparity of $6,349. (R-4, Ex. B at 4.) Moreover, during the 2011–2012 and 2012–2013 school years Petitioner paid more than 48 percent of the District's costs while providing less than 39 percent of the District's students. (Statement of Undisputed Material Facts at 14, ¶ 54 (citing P-4; P-5; P-16 at 4; R-5 at 6).)

Both Petitioner and River Edge are ranked as category "I" school districts, the second highest socio-economic group, in the State Department of Education's District Factor Group rankings based on socio-economic data points. (Id. at 14, ¶¶ 57–58.) River Edge maintains approximately 1,400 more housing units than Oradell, with 4,261 housing units in River Edge and 2,831 housing units in Oradell. (Id. at 17, 24, ¶¶ 67, 97.) For the 2011–2012 school year, Oradell had a total equalized property value of $1,735,332,615, while River Edge had a total equalized property value of $1,841,924,705. (Id. at 13, ¶ 48 (citing P-4).) For the 2012–2013 school year, Oradell had a total equalized property value of $1,729,527,265, while River Edge had a total equalized property value of $1,782,071,050. (Id. at 13, ¶ 49 (citing P-5).) River Edge

also had more total property value than Oradell for each of the last five school years. (Id. at 13, ¶ 51 (citing P-4; P-5; P-16 at 4).) The median value of an owner-occupied housing unit is $478,100 in River Edge and $607,300 in Oradell. (Id. at 1, ¶ 69 (citing P-15 at 11).) The median family income in Oradell is $147,139, while the median family income in River Edge is $109,335. (Id. at 16, ¶ 64(d).) A greater percentage of Oradell's population (16.6 percent) is over the age of 65 than River Edge's population (13.8 percent). (Id. at 19, ¶ 76 (citing P-15 at 11).)

POSITIONS OF THE PARTIES

Petitioner insists that the Commissioner has authority to create an equitable apportionment model, irrespective of N.J.S.A. 18A:13-23, and deems erroneous the contention that the Commissioner may not revise cost apportionment except by direct order of the New Jersey Supreme Court. (Petition at 3, ¶ 14, dated September 14, 2011.) Petitioner considers the equalized-valuation model inequitable in light of Oradell's higher real-estate value. (Id. at 8–10, ¶¶ 38–51.)

Respondent considers North Haledon to be *sui generis*, and denies that the New Jersey Supreme Court determined the respective constituent tax burdens in North Haledon to be inequitable. (Answer at 5, ¶ 16; 9, ¶ 39.) Respondent believes that Petitioner's remedy for its grievance and its differences with the School Funding Reform Act lies with the Legislature. (See Letter from Francis J. Campbell, Special Counsel, Borough of River Edge, to David C. Hespe, Chief of Staff, New Jersey Department of Education at 4 (December 21, 2011) (hereinafter "2011 Letter to Hespe").) Respondent maintains that the action requested by Petitioner remains beyond the Commissioner's powers, absent an order from the New Jersey Supreme Court. (See Answer at 11, ¶ 2.) According to Respondent, Commissioner intervention, notwithstanding N.J.S.A. 18A:13-23, would require facts establishing "constitutional deficiencies in a situation 'substantially similar'" to North Haledon. (Id. at 11, ¶¶ 3–4.) Respondent also considers any disproportionate payout by Oradell to be nothing more than the natural result of Oradell's own rising property values pursuant to the statutory formula. (Id. at 11, ¶ 51; 12–13, ¶¶ 3–5.) Moreover, Respondent's expert agrees that a $6,349 disparity exists between River Edge's and Oradell's respective tax levies under a hypothetically

imposed 100 percent per-pupil apportionment. (See R-4, Ex. B. at 3 (consisting of Respondent's expert's response report to Petitioner's expert's report).)

ANALYSIS

In the present matter, the Commissioner ordered a determination as to the substantial similarity, or lack thereof, between the present controversy and North Haledon. (See P-14 at 2.) "Substantial" is defined as "being largely, *but not wholly*, that which is specified." Merriam-Webster Dictionary, <http://www.merriam-webster.com/dictionary/substantial> (emphasis added). The fundamental issue specified in North Haledon was the disparity in per-pupil costs among the municipalities, which could not be remedied through statutory withdrawal from the district by the township carrying the disproportionate burden due to such a withdrawal's constitutional implications upon racial demographics in the school district. See North Haledon, supra, 181 N.J. at 184–86. The present analysis begins with a determination of whether, as in North Haledon, Oradell's withdrawal was prohibited for constitutional reasons. (See P-14 at 1.)

According to guidance from the Attorney General's Office following the North Haledon decision, the Commissioner of Education may revise cost apportionments among constituent municipalities in a regional district where "the relative tax burden of the . . . districts . . . is inequitable" and dissolution or withdrawal of constituent districts had been denied to prevent "deficiencies of a constitutional dimension." (Appendix to Petition, Ex A. at 1 (consisting of Letter from Michelle Lyn Miller, Senior Deputy Attorney General, on behalf Peter C. Harvey, Attorney General of New Jersey, to William Librera, Commissioner, New Jersey Department of Education (September 21, 2004) (hereinafter "2004 Attorney General's Letter").) A "constitutional defect" encompasses the "inability to maintain a thorough and efficient system of education in the remaining districts" and would result in the district being "compelled to remain unified as a regional district." (Id. at 2.) Prior to such an "extraordinary remedy" as commissioner-guided apportionment, a district would need to undertake the process to withdraw from or dissolve the regional district. (Id. at 2.)

Here, Petitioner has satisfied the "tortuous procedure for withdrawing" from the District required under N.J.S.A. 18A:13-51 to -65 to the point at which the Commissioner "submit[ted] the petition for withdrawal to the Board [of Review] for a decision as to whether to authorize a referendum." Oradell, supra, 406 N.J. Super. at 206–07; see also Winslow Twp. Bd. of Educ. v. Bd. of Review, 275 N.J. Super. 206, 209 (App. Div. 1994) (describing the "tortuous" process for withdrawing from a limited-purpose regional district). The Board of Review was granted "broad discretion" with regard to the withdrawal application, and voted to deny the petition for a referendum. Oradell, supra, 406 N.J. Super. at 201, 210.

Respondent submits that the Board denied the petition for a referendum for "*statutory* criteria rather than a claimed '*constitutional imperative.*'" (Answer at 4, ¶ 13.) In support of this argument, Respondent urges that the Appellate Division affirmed the Board of Review's denial of the petition for a referendum on withdrawal on "statutory grounds" because when affirming the Board's decision the Appellate Division concluded that "the Board complied with the statutory requirements, and considered appropriate factors." (Ibid. (citing Oradell, supra, 406 N.J. Super. at 212).) Further, Respondent contends that authority for the Commissioner to affect a district's tax apportionment exists only where such action is "necessary to insure the provision of a thorough and efficient education." (Respondent's Post-Hearing Brief at 32.) However, Respondent admits that the Attorney General's letter authorizes the Commissioner to order reapportionment where it has been determined that the relative tax burdens of constituent districts are inequitable and where withdrawal is denied "because it would result in deficiencies like the one presented [in North Haledon], i.e., where withdrawal . . . would advance racial segregation in the regional school district." (Answer at 8.)

As explained in North Haledon, each of the four factors for consideration under N.J.S.A. 18A:13-56(b) "implicates the State's constitutional obligation for the maintenance of a thorough and efficient system of free public schools." North Haledon, supra, 181 N.J. at 173 (quoting In re Petition for Authorization to Conduct a Referendum on the Withdrawal of N. Haledon Sch. Dist. from the Passaic Cnty. Manchester Reg'l High Sch. Dist. (North Haledon II), 363 N.J. Super. 130, 138–39 (App. Div. 2003)). Under N.J.S.A. 18A:13-56, a petition to conduct a referendum on withdrawal from a

regional school district may be denied "*only* after the Board has 'consider[ed] the effect of the [proposal] upon the educational and financial condition of the withdrawing and the remaining districts[.]'" North Haledon, supra, 181 N.J. at 173 (emphasis added). Reasons to deny a referendum under N.J.S.A. 18A:13-56(b) include (1) imposition of excessive debt burden upon any of the constituent districts, (2) inability to maintain an efficient school system without excessive costs, (3) insufficient number of pupils remaining in the district, or (4) "any other reason, which it may deem sufficient." Ibid. (quoting N.J.S.A. 18A:13-56(b)).

"[F]acts which establish *any* of the statutory criteria [from N.J.S.A. 18A:13-56(b)] . . . are incompatible with the constitutional guarantee of a thorough and efficient education and dictate denial of the petition [to withdraw,]" and facts satisfying the catch-all "any other reason" provision under N.J.S.A. 18A:13-56(b)(4) "must be of the *same character* as the other three factors, as *each factor implicates the State's constitutional obligation for the maintenance of a 'thorough and efficient system of free public schools*.'" Ibid. (quoting North Haledon II, supra, 363 N.J. Super. at 138–39) (emphasis added). In fact, "[a]ny less weighty reason would be an inadequate ground for compelling constituent local school districts and municipalities to preserve a regional school district against the will of a majority of the voters in a majority of its local districts." Ibid. (quoting North Haledon II, supra, 363 N.J. Super. at 139).

North Haledon is distinguishable from the present matter to the extent that the North Haledon Court set aside the results of a vote under N.J.S.A. 18A:13-56, while no such vote occurred here because the Board denied the request for a referendum. In North Haledon, withdrawal was granted by improper application of N.J.S.A. 18A:13-56; thereafter, the Court corrected the Board, ordered North Haledon to remain part of the regional school district, and waived the voting requirements of N.J.S.A. 18A:13-23 in order to spare what clearly would have been its empty pursuit. North Haledon, supra, 181 N.J. at 186. In such a situation where the vote occurred prior to judicial intervention nullifying that vote's effect, the court's action occurs "against the will of a majority of the voters[.]" See North Haledon, supra, 181 N.J. at 173. Here, no vote occurred because the Board *properly* exercised its discretion under N.J.S.A. 18A:13-56 and denied the petition for a referendum, leaving the voters' will entirely unknown. However, neither

the Appellate Division decision nor the Supreme Court decision in North Haledon suggests that constitutional concerns were implicated under N.J.S.A. 18A:13-56 solely because the Board erroneously permitted a referendum on withdrawal to occur when such withdrawal was impermissible. On the contrary, the constitutional implications were present regardless of the presence of the vote, because the Court stated that North Haledon "cannot *petition* for withdrawal because of the impact of withdrawal on the racial balance," and that a constitutional imperative "require[d] the *Board* to compel North Haledon to remain in the Regional District despite the tax burden on its citizens." Id. at 185–86 (emphasis added).

The treatment of N.J.S.A. 18A:13-23 in North Haledon and that in the present situation are analogous despite the different referendum status. Notably, Commissioner Davy premised her 2009 denial of Oradell's petition largely on Petitioner's failure to exhaust remedies provided under N.J.S.A. 18A:13-23.3. (See Appendix to Petition, Ex. E at 2.) Petitioner subsequently pursued this remedy to no avail, and thereafter petitioned present-Commissioner Cerf to intervene notwithstanding N.J.S.A. 18A:13-23.3. (See Statement of Undisputed Material Facts at 8–9, ¶¶ 27–29; Petition at 10, ¶ 52.) On the issue of Commissioner intervention notwithstanding N.J.S.A. 18A:13-23.3, the Attorney General advised that "the Commissioner *could* require as a precondition of determining tax inequity due to statutory apportionment, that the voters of the affected districts have an opportunity to be heard on the apportionment scheme[,]" but concluded that "the Commissioner is authorized to act notwithstanding . . . N.J.S.A. 18A:13-23" in "the presence of an inequitable tax burden . . . and due to a constitutional imperative . . . the Board of Review (or a court reviewing the Board's determination) determines that the regional district must remain intact." (2004 Attorney General Letter at 3–4 (emphasis added).) Here, Oradell sought such a referendum to change the tax-apportionment methodology under N.J.S.A. 18A:13-23, but that referendum was defeated by River Edge. (See Statement of Undisputed Material Facts at 9, ¶¶ 28–29.)

In denying Petitioner's request for a referendum on withdrawal, the Board of Review relied upon the first and second factors of N.J.S.A. 18A:13-56(b), an excessive debt burden and inability to maintain an efficient school system, when considering the

four factors of N.J.S.A. 18A:13-56(b) and denying the petition. (See Appendix to Petition, Ex. E at 7–15 (consisting of the Amplification of the Board of Review's decision to deny the petition for authorization to conduct a referendum on Oradell's proposed withdrawal from the district).) In doing so, the Board of Review essentially determined that a constitutional obligation for the maintenance of a thorough and efficient system of free public schools prohibited Petitioner from withdrawing from the District, because, as explained by the Appellate Division and Supreme Court, satisfaction of any of the four criteria from N.J.S.A. 18A:13-56(b) is "incompatible with the constitutional guarantee of a thorough and efficient education[.]" See North Haledon, supra, 181 N.J. at 173 (quoting North Haledon II, supra, 363 N.J. Super. at 138). Therefore, Respondent's assertion that the Board of Review denied the petition for a referendum on withdrawal for statutory rather than constitutional reasons is erroneous.

The North Haledon Court proscribed that where a community is "compel[led] . . . to remain in [a] Regional District despite the tax burden on its citizens . . . N.J.S.A. 18A:13-23 is not applicable." North Haledon, supra, 181 N.J. at 186. Oradell has pursued withdrawal from the District to the same extent deemed sufficient to set aside the voting requirement of N.J.S.A. 18A:13-23 in North Haledon. Petitioner satisfied the additional step of attempting to modify the apportionment scheme via N.J.S.A. 18A:13-23, but that statute lacked effect for the same reason explained in North Haledon; the other school district benefitting from the equalized-valuation method maintained an effective veto power over any proposed change to that formula. See id. at 185 (explaining that Haledon and Prospect Park maintained an effective veto power over apportionment reform under N.J.S.A. 18A:13-23). In fact, the "effective veto" is more pronounced in the present situation, because the district comprises only two communities—one voting directly in opposition to the other. The effective veto that defeated Oradell's petition is equivalent to the circumstances in North Haledon under which N.J.S.A. 18A:13-23 had been waived entirely. Oradell failed to obtain relief from that disparity via referendum under N.J.S.A. 18A:13-23, and will remain unable to do so, because Respondent maintains, and will continue to maintain, that effective veto.

Therefore, like the situation in North Haledon, Petitioner has been precluded from withdrawing from the District due to the constitutional obligation of the maintenance of a

thorough and efficient system of free public schools. In this situation, the Commissioner possesses the authority to develop an equitable cost-apportionment scheme for the District notwithstanding N.J.S.A. 18A:13-23.3.

However, the additional "finding of an inequitable tax burden on the petitioning constituent district(s)" is also required prior to the development of an equitable cost-apportionment scheme for the District. (See 2004 Attorney General Letter at 2.) The Attorney General's Office's guidance also suggests that an "inequitable tax burden . . . could be demonstrated by a constituent district unsuccessfully seeking to change the apportionment methodology." (See id. at 4.) Little other guidance exists regarding how to analyze whether a regional school district's tax apportionment constitutes inequity meriting the Commissioner's intervention. Just as N.J.S.A. 18A:13-56(b)(1) "does not define what constitutes an excessive debt burden," see Oradell, supra, 406 N.J. Super. at 207, guideposts by which to establish "inequity" are similarly lacking. However, a 1999 report from the Assembly Task Force recommended the development of a reapportionment scheme for regional districts where cost apportionments deviate by more than "perhaps 10%" on a per-pupil basis. (See "Assembly Task Force on School District Regionalization," February 25, 1999, available at <http://www.njleg.state.nj.us/legislativepub/reports/school.pdf>.)

Both the Commissioner's previous explanation that "the Legislature has recognized the equalized value of a community's real estate as a legitimate factor in assessing its responsibility for the costs of public education[,]" and Respondent's assertion that that "avenues of deregionalization . . . are narrowly circumscribed by the New Jersey Legislature" are correct. (See Appendix to Petition, Ex. E at 2; 2011 Letter to Hespe at 4.) Nonetheless, while mindful of both principles, the Court assessed the disparity in North Haledon based on per-pupil ratios; the Court's consideration of per-pupil ratios is contrary to Respondent's argument that a per-pupil basis for analysis is nothing more than a "seductive . . . oversimplification[.]" (Compare Respondent's Posthearing Brief at 10 with North Haledon, supra, 181 N.J. at 169.) Importantly, the issue is not whether "this is the correct manner to view communities' contributions to regional school districts[,]" as articulated by River Edge's expert witness. (See R-4, Ex.

B at 2.) Instead, the proper inquiry in this matter is whether the disparity is inequitable and, if so, what would be an equitable funding formula for the District.

The totality of the North Haledon Court's analysis in its determination of the existence of inter-district inequity, and subsequent order that costs be reapportioned, consists of the following: (1) "North Haledon was responsible for over half the district's operating costs, or just over $12,700 *per pupil*, even though the borough provided only slightly more than twenty eight percent of the student body . . . [while] Haledon and Prospect Park were paying only $5,708 and $3,875 *per pupil* respectively"; (2) between 1994 and 2001, "viewed on a *per pupil* basis," North Haledon's cost per student escalated from $5,700 to $18,400, while the cost per student of Haledon and Prospect Park actually decreased by approximately $400; and (3) North Haledon was "justifiably concerned about the disproportionate tax burden (over $2.5 million in the 2001–2002 school year) . . . in relation to the other constituent municipalities." North Haledon, supra, 181 N.J. at 166, 169, 184–85 (emphasis added).

Although Respondent's expert correctly noted that the North Haledon Court did not "contemplat[e] facts relating to a fairness or equitability standard[,]" the Court did "indicat[e] that North Haledon's per pupil contribution was significantly different from Haledon's and Prospect Park's." (See R-4, Ex. A at 17.) Regardless, the Court evidently found this difference sufficient to mandate an equitable reapportionment scheme. See North Haledon, supra, 181 N.J. at 186. Following that remand, Judge La Fiandra considered "property wealth, aggregate income, and enrollment of each individual school district," among other factors, when determining an equitable cost-apportionment scheme for that regional school district. See In re Petition for Authorization to Conduct a Referendum on the Withdrawal of N. Haledon, EDU 3063-06, Report and Recommendation (March 16, 2011), <http://njlaw.rutgers.edu/collections/oal/>. Respondent's expert asserts that the Legislature "is well aware of the issues concerning the apportionment of regional school district tax levies," and emphasizes that in the thirteen years since the Assembly Task Force recommended changes the Legislature has not amended the reapportionment statutes or delegated further authority to the Commissioner. (See R-4, Ex. A at 12; R-4, Ex. B. at 2.) While the Assembly Task Force Report's recommendations have not been

acted upon by the Legislature, that Report recognized that "there should be a realistic mechanism which compels equitable adjustments in the distribution of costs among constituent municipalities for the small number of existing regionalized districts which currently evidence an extreme disproportionate distribution of costs." "Assembly Task Force on School District Regionalization," supra, February 25, 1999, available at <http://www.njleg.state.nj.us/legislativepub/reports/school.pdf>.

The Commissioner's authority to set aside the mechanism for changing the apportionment scheme in favor of one determined by the Commissioner is presently the only remedy available in instances where, as here, a municipality believes that it is responsible for a disproportionate tax levy that is unalterable due to N.J.S.A. 18A:13-23's tendency to result in "an effective veto." Due to the ineffectiveness of N.J.S.A. 18A:13-23 in such a situation, the Attorney General's Office suggests that the Commissioner could find that an inequitable tax burden exists based upon "a constituent district unsuccessfully seeking to change the apportionment methodology[.]" (Appendix to Petition, Ex. A at 4.)

The findings and recommendations of the 1999 Assembly Task Force on School District Regionalization, while non-binding, are informative. The report's findings include that "the equalized valuation method for apportioning costs in a regional school district . . . is a disincentive to school district regionalization." The report makes the following recommendations: (1) "allow reassessment of cost distribution [in a regional district] if the per pupil cost deviates by more than 10% between any two constituent municipalities"; (2) "[a] new and fairer formula should be devised to provide for more equity among constituent municipalities"; (3) "there should be a realistic mechanism which compels equitable adjustments in the distribution of costs among constituent municipalities for the *small number* of existing regionalized districts which currently evidence an extreme disproportionate distribution of costs"; and (4) "municipalities should have the choice of opting out of a regional district without major obstacles when a specified threshold deviation in the per pupil amount paid by each constituent municipality is reached, perhaps 10%." The report also identified an "important goal" of "[e]liminating the disparity of costs among constituent municipalities which belong to existing regional school districts[.]" "Assembly Task Force on School District

Regionalization," supra, February 25, 1999, available at <http://www.njleg.state.nj.us/legislativepub/reports/school.pdf>.

Modification of the tax apportionment in this present matter serves not to undermine the "current trend in the State towards consolidation," but to further it. (See Ex. D at 15.) In addition to the concerns indicated by the Assembly Task Force, it is equally likely that communities will abort regionalization plans at the exploratory stage if there is a risk that changes in property value or the number of students in one constituent district over time may impact the feasibility of their initial cost-apportionment scheme, and that constituent district may be left in the untenable position where the other constituent districts maintain an "effective veto" precluding any modification to that scheme. Although N.J.S.A. 18A:13-23 was amended to permit new regional school districts to apportion costs entirely on a per-pupil basis, entirely on a property-valuation basis, or using a combination of the two, the availability of relief such as that recommended in the present matter mitigates concerns about such an "effective veto" once the district is established, because if a constituent district becomes precluded from withdrawing from a district with an inequitable tax burden, the Commissioner may still cure such inequity notwithstanding N.J.S.A. 18A:13-23.

As noted by Commissioner Davy when declining to act in 2009, the "mere presence of some difference in the costs per pupil" may not, in itself, create an inequitable tax burden. (See Appendix to Petition, Ex. E at 1–2.) It may be tempting to dismiss a disparity of $5,600, or even $6,349, per pupil as insufficient to merit "substantial" similarity to the $13,100 per-pupil difference present in North Haledon (the difference between North Haledon's $18,400 "per pupil" burden and Haledon's $5,300 burden). I am not so inclined.

Equitable apportionment must be determined according to "*all of the circumstances.*" North Haledon, supra, EDU 3063-06, Report and Recommendation, (March 16, 2011) <http://njlaw.rutgers.edu/collections/oal/> (emphasis added). The tax burden inequity in North Haledon resulted in a recommendation from Judge La Fiandra of a formula consisting of 33 percent property valuation and 67 percent per-pupil valuation, based on her consideration of "the current State aid formula, property wealth,

aggregate income, and enrollment of each individual school district," among other factors. North Haledon, supra, EDU 3063-06, Report and Recommendation (March 16, 2011), <http://njlaw.rutgers.edu/collections/oal/>.

Similar considerations are required here, and the following factors are of particular importance. First, the $6,349 disparity between River Edge's and Oradell's costs per pupil during the 2012–2013 school year is significant, and the disparity has grown larger in recent years. Moreover, Oradell currently pays 48 percent of District costs despite providing 39 percent of the District's students. In aggregate, Oradell taxpayers paid more than $2.5 million more than they would under an entirely per-pupil approach, and similar disparities existed between the numbers for at least the 2008–2009 and 2011–2012 school years. (See P-15 at 3.) That $2.5 million aggregate disparity per year is substantially similar to the $2.5 million aggregate disproportionate tax burden identified by the North Haledon Court when remanding to the Commissioner for development of an equitable apportionment scheme. See North Haledon, supra, 181 N.J. at 186.

Under these circumstances, like the recommendation in North Haledon, I recommend that Oradell's situation calls for some "equitable component" that "excludes both the 100 percent property valuation method of apportionment and the 100 percent per pupil method." See North Haledon, supra, EDU 3063-06, Report and Recommendation (March 16, 2011), <http://njlaw.rutgers.edu/collections/oal/>. Accordingly, based upon consideration of the totality of material presented, I **RECOMMEND** a cost-apportionment formula based upon 20 percent property-valuation contribution and 80 percent per-pupil contribution. I further **RECOMMEND** that this formula be implemented over a period of two years.

Finally, any concern that "the Commissioner will need to potentially determine a tax allocation formula . . . in every one of [New Jersey's seventy existing regional] school districts" if relief is granted here is misguided; any potential "floodgates" would, according to Respondent's own expert, extend to just six out of the seventy regional school districts in New Jersey, even if all those districts were to pursue a similar remedy as that available through this recommendation. (See 2011 Letter to Hespe at 4;

(expressing concern that if the Commissioner entertains Petitioner's claims floodgates would open for similar claims by other constituents of regional school districts); R-4, Ex. B at 2, 14–15 (illustrating only six regional school districts in New Jersey with per-pupil discrepancies in excess of the type in controversy here); "FAQ: How the State's Regionalization Plan Could Affect Your District," New Jersey State Bar Association, February 4, 2009, available at <http://www.njsba.org/sb_notes/20090204/images/regionalization.pdf>.)

I hereby **FILE** my report and recommendation with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

April 5, 2013
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 4-5-13

Date Mailed to Parties: APR - 9 2013

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

P-11 A Preliminary Study to Determine the Feasibility of the Borough of Oradell Withdrawing from the River Dell Regional School District, December 2006

P-12 Correspondence from the Commissioner of Education, November 16, 2009

P-13 Supplemental Analysis Prepared by James L. Kirtland, CPA (ret.), July 28, 2011

P-14 Correspondence from the Commissioner of Education, January 24, 2012

P-15 Expert Report: Richard S. Grip, Ed.D., and James L. Kirtland, CPA (ret.), June 13, 2012

P-16 Rebuttal Expert Report: Richard S. Grip, Ed.D., and James Kirtland CPA (ret.), June 22, 2012

P-17 Response to Questions Raised by the Board of Review in Relation to the Petition Filed by the Borough of Oradell to Withdraw from the River Dell Regional School District, authored by Vincent D. Yaniro, July 2007

P-18 Statement of the Board of Review authored by Councilwoman Esther Fletcher, July 20, 2007

P-19 Explanatory Statement and Budget Message, River Edge

P-20 Minutes of Mayor and Council, River Edge, February 22, 2011

P-21 Minutes of Mayor and Council, River Edge, May 12, 2011

P-22 Minutes of Mayor and Council, River Edge, February 21, 2012

P-23 Minutes of Mayor and Council, River Edge, April 2, 2012

P-24 Campaign flyer

For Respondent

R-1 Legislative Fact Sheet on Public School Education Act of 1975

R-2 Commissioner Librera's Letter Decision, January 18, 2005

R-3 School Funding Reform Definitions

R-4 Report Concerning the Cost Apportionment Formula for the River Dell Regional School District, Prepared by Melvin L. Wyns, June 11, 2012

R-5 Response Report to the Expert Report for the Borough of Oradell, prepared by Melvin L. Wyns, June 20, 2012

APPENDIX

Witnesses

For Petitioner:

Andrew Rudman
Richard Grip
James Kirtland

For Respondent:

Melvin Wyns
Sandy Moscaritolo

Exhibits

For Petitioner

P-1 Curriculum Vitae of James L. Kirtland, CPA
P-2 Curriculum Vitae of Richard S. Grip, Ed.D.
P-3 Census Data
P-4 Financial data relied upon by James L. Kirtland, CPA (2011–2012 school year)
P-5 Financial data relied upon by James L. Kirtland, CPA (2012–2013 school year)
P-6 Decision of Judge Maria Mancini La Fiandra, ALJ, March 6, 2011
P-7 Correspondence form Mayor LaMonica to Mayor Watkins, October 5, 2004
P-8 Findings and Recommendations of the Assembly Task Force on School District Regionalization, February 25, 1999
P-10 Final Report from the NJ Office of Legislative Services entitled "2006 Special Session Joint Legislative Committee on Public School Funding Reform," December 1, 2006

233-14

DAVID HERRON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

The petitioner, a Montclair Township resident and taxpayer, challenged the respondent Board's implementation of a two-year strategic plan that includes quarterly testing of students to measure their readiness for college and careers. Petitioner asserted, *inter alia*, that a component of the plan, which would exempt from quarterly testing those students enrolled in advanced placement (AP) classes, is discriminatory in that less than 10% of AP students are African-American. The petitioner contended that he is an advocate for students in Montclair public schools, and has successfully intervened on behalf of a number of these students. Petitioner claimed no other relationship to the public schools, aside from his status as a concerned citizen of Montclair. The Board filed a motion to dismiss, in which it argued that petitioner lacks standing to bring his claims.

The ALJ found, *inter alia*, that: to have standing to bring an administrative action, a party must have suffered a distinct injury or harm that was caused by the adverse party and that can be remedied by the administrative forum; the petitioner is not currently a public school parent, and neither he nor any of his children will be asked to take the assessments he contends are discriminatory; a desire to vindicate the public interest is insufficient to confer standing; and there must be a specific connection between the petitioner and the public interest he alleges to represent. The ALJ concluded that the petitioner lacks standing, and granted respondent's motion to dismiss the petition.

The Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

June 2, 2014

OAL DKT. NO. EDU 14067-13
AGENCY DKT. NO. 209-9/13

DAVID HERRON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	
RESPONDENT.	:	

The petitioner in this case seeks to challenge respondent's decision to administer quarterly assessments designed to measure its students' readiness for college and careers, but to exempt from the testing those students who are taking advanced placement (AP) courses. In petitioner's view the exemption disparately and unfairly impacts African-American children since – according to petitioner – the majority of Montclair's AP students are white. The question before the Commissioner, however, is whether petitioner has standing to proceed with an action against respondent. The conclusion of the Administrative Law Judge who heard the matter in the Office of Administrative Law (OAL) was that petitioner does not have such standing. Upon review of the record and Initial Decision of the OAL,[1] the Commissioner concurs.

It appears undisputed that petitioner does not currently have children in respondent's schools, and will therefore suffer no direct personal harm or inconvenience from the actions which respondent has decided to undertake. Further, while petitioner is a resident and taxpayer in Montclair, he has alleged no personal financial ramifications from respondent's

[1] Neither party filed exceptions to the Initial Decision.

testing plan. Thus, petitioner does not qualify as an "interested person" under the regulations governing disputes before the Commissioner, *see, N.J.A.C.* 6A:3-1.2.

Nor does petitioner meet the established criteria for "standing." As referenced in the Initial Decision, standing is a threshold justiciability determination about whether a litigant is entitled to bring an action before a court or other tribunal. *Stubaus v. Whitman,* 339 *N.J. Super.* 38, 47 (App. Div., 2001). In order to have standing, a party must be in a position adverse to other parties, have a palpable stake in the outcome of the litigation, and be likely to suffer harm in the event of an unfavorable decision. *Ibid.*

Petitioner offers, as a basis for a determination that he has standing, his efforts over the years to advocate for various Montclair students who have experienced academic or disciplinary problems, or have sought accommodations. These advocacy efforts are commendable, but they do not add up to the concrete, personal stake in respondent's current actions which standing contemplates. Further, no Montclair student or parent has joined petitioner in the prosecution of the instant matter. Thus, there are no parties in this case with concrete interests adverse to the actions which respondent has proposed, and to which petitioner objects.[2]

[2] Although the courts have allowed litigants to assert the rights of third parties, they have only done so in limited situations. For example, when a plaintiff suffers direct impairment of constitutional rights, that plaintiff may also assert the rights of third parties who find it difficult to bring their own claims. *Trombetta v. Atlantic City*, 181 *N.J. Super.* 203, 222, 436 A.2d 1349 (Law. Div. 1981), *aff'd,* 187 *N.J. Super.* 351, 54 A.2d 900 (App. Div.1982). A plaintiff may also raise the constitutional rights of a third party when the third party's rights are likely to be diluted or adversely affected unless they are raised by a plaintiff holding a confidential relationship with the third party. *In re Estate of Neuwirth*, 155 *N.J. Super.* 410, 419, 382 A.2d 972 (Probate Div.1978). Finally, a non-profit organization has been permitted to sue on behalf of its injured members. *In re Association of Trial Lawyers of America*, 228 *N.J. Super.* 180, 186, 549 A.2d 446 (App. Div.), *certif. denied,* 113 N.J. 660, 552 A.2d 180 (1988). But here, petitioner has not suffered any direct injury; does not hold a confidential relationship with Montclair students and their parents – who could bring a petition on their own if they chose; and is not a non-profit organization.

In sum, the Commissioner adopts the Initial Decision of the OAL, which found that petitioner lacks the standing to maintain this action against respondent. Accordingly, respondent's motion to dismiss the petition is granted.

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/02/14

Date of Mailing: 6/04/14

[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 14067-13
AGENCY DKT. NO. 209-9/13

DAVID HERRON,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,

Respondent.

David Herron, pro se

Mark Tabakin, Esq., for respondent (Weiner Lesniak, attorneys)

Record Closed: April 3, 2014 Decided: April 16, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, David Herron (Herron), a Montclair Township resident and taxpayer who presently has no children enrolled in the public schools, challenges the Montclair Board of Education's (the Board) implementation of a two-year strategic plan that

includes quarterly testing of students. The Board has filed a motion to dismiss in lieu of an answer, urging that Herron lacks standing to bring his claims.

PROCEDURAL HISTORY

Herron filed a petition of appeal with the Commissioner of Education (the Commissioner) on September 3, 2013. The Board filed a motion to dismiss in lieu of an answer on October 1, 2013, and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on October 2, 2013. Herron opposed the Board's motion via a brief filed on January 24, 2014. The Board replied on February 12, 2014. Oral argument was conducted on April 3, 2014, at which time the record closed.

FINDINGS OF FACT

The Board's motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. In ruling on a motion to dismiss

> The judge considers whether all the evidence together with all legitimate inferences therefrom could sustain a judgment in favor of the party opposing the motion. The judge is not concerned with weight, worth nature or extent of the evidence. The judge must accept all the evidence supporting the party defending against the motion and accord that party the benefit of all inferences that can reasonably and legitimately be deduced therefrom. If reasonable minds could differ, the motion must be denied.
>
> [37 New Jersey Practice, Administrative Law and Practice § 5.19, at 259-60 (Steven Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000).]

Accordingly, for the purposes of the motion, all facts alleged by the petition will be deemed admitted, and I **FIND** as follows:

Herron is a citizen of Montclair. He relates in his petition that the New Jersey Department of Education (the Department) has mandated the implementation of assessments under the Partnership for Assessment of Readiness for College and Careers (PARCC). It did so in an effort to ensure that student achievement in New Jersey aligns with the National Common Core Standards mandated by the United States Department of Education. PARCC assessments are still in development and are in the process of being field tested this year.

On or about June 17, 2013, the Board voted to adopt a two-year strategic plan, which will include quarterly testing of all district students. These local assessments would be in addition to those mandated under PARCC. Herron asserts that the quarterly assessments at issue will be "teacher made," and he cites various concerns about their content and implementation. For example, he alleges that district curriculum was to be aligned with the newly drafted assessments, but that the curriculum drafting project is incomplete. Moreover, the proposed tests have not been field tested.

But Heron's paramount concern is that the Board has proposed an exemption from quarterly testing for students enrolled in advanced placement (AP) classes. Urging that less than ten percent of AP students are African-American, Herron asserts that the quarterly testing proposed by the Board would result in disparate treatment of African-American students and is discriminatory.

In his brief, Herron further advises that he is "an advocate for students in the Montclair public schools." He points out that he often attends meetings with school officials, and offers examples of students on whose behalf he has successfully intervened. But Herron claims no other relationship to the public schools; other than his status as a concerned taxpaying citizen of the community the schools serve.

CONCLUSIONS OF LAW

Standing is a "threshold justiciability determination whether the litigant is entitled to initiate and maintain an action before a court or other tribunal." In re Six Month

Extension of N.J.A.C. 5:91-1, 372 N.J. Super. 61, 85 (App. Div., 2004); Stubus v. Williams, 339 N.J. Super. 38, 47 (App. Div., 2001). In order to have standing, a party "must present a sufficient stake in the outcome of the litigation, adverseness with respect to the subject matter and a substantial likelihood that the party will suffer harm in the event of an unfavorable decision." In Re Camden County, 170 N.J. 439, 449 (2002). The Board urges that Herron lacks standing to bring his claims, and for the reasons that follow, I concur.

Herron is not a public school parent. Neither he nor any of his children will be asked to take the assessments he contends are discriminatory. Herron's only relationship to the public schools is as a taxpayer; albeit one who clearly is passionate about the quality of education delivered to the citizens of Montclair, and who pursues that interest by assisting and advocating for Montclair students and their families. But the Board correctly asserts that to have standing to bring an administrative action, a party must have suffered a distinct injury or harm that was caused by the adverse party and that can be remedied by the administrative forum. New Jersey Turnpike Auth. v Parsons, 3 N.J. 235, 240 (1949); In re Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180 (App. Div. 1988). Neither the courts nor the Commissioner enter rulings that are advisory or abstract. N.J. Civil Serv. Ass'n v. State of New Jersey, 88 N.J. 605, 611 (1982); Crescent Park Tenants Assoc. v. Realty Eq. Corp. of New York, 58 N.J. 98.107; Milano v. Franklin Bd. of Educ., EDU 08606-08, Initial Decision (February 24, 2009), Comm'r's Decision (December 21, 2009), <http://lawlibrary.rutgers.edu/oal/search.html>.

Accordingly, a desire to vindicate the public interest is insufficient to confer standing; there must be a specific connection between the petitioner and the public interest he alleges to represent. D.H. on behalf of J.M.H. v. Montclair Bd. of Educ., EDU 9419-04, Initial Decision (November 22, 2004), Comm'r's Decision (December 29, 2004), <http://lawlibrary.rutgers.edu/oal/search.html>. For example, in Montclair a parent challenged the imposition of a testing requirement for enrollment in Algebra, but had no children affected by the controverted test. Her claim was dismissed, with the administrative law judge noting that neither the petitioner nor her child "[would] be

directly affected by the challenged policy . . . or harmed by an unfavorable decision." Ibid.

Likewise here, none of Herron's children are in school and none will be directly affected by the allegedly objectionable quarterly assessments. Herron urged eloquently and strenuously at oral argument that he speaks on behalf of the Montclair school community, and his ongoing community advocacy was the center point of his arguments in opposition to the pending motion to dismiss. But as I pointed out to Herron, his arguments in fact buttress the Board's contention that he has no personal stake in the outcome of this dispute but rather, has brought this action only on behalf of unnamed others.

The case law cited by Herron is inapposite. For example, the plaintiff in Walker v. Borough of Stanhope, 23 N.J. 657 (1957), was held to have standing to challenge a Stanhope ordinance barring mobile homes, even though neither his home nor his business was located in Stanhope. But Walker was a retailer of mobile homes whose business had been adversely affected by the ordinance. He thus clearly had a personal pecuniary interest in the subject matter of his suit, and a clear and very real stake in the outcome. Likewise, an earlier successful suit by Herron against the Montclair public schools offers him no solace. In Herron v. Montclair Board of Education, EDU 7286-94, Initial Decision (January 24, 1995), Comm'r's Decision (April 19, 1995), <http://lawlibrary.rutgers.edu/oal/search.html>, Herron was found to have standing to challenge a Board policy establishing a fee for preschool. But the administrative law judge expressly noted that Herron's then three-year-old child might be enrolling in that pre-school program, thus giving him a very real and personal interest in the Board policy at issue.

Accordingly, I **CONCLUDE** that Herron's petition of appeal must be dismissed for lack of standing.

ORDER

Based on the foregoing, the Board's motion to dismiss is **GRANTED**, and the claims raised by the petition are **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 16, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: April 16, 2014

Date Mailed to Parties: APR 17 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

238-14

OAL DKT. NO. 8152-12
AGENCY DKT NO. 112-4/12

BOARD OF EDUCATION OF THE BOROUGH OF LONGPORT, ATLANTIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, AND BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions and replies thereto[1] were timely filed, pursuant to *N.J.A.C.* 1:1-18.4, on behalf of Petitioner and Co-Respondent, Atlantic City Board of Education.[2]

In this matter, the Longport Board of Education (Longport) seeks to sever its sending-receiving relationship with the Atlantic City Board of Education (Atlantic City) or, in the alternative, to modify the present sending-receiving relationship between Longport and Atlantic City so as to create a dual designation sending-receiving relationship with Atlantic City and the Ocean City Board of Education (Ocean City). Following three days of hearing in the

[1] Petitioner submitted a reply to the reply brief submitted on behalf of Atlantic City. Same was not considered as *N.J.A.C.* 1:1-18.4 makes no provision for replies to reply exceptions.

[2] While the matter was pending before the Commissioner of Education for final decision, petitioner filed a Motion to Supplement the Record, which the Commissioner determined was more appropriately considered a Motion for Remand to consider whether an appearance of impropriety existed, such that a new hearing before a different ALJ was required. The Commissioner remanded the matter to the Office of Administrative Law for a determination on the issue. The Chief ALJ determined that no appearance of impropriety existed and, therefore, a new hearing was not necessary. As the Commissioner does not have jurisdiction over the disqualification/recusal issue, it will not be addressed herein.

Office of Administrative Law (OAL), the ALJ determined to deny Longport's petition in its entirety.

The Legislature has bestowed upon local school districts lacking high school facilities of their own the power to decide how and where their students should be educated. *Bd. of Educ. of Ho-Ho-Kus v. Bd. of Educ. of Midland Park*, 96 *N.J.A.R.2d(EDU)* 964 (1996). To that end, *N.J.S.A.* 18A:38-11 permits the board of education of such a district to designate a high school or high schools for its pupils to attend on a tuition basis. Once a sending district makes the decision to educate its students in another district, it must obtain approval from the Commissioner to terminate or otherwise modify the sending-receiving relationship. *N.J.S.A.* 18A:38-11.

The modification of an existing sending-receiving relationship is governed by *N.J.S.A.* 18A:38-13, which provides, in pertinent part:

> The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.

Thus, in ruling on an application for modification, the Commissioner must evaluate whether granting the requested modification will have a "substantial negative impact" upon 1) the quality of education, 2) the financial condition, or 3) the racial composition of the pupil populations of the districts involved. If, upon consideration of all the circumstances, no substantial negative impact is found, the application must be granted.

In the Initial Decision, the ALJ determined that severance of the sending-receiving relationship between Longport and Atlantic City will not result in a substantial

negative impact upon the quality of education or the financial state of any of the involved districts. Accordingly, the ALJ concluded that the sole issue to be decided was whether the contemplated modification would have a substantial negative impact on the racial composition of Atlantic City High School (ACHS). Ultimately, the ALJ denied Longport's application upon his determination that the requested modification would have a substantial negative impact on the racial composition of ACHS.

In analyzing that issue, the ALJ recommended a two-part test for determining whether severance of a sending-receiving relationship will result in a substantial negative impact on racial composition.[3] The ALJ's test – purportedly derived from prior decisions of the Commissioner – would establish a bright-line rule that effectively mandates the summary denial of any petition for modification upon a threshold determination that the current receiving district is "racially imbalanced."[4] The ALJ reasoned that, if a school is already racially imbalanced, then the departure of even one Caucasian student from that school necessarily constitutes a substantial negative impact on racial composition, such that the application for modification must be denied without further consideration.

The Commissioner cannot countenance such an interpretation. At the outset, the Commissioner finds that such a bright-line rule would dissuade sending districts from entering into agreements with "racially imbalanced" receiving districts. In that regard, both districts would be immediately bound to continue the relationship in perpetuity, regardless of

[3] The two-part test advocated by the ALJ is: "Step 1 – Is the receiving district in racial imbalance; and Step 2 – If not, will the departure of the sending district's children create imbalance or further exacerbate any existing imbalance resulting in a substantial negative change in the racial balance of the school? Step 2 requires a detailed statistical analysis of the student population of the districts involved. But, in order to get to Step 2, the petitioner must meet the test established in Step 1, that is, it must show that the receiving district is not racially out of balance."

[4] The ALJ suggested that a school is "racially imbalanced" whenever its minority population is not between 40% and 60% of the total student population.

future educational or financial considerations. This would deprive the districts of any meaningful opportunity to evaluate the new relationship since, regardless of their assessments, there would be no available recourse. In short, both districts would be hamstrung from the moment they signed the agreement.

Moreover, the notion that the current "racial balance" of the receiving district is alone dispositive of whether a substantial negative impact will result from severance is incompatible with the statute's command that the Commissioner "make equitable determinations based upon consideration of all of the circumstances." Indeed, the determination of whether a requested modification will result in a substantial negative impact on racial composition requires a fact-sensitive inquiry in which the significance of the statistics are evaluated under "all of the circumstances" of the particular case.[5] *Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of the City of Englewood,* 257 *N.J. Super.* 413 (App. Div. 1992).

Thus, the Commissioner is statutorily required to conduct a comprehensive review of all of the circumstances. The current racial composition of the receiving district's pupil population is unquestionably a fundamental and indispensible part of the Commissioner's inquiry. It is, however, a single component of the holistic review mandated by *N.J.S.A.* 18A:38-13. The significance of that component cannot be determined in a vacuum. Rather, it must be viewed in the context of other relevant factors, such as the extent of the projected statistical changes and the existence of other aggravating circumstances.

---

[5] Likewise, the ALJ's two-part test is inconsistent with the explicit language of the controlling statute. It is a cardinal rule of statutory construction that full effect should be given, if possible, to every word of a statute. *Carlson v. Hannah*, 6 *N.J.* 202, 214 (1951). Any interpretation that renders statutory language meaningless is to be avoided. *McCann v. Clerk of Jersey City*, 167 *N.J.* 311, 321 (2001). The operative language of the controlling statute requires the Commissioner to grant the petitioning district's request for modification, unless a *substantial* negative impact would result. The two-part test espoused by the ALJ requires denial where the requested modification will have *any* negative impact on racial composition, effectively removing the word "substantial" from the statute.

In *Englewood, supra*, the requested modification would have resulted in a de minimis 1.6% proportional change. However, the record established that the petitioning district had begun withdrawal from the receiving district based upon "white flight" long before it filed its application with the Commissioner. Thus, there was evidence of a deliberate and rapid decline in the receiving district's Caucasian population. Perhaps more importantly, there were so few Caucasian students still enrolled in the receiving district that severance would have resulted in a 16% decrease in the gross Caucasian population, leaving the receiving district with a proportional minority population of 89.8%. The court found this combination of statistics and nefarious motivations, coupled with evidence that the remaining minority population would suffer a significant symbolic loss, supported a finding that the requested modification would have a substantial negative impact upon racial composition and must be denied.

Englewood and its progeny [6] establish that a de minimis statistical change may constitute a "substantial negative impact" when coupled with certain aggravating circumstances. Examples of such aggravating circumstances include, *inter alia*, a trend of rapidly declining Caucasian enrollment, evidence of projected symbolic loss, and a high percentage of projected change in the gross Caucasian population upon severance. *Id.*

Longport has long provided for the education of its high school-aged students through a sending-receiving relationship with Atlantic City. ACHS has a total student population of 2,040.[7] Longport sends only nine (9) students to ACHS. The Longport students represent .4% (9/2040) of the total student population of ACHS. Including the nine (9) Longport

[6] The Commissioner finds that each severance case presents a unique set of facts, statistics and circumstances, which require independent review. Accordingly, the Commissioner finds no prior case dispositive of the instant application.

[7] For purposes of this decision, the Commissioner adopts the enrollment figures and statistics contained in the Joint Stipulation of Facts, which the ALJ admitted into evidence yet inexplicably disregarded.

students, 442 Caucasian students attend ACHS. Caucasians represent 21.7% of the total student population, while various minority groups represent the other 78.3%.

By all accounts, ACHS currently has a very diverse racial composition: the school has a Hispanic population of 31%, an African American population of 29%, an Asian/Pacific Islander population of 17.9%, and a Caucasian population of 21.7%. The Commissioner recognizes that the departure of the nine (9) Longport students will have *some* impact on that diversity. However, as our Supreme Court has observed, "[n]ot every action that reduces the percentage of white students necessarily implicates the State's policy against segregation in the public schools." *North Haledon Board of Education v. Passaic County Manchester Regional School District*, 181 *N.J.* 161, 165 (2004). Thus, the pertinent question is not whether there will be a negative impact, but whether that impact will be "substantial" as contemplated by the controlling statute, *N.J.S.A.* 18A:38-13.

In the event that all nine (9) Longport students departed ACHS, the Caucasian population at the school would decrease from 442 to 433. The remaining 433 Caucasians would represent 21.3% of the total student population of ACHS, a proportional change of .4%. In the abstract, a .4% proportional change can only be characterized as de minimis. The significance of these statistics must, however, be evaluated in light of all of the circumstances of the case. Only then can a determination be made as to whether the impact on racial composition is substantial.

Here, the Commissioner finds insufficient evidence of aggravating circumstances in the record to support a finding that the otherwise de minimis .4% proportional change represents a "substantial negative impact" on the racial composition of ACHS. In that regard, the record does not establish that severance will result in a significant decrease in the gross Caucasian population at ACHS. The nine (9) Longport students represent 2% of the Caucasian

population at ACHS. Thus, the loss of those nine (9) students would represent only a 2% decrease in the gross population of Caucasian students. Further, ACHS would continue to have a sizeable Caucasian population of 433 students, representing 21.3% of the total student population.

Nor does the record establish a consistent and rapid decrease in Caucasian enrollment at ACHS over time. While the evidence presented at hearing demonstrates a minor decline in the proportion of Caucasian students enrolled at ACHS over a 10 year period, it also demonstrates a decline in the proportion of African-American students during that same time period. In fact, the proportion of African-American students enrolled at ACHS suffered the greatest decline over the past 10 years. Furthermore, in more recent years, the record reflects a slight increase in the proportion of Caucasian students enrolled at ACHS. This can hardly be analogized to the calculated mass exodus of Caucasian students seen in *Englewood.*

The Commissioner finds the record similarly devoid of any tangible evidence that would support a finding that symbolic loss will occur in the wake of severance. To that end, the Commissioner finds that there was no objective evidence presented to establish any actual or potential psychological impact on ACHS minorities as a consequence of the departure of Longport's Caucasian students. ACHS has a very diverse racial composition, and will continue to have a very diverse racial composition with nearly identical proportional percentages following severance.

Based upon the foregoing, the Commissioner finds that, under all of the circumstances here presented, severance will not have a substantial negative impact on the racial

composition of ACHS.[8] Further, the Commissioner is persuaded that, for the reasons outlined by the ALJ in his decision, severance will not result in a substantial negative impact on the quality of education or the financial condition of the districts involved. Absent a showing of substantial financial, educational, or racial negative impact herein, the Commissioner is required to grant the requested severance.[9]

Accordingly, the Initial Decision is adopted in part and rejected in part, as modified above. Longport's application for severance of its sending-receiving relationship with ACHS is hereby granted, subject to its entering into a new sending-receiving relationship with Ocean City for a minimum duration of five years.

IT IS SO ORDERED.[10]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/05/14
Date of Mailing: 6/06/14

[8] The Commissioner further finds that the .1% proportional change in racial composition resulting from addition of the nine (9) Longport students to Ocean City High School will not have a substantial negative impact upon the racial composition of the school.

[9] In light of the Commissioner's decision on the application for severance, it is unnecessary to reach the alternative application for dual-designation.

[10] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8152-12
AGENCY DKT. NO. 112-4/12

BOARD OF EDUCATION OF THE BOROUGH OF LONGPORT, ATLANTIC COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, AND BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, ATLANTIC COUNTY,
Respondents.

George K. Miller, Jr., Esq., for petitioner (Miller, Gallagher & Grimley, attorneys)

Kim C. Belin, Esq., for respondent Atlantic City Board of Education (Cooper Levenson, attorneys)

Michael P. Stanton, Esq., for respondent Ocean City Board of Education (McCrosson & Stanton, attorneys)

Record Closed: May 14, 2013 Decided: June 26, 2013

BEFORE **BRUCE M. GORMAN**, ALJ:

STATEMENT OF THE CASE

Petitioner Longport Board of Education seeks severance of its sending-receiving relationship with respondent Atlantic City Board of Education and seeks to establish a sending-receiving relationship with respondent Ocean City Board of Education. In the alternative, petitioner seeks to create a dual-designation sending-receiving relationship with both Atlantic City High School and Ocean City High School.

PROCEDURAL HISTORY

The petitioner requested a fair hearing and the matter was filed at the Office of Administrative Law (OAL) on June 19, 2012, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and 14F-1 to -13. The matter was heard on February 1, 2013, March 26, 2013, and March 28, 2013, and the record closed.

FACTUAL DISCUSSION

Longport is a non-operating school district situated in Atlantic County at the southern end of Absecon Island. At the present time, Longport sends twenty-four students to various local high schools. Nine of those students attend Atlantic City High School pursuant to a long-standing sending-receiving relationship between the two districts. Three students attend Ocean City High School in accordance with the STEM program, a Choice Program authorizing another school district. The remaining students attend a variety of private and parochial schools.

Judith Ann Ferguson testified for Longport. Ferguson presented an extensive curriculum vitae (P-17). She holds a bachelor's degree in English education from Trenton State College, a master's degree in foundations of education from Rutgers University, and a doctorate in educational administration from Rutgers University. In a career spanning over forty-five years, she has served as a teacher, school program coordinator, school business administrator, and superintendent of schools. She served in the latter capacity in three different school districts in New Jersey.

In 1998, Ferguson formed Centennium Consultants, LLC. Working from that entity, Ferguson acted as a consultant to a variety of school districts, with emphasis on regionalization and withdrawal studies. She is or has been affiliated with several other entities engaged in consultation services for the educational community. She is a past president of the New Jersey Association of School Administrators. She has published fifteen separate articles in the field of education administration. Additionally, she has given numerous seminars in the field. Prior to accepting a contract with Longport, she had provided eight feasibility studies.

Ferguson was qualified and accepted by this tribunal as an expert in feasibility studies regarding severance and withdrawal of students and the impact with regard to that withdrawal on both sending and receiving districts.

Ferguson noted that she was paid by Longport to produce her report.

Ferguson identified her Feasibility Study dated November 14, 2011 (P-3), as well as an undated addendum to that study (P-4). The purpose of the report was to determine the feasibility of the Longport student body withdrawing from Atlantic City High School. Ferguson compiled the study through the use of documents, interviews, and online information. She also used materials she had previously gathered for a regionalization study for Ocean City High School, which she conducted in 2001. Ferguson acknowledged that her study is now nearly two years old, and since that time there has been some slight change to the demographics contained therein.

Ferguson began by noting that Ocean City High School is 4.4 miles from Longport, while Atlantic City High School is 6.4 miles from Longport. She did not explain her measuring point in Longport.

Ferguson did not personally conduct an inspection of Atlantic City High School, but did visit Ocean City High School. She noted that Atlantic City High School is ten years old, while Ocean City High School was newly constructed. However, she stated that the facilities were comparable.

Using statistics compiled for the 2010–2011 school year, Ferguson then addressed the racial composition of Atlantic City High School and Ocean City High School. The racial composition of those high schools was addressed in Table 4 of the Feasibility Study. At the time of the study, Atlantic City High School had a total population of 2,309 students. Out of that total, 1,892, or 81.94% of the student body, consisted of minorities. Conversely, Ocean City High School had a total student population of 1,242 students and a minority population of 92 students, or 7.41% of the student body.

Ferguson then explained Table 5 of her Feasibility Study, which projected the racial impact of the withdrawal of the Longport students from Atlantic City High School. In reaching this calculation, she did not use the entire Longport student population of twenty-four high school students, but only the nine high school students currently enrolled in Atlantic City High School. Based upon her calculations, she concluded that the withdrawal of the nine Caucasian Longport students from Atlantic City High School would result in a differential of .34% for the 2011–2012 school year, .35% for the 2012–2013 school year, .24% for the 2013–2014 school year, .36% for the 2014–2015 school year, and .28% for the 2015–2016 school year. For the 2013–2014 school year she projected only six Longport students, while for the 2015–2016 school year she projected only seven Longport students. She utilized nine students for the other years.

Based upon her projections, she concluded that withdrawal of the Longport students would have no substantial negative impact upon Atlantic City High School's racial composition.

Ferguson then explained Table 6 of her Feasibility Study, which projected the racial impact of the enrollment of the Longport students in Ocean City High School. In reaching this calculation, again she did not use the entire Longport student population of twenty-four high school students, but rather the nine high school students currently enrolled in Atlantic City High School. Based upon her calculations, she concluded that the enrollment of the nine Caucasian Longport students in Ocean City High School would result in a differential of .05% for the 2011–2012 school year, .06% for the 2012–2013 school year, .04% for the 2013–2014 school year, .06% for the 2014–2015 school

year, and .04% for the 2015–2016 school year. Again, for the 2013–2014 school year she projected only six Longport students, while for the 2015–2016 school year she projected only seven Longport students. She utilized nine students for the other years.

Ferguson noted that she created Tables 5 and 6 using the Cohort Survival Method. The Cohort Survival Method is a system utilizing mathematical calculations to create estimates of future enrollment.

Ferguson concluded that the change in racial composition for the two high schools would be de minimis.

Ferguson analyzed the respective educational programs of Atlantic City High School and Ocean City High School. Utilizing the New Jersey School Report Card, she produced Table 7 of the Feasibility Study. She found that the length of the school day for Atlantic City High School was six hours and twenty-five minutes, while at Ocean City High School it was six hours and thirty-seven minutes. The average class size at Ocean City High School was 18.6 students; at Atlantic City High School it was only 14.4 students. Table 7 shows that students receive five hours and eight minutes of instructional time at Atlantic City High School, while they receive six hours and ten minutes of instructional time at Ocean City High School. However, at the hearing, Ferguson testified that additional factors would adjust the instructional time at Atlantic City High School to six hours and twenty-five minutes.

The School Report Card showed attendance rates of 89.5% and 94.8%, respectively, for Atlantic City High School and Ocean City High School. However, the graduation rate at Atlantic City High School was only 75.6%, while the graduation rate at Ocean City High School was 99.1%.

Other notable statistics included the student-to-faculty ratio, which was 11.2:1 at Atlantic City High School and 10.1:1 at Ocean City High School. English was used as a first language by 99.2% of the student population at Ocean City High School, and by only 65.4% of the students at Atlantic City High School.

Finally, Atlantic City High School exhibited a 43% student suspension rate, while Ocean City High School exhibited only a 4% student suspension rate. Ferguson admitted she did not know what the differential in student suspension rates meant.

Ferguson then analyzed the results of standardized testing. She noted at the outset that every school in New Jersey is classified with a letter based upon its socioeconomic composition. An "A" district has the lowest socioeconomic level, and each letter above "A" indicates a higher socioeconomic level. Atlantic City is classified as an "A" district, meaning Atlantic City is socioeconomically poor. Ocean City is classified as a "DE" district, meaning it is socioeconomically in the middle, neither wealthy nor poor, but socioeconomically more advanced than Atlantic City. When the Department of Education engages in comparisons, it compares Atlantic City High School to other "A" districts, while it compares Ocean City High School to other "DE" districts.

With that background, Ferguson then addressed Table 8 of her Feasibility Study. At the outset, she stated that both school districts compare favorably on the High School Proficiency Assessment (HSPA) results. Atlantic City High School scored higher than other Type A districts, while Ocean City High School scored higher than other Type DE districts. However, when Atlantic City and Ocean City high schools were compared to each other, Ocean City High School had significantly higher test scores. Specifically, Table 8 reflects that Atlantic City High School showed a 58.9% proficiency in language arts/literacy, while Ocean City High School demonstrated a 77% proficiency in that area. Atlantic City High School demonstrated a 41.2% proficiency in mathematics, while Ocean City High School showed a 57.9% proficiency in that area.

Table 9 shows the results of the Scholastic Aptitude Test (SAT) for 2009–2010. The results were similar to the HSPA results. Both districts outperformed their district factor group. When compared to each other, students at Ocean City High School received higher scores than students at Atlantic City High School. On the mathematics SAT, Atlantic City High School students produced an average score of 447, while Ocean City High School students produced an average score of 460. On the SAT verbal test, Atlantic City High School students produced an average score of 430, while

Ocean City High School students produced an average score of 499. On the essay portion of the SAT, Atlantic City High School students produced an average score of 427, while Ocean City High School students produced an average score of 491.

Ferguson noted that only 51% of the student population of Atlantic City High School took the SATs, while 74% of the student population of Ocean City High School did so. She concluded that removing nine Longport students from Atlantic City High School and placing them at Ocean City High School would not substantially affect either the HSPA or the SAT statistics.

Ferguson analyzed the advanced-placement programs in the two high schools. Atlantic City High School offers twenty advanced-placement courses, while Ocean City High School offers seventeen. During the 2009–2010 school year, Atlantic City High School administered an aggregate of 344 advanced-placement examinations. Out of that number, 149 tests were graded "3" or higher. A score of at least "3" is required for the student to receive advanced-placement credit. During that same period, an aggregate of 359 students enrolled in advanced-placement courses at Ocean City High School. Of the 360 exams administered, 282 were graded "3" or higher.

Ferguson reviewed the results from the No Child Left Behind Act of 2001 during the 2009–2010 school year. White students in both schools met the proficiency standards set forth in the Act. In Atlantic City High School, African-American students, Asian/Pacific Islander students, and Hispanic students failed to meet the proficiency standards. Significantly, Ocean City High School lacked sufficient numbers of minority students to produce statistics for those categories under No Child Left Behind. Failure to produce those statistics was the result of Ocean City High School's overwhelmingly white student population and minimal minority population.

Finally, Ferguson reviewed the high-school-graduation requirements of the two schools. Atlantic City High School requires that a student earn thirty credits each year in order to graduate, while Ocean City High School requires that a student earn thirty-five credits each year. Atlantic City High School required a minimum of 110 credits to

graduate in the 2011–2012 school year, and will require 120 credits starting with the class of 2013. Ocean City High School requires 135 credits.

Ferguson concluded that, from an educational perspective, both schools had "very fine programs." She stated that she could not conclude that either school was superior from a curriculum point of view. Ferguson concluded that she would be happy to have her child attend either school. She also concluded that the removal of nine students from Atlantic City High School and the enrollment of those students in Ocean City High School would not have a negative impact on the core offerings of either school.

Ferguson then turned to the financial impact of the proposed severance on Atlantic City High School and the increase in student population on Ocean City High School. She noted that both districts rely upon tuition incomes as one of the variables in its budgeting process. Consequently, the number of students in each district is important from a financial perspective.

Ferguson then addressed Table 18 of the Feasibility Study, entitled Comparative Tuition Projections. Ferguson began by projecting the number of students who would be transferred from Atlantic City High School to Ocean City High School over a three-year period. For the 2011–2012 and 2012–2013 school years, she projected nine students. Since those years are already past or present, those are hard numbers. For the 2013–2014 school year, she projected six students. Based upon those numbers, Ferguson calculated that, over that three-year period, Atlantic City would have lost tuition in the amount of $539,565, while Ocean City would have gained tuition in the amount of $411,066, a differential of $128,499.

Ferguson found that Atlantic City High School has a total school budget of approximately $176 million. Ocean City High School has an approximate school budget of $40 million. She concluded that a shift of the Longport students would have a "very minimal impact on the school tax rate."

Based upon her conclusions concerning race, education, and finance, Ferguson concluded that the transfer of the Longport students from Atlantic City High School to Ocean City High School would not have a negative substantial impact upon either institution.

Ferguson then introduced an addendum to her Feasibility Study (P-4). The purpose of the addendum was to address the second count of the petition, which sought a joint sending-receiving relationship between Longport and both Atlantic City High School and Ocean City High School. The addendum consisted of two pages and utilized the same analyses provided in the Feasibility Study. Its conclusion was identical to that contained in the Feasibility Study (P-3), namely, that no substantial negative impacts would result if Longport students were afforded the option to attend either Atlantic City High School or Ocean City High School.

Ferguson introduced an additional chart (P-16), which purported to delineate the numerical findings contained in four cases dealing with the racial impact of the severance of sending-receiving relationships. In two of those cases, the petition was granted, and in two the petition was denied. The racial differentials in the two cases where severance was granted was 7.9% (Winfield/Rahway) and 3.7% (Saddle River/Ramsey).

On cross-examination, Ferguson acknowledged that the reason the transfer of the Longport students had so little impact was because there were so few students. She also agreed that a diverse environment is an important element of education. But Ferguson contended that Ocean City's 7.41% minority composition constituted diversity. She then conceded that at Ocean City High School, the Longport students will be exposed to a predominantly white culture.

Ferguson acknowledged her understanding that Ocean City High School is a "Choice school," but denied knowledge of how the Choice system would affect the financial impact on the respective districts. She also agreed that if all twenty-four Longport students enrolled in Ocean City High School, the percentages involving racial impact would be altered, although to what extent she did not know.

Under questioning from this tribunal, Ferguson agreed that the fundamental finding of her study was that Longport's student population is too small to matter.

Carl Tripician testified for Longport. Tripician is an attorney. He serves as municipal prosecutor for the City of Longport, is a senior adjunct professor at Atlantic Cape Community College, is a member of the District I Ethics Committee, and is a member of the Fee Arbitration Committee. He was elected to the Longport Board of Education in 2008 and has served as its president since 2009.

Tripician testified that Longport is a non-operating school district. Longport itself has no schools, and has a sending-receiving relationship with other schools to provide for the education of its students. Kindergarten through eighth-grade students in Longport attend Margate Elementary School in the neighboring municipality of Margate. Ninth- through twelfth-grade students can attend Atlantic City High School under a sending-receiving relationship.

Tripician testified that the Board is pursuing this petition because it seeks the best possible educational opportunities for its students. Tripician cited several factors in the Board's determination to proceed. First, he noted that tuition at Atlantic City High School continues to rise and is presently up to approximately $24,000. Second, he noted that Ocean City makes more sense for Longport students because it is "right over the bridge."

But most of all, Tripician emphasized that the parents in Longport want their children to have a choice. They favor a dual relationship with both Atlantic City High School and Ocean City High School because it will afford the students an opportunity to choose. In that way, each Longport student can determine what educational opportunity is best for him or her. As proof of that proposition, Tripician introduced a series of letters from Longport parents stating which school they would prefer their child to attend in the event that a dual relationship were approved (P-10). A summary of this survey was presented, as well (P-11).

Tripician testified that the high minority population of Atlantic City High School and the relatively low minority population of Ocean City High School did not impact the Board's action. He asserted that race was not a motivating factor in the Board's decision to seek to terminate its relationship with Atlantic City High School in favor of Ocean City High School.

On cross-examination, Tripician explained that the Board had no interest in terminating its sending-receiving relationship for its elementary students with the Margate Board of Education, because Margate was adjacent to Longport, and the parents were easily able to drop off and pick up their children at the Margate Elementary School. The fact that Margate Elementary is a predominantly white school was irrelevant.

Tripician noted that the factors entering into the Board's decision to seek to terminate its relationship with Atlantic City High School in favor of Ocean City High School were proximity, dropout rate, attendance, test scores, and what he perceived to be the higher level of advanced degrees held by members of the Ocean City High School faculty.

I found Tripician's assertion that race played no role in the desire of Longport to terminate its relationship with Atlantic City High School to be unconvincing. The gravamen of his argument was that Longport parents wanted choice for their children. But, according to Tripician, the desire for choice did not extend to the entire student population, but only to those students of high-school age who would be required to attend Atlantic City High School. Apparently, Longport's parents saw no need for choice at the elementary level, where their children attend the overwhelmingly white Margate school system.

Jann Cohen testified for Longport. Cohen is a certified school board administrator employed primarily by the Buena Regional Board of Education, but she is also employed part-time by the Longport Board of Education. She has served at Longport since the 2004–2005 school year.

Cohen testified that Longport has no overall written sending-receiving contract with the Atlantic City Board of Education. Each year, the Atlantic City Board of Education sends Longport a written agreement, which Longport approves.

Cohen testified that Longport started the 2012–2013 school year with twenty-five high school students, but now has twenty-four. Those twenty-four students attend high schools as follows: nine—Atlantic City High School; three—Ocean City High School; two—Charter Tech; three—Holy Spirit High School; one—Our Lady of Mercy Academy; six—Saint Augustine College Preparatory School.

Cohen testified that some Longport students have always attended the local parochial schools. She stated that Longport's total enrollment is trending downward. The same is true of the Margate school system. Margate previously had three kindergarten-through-eighth-grade schools. Margate has closed one of the three schools, and may close a second.

Cohen offered the opinion that the effect of the withdrawal of nine students from Atlantic City High School and their placement in the Ocean City school system would be minimal. The total cost in tuition of all twenty-four Longport students attending Ocean City High School would be $320,000.

Erik J. Ortolf testified for Longport. Ortolf holds a bachelor's degree and a master's degree from the University of Delaware, and holds educational certificates from Rowan University. He has thirty-three years of experience in education. He is the director of Pupil Personnel Services for the Ocean City School District. In that position, he is in charge of the counseling program, testing, and, among other areas, the Choice Program.

Ortolf testified regarding the procedure whereby Ocean City implements its Choice Program. The district receives applications and develops a list of interested students. It then conducts a lottery to determine who will be awarded the available seats.

Ortolf stated that there are limited seats available for students in grades kindergarten–eight, ten and eleven. First priority is given to tier-one students, who are those students who spent the previous year in a public school. Tier-two students have secondary access. Tier-two students come from private or parochial schools. Ocean City does not accept students who are entering the twelfth grade.

The largest group of Choice students is the group entering ninth grade. In order to qualify for a ninth-grade seat at Ocean City, a student must have a minimum score of 225 in the NJASK tests in both language literacy and mathematics. The scores from the seventh grade are used for that purpose, since the eighth-grade tests are administered too late to be utilized. Ocean City allocates thirty seats for students entering the STEM program, that is, students interested in science, technology, engineering and mathematics. Eight seats are made available for students interested in the performing arts, five for instrumental performance and three for dance.

For the 2012–2013 school year, Ocean City High School had 102 applicants for entry into the ninth grade. Fifty of the 102 applicants had the proper NJASK qualifications. Four students were afforded automatic admission because they had siblings at Ocean City High School. The remaining forty-six entered a lottery for the thirty-eight available seats. A waiting list of seven to eight students is maintained.

Ocean City's Choice Program has been in effect for three years. Ocean City must annually report its activity to the Commissioner of Education. Ortolf stated that there is no financial criterion to become a Choice District.

Wayne W. Thomas testified for Atlantic City. Thomas received a bachelor's degree from Wilkes University in 1962, a master's degree in education from Rutgers University in 1965, and a master's degree in English from Scranton College. He has taken graduate courses at both Temple University and Rowan University, but has attained no further degree.

During his educational career, Thomas has served as a teacher, vice principal, and business administrator. He was the business administrator for the Willingboro

School District for twelve years. Thereafter, he worked for the Department of Education for five years, serving as an acting county superintendent, as a member of the task force in the Camden school system, and as a State monitor. He was qualified as an expert in analyzing student data and demographic trends.

Thomas testified that although Longport couches its petition in terms of altering its relationship with Atlantic City High School, the petition seeks a de facto termination of its relationship with that school. Thomas reviewed Longport's Feasibility Study (P-3) and participated with Dr. Daniel Mastrobuono in the preparation of a separate expert's report (AC-5).

Thomas testified that Atlantic City High School currently contains 2,039 students for the 2012–2013 school year. At the time he analyzed the student body, he determined that 441 students at Atlantic City High School were Caucasian; the balance were minorities. All nine of the Longport students attending Atlantic City High School were white. Those nine students represented 2% of all white students at Atlantic City High School. Thomas concluded that allowing the nine Longport students to depart Atlantic City High School for Ocean City High School would move the demographics of Atlantic City High School "in the wrong direction." Thomas opined that diversity is important in student development and that students learn from each other.

Thomas noted that the white population of Atlantic City High School has declined over the last ten years. In 2002, 74% of the student population at Atlantic City High School were minority students. That number has now increased to 78%. Thomas concluded that the more Caucasian students who are removed from Atlantic City High School, the higher the percentage of minority students will be.

Thomas expressed concern that if Longport is allowed to sever its relationship with Atlantic City High School, other districts may follow, most notably, Margate, Ventnor and Brigantine. The number of Margate students attending Atlantic City High School is 116, and of that number, 105 are white. The white Margate students represent 24% of the white population of Atlantic City High School. If Margate were to

sever its relationship with Atlantic City High School, the percentage of minority students at Atlantic City High School would rise to 83%.

Thomas testified that 308 Ventnor students attend Atlantic City High School. Of that number, 150 are white. Those 150 students comprise 34% of the white population of Atlantic City High School.

Finally, Thomas testified that 194 Brigantine students attend Atlantic City High School. Of that number, 132 students are white. Those white students represent 30% of the white population of Atlantic City High School. Atlantic City itself sends 1,412 students to Atlantic City High School. Of that number, only 44 are white, representing 3% of the white population of Atlantic City High School.

Thomas warned that the departure of Longport could encourage other districts to follow, thereby virtually eliminating the white population of Atlantic City High School.

Thomas testified that Ocean City High School has 1,242 students. Of that number, 92.5% are white and 7.5% are minority. He stated that the transfer of the nine Atlantic City High School Longport students would slightly increase the percentage of white students at Ocean City High School.

Thomas testified that the departure of the nine Longport students from Atlantic City High School to Ocean City High School would have no significant financial impact on either institution. The budget of Atlantic City High School is $155 million. Of that amount, $185,000 represents tuition from Longport.

Thomas offered the opinion that transferring all nine Atlantic City High School students into Ocean City High School would not affect the diversity at Ocean City High School, but removal of the nine students would affect Atlantic City High School diversity.

On cross-examination, Thomas acknowledged that he did not speak with the business administrator at any of the school districts involved in the litigation. Instead,

he obtained his data from Department of Education sources, including school report cards and school budgets.

Thomas did not disagree that the student population of Atlantic City High School has been comparatively flat. In 2000 the student population was 2,089 students; in 2011 the population was 2,028 students. Thomas noted, however, that if the nine Longport students were removed from Atlantic City High School, the proportional change would represent 2% of the total white student population of Atlantic City High School.

Daniel Mastrobuono testified for Atlantic City. Like Thomas, Mastrobuono is a consultant with the Education and Resource Center. He holds a bachelor's degree in education from Rutgers University, a master's degree in education administration from Rowan University, and a doctorate in education and administration from Nova University.

Mastrobuono commenced his career as a fifth-grade teacher. He progressed to the positions of principal, assistant principal, and superintendent. Thereafter, he served for seven years as county superintendent in Camden County. He served as Cumberland County superintendent for three years, and worked for two and one-half years as assistant to the Commissioner of Education for shared services.

In his position as assistant to the Commissioner, his job consisted of attempting to find districts that could build shared services. In the course of his work, he analyzed student and demographic trends. He assisted in the preparation of feasibility studies for Ho-Ho-Kus, and is presently working on a feasibility study for Woodbine, Millville, and Middle Township.

Finally, Mastrobuono dealt with the area of monitoring procedures. In the course of that work, he evaluated curriculum and instruction.

Mastrobuono was qualified as an expert in education, curriculum and instruction, school finance, and the severance or withdrawal of students.

Mastrobuono reviewed Longport's feasibility study (P-3). Additionally, he co-authored Atlantic City's feasibility study (AC-5).

Mastrobuono determined that the nine Longport students at Atlantic City High School were all white. Atlantic City High School contains 441 white students and 1,368 minority students. A breakdown of the minority students reveals 371 Asian students, 590 African-American students, and 638 Hispanic students. Mastrobuono concluded that the above-described breakdown renders Atlantic City High School "diverse."

Mastrobuono opined that maintaining a diverse student body is crucial. He quoted Jonathan Kozol's work, The Shame of the Nation, in stating that we should not allow our students to grow up in two different societies. Human variety plays an important role in the development of children. Children learn to think more deeply in pluralistic environments. Mastrobuono argued that the departure of the nine Longport students from Atlantic City High School would have an impact because each individual is significant. In his view, one student can have a beneficial effect on diversity.

Mastrobuono cited an article in the Journal of Social Issues that opined that students in a diversity setting were more motivated to compete in a heterogeneous society.

Mastrobuono expressed his concern that if Longport were permitted to sever its relationship with Atlantic City High School, other sending districts would follow. He stated that the tuition component would impel them in that direction, given that Ocean City High School's tuition was less than Atlantic City High School's tuition. The tuition savings for Longport, in his view, was approximately $28,551, a sum that would have a "very negligible impact" on Longport. But the savings that could be accrued by the other sending districts would be greater, and could encourage them to defect to Ocean City High School.

Mastrobuono reviewed the respective educational programs of Atlantic City High School and Ocean City High School. It was his opinion that the respective curricula

were at least equal, and that Atlantic City's High School curriculum was potentially superior to that of Ocean City High School.

Based upon the data he reviewed, Mastrobuono opined that five of the nine Longport students in Atlantic City High School would remain in Atlantic City High School. However, he did not believe this trend would continue in future years. He stated that the "people pushing this" wanted Longport students to go to Ocean City High School. Mastrobuono concluded that any one student who will affect the diversity situation is a negative in this day and age.

Mastrobuono stated that all of his opinions were based upon a reasonable degree of educational certainty.

Sherry Yahn testified for Atlantic City. Yahn has been employed by the Atlantic City Board of Education for twenty-one years and currently serves as assistant superintendent for Curriculum and Instruction. She holds a bachelor's degree from Stockton College and a master's degree in education and administration from Cheyney University. She has completed her doctorate classes in education administration, but has not yet prepared her dissertation.

Yahn testified that according to mandated State reports, Atlantic City High School contains 2,046 students, of whom 441 are white and 1,605 are minority. Atlantic City itself sends 1,413 students to Atlantic City High School. Of those 1,413, forty-four are white and 1,369 are minority. Longport sends nine students to Atlantic City High School. All nine Longport students are white.

Yahn expressed concern about the impact of the departure of the nine Longport students from Atlantic City High School. She explained that the State designates a school as a "priority school" when it fails to reach certain indicators in attendance and achievement. If the graduation rate at Atlantic City High School continues its downward spiral, Atlantic City High School could be designated a priority school. If it remains a priority school for two years, the State could take over the district. Yahn noted that all

Longport students will graduate. Accordingly, their departure from the district will reduce Atlantic City High School's graduation rate.

Yahn also expressed concern that advanced-placement (AP) classes may be reduced if Longport students depart. Longport students tend to be high achievers and attend AP classes. Based upon current standards in place at Atlantic City High School, if the attendance at an AP class falls below fifteen students, the class is usually eliminated. A reduction in AP classes could also lead to the layoff of teachers who specialize in those areas.

Yahn identified an enrollment chart for Atlantic City High School (AC-11). That chart shows that 829 students take AP or honors courses at Atlantic City High School, a number that represents 40.8% of the student population. Yahn explained that an AP class maintains curriculum standards set by the Educational Testing Service, while an honors class is one that utilizes an Atlantic City High School curriculum. Yahn noted that 44.6% of the 829 students in AP/honors courses come from the sending districts. All nine Longport students take AP classes. If they depart, the numbers of AP classes offered could decline.

On cross-examination, Yahn admitted that the school currently offers several AP courses that do not have fifteen students. Notwithstanding the reduced enrollment in those classes, they had not been cancelled.

Yahn testified that Atlantic City High School's graduation rate has been reduced because of a change in the manner in which that rate is calculated by the State. Previously, only those seniors enrolled in October of their senior year were counted. Based upon changes in the calculation, the school is now required to include students in juvenile facilities and in special-education placements. As a result, Atlantic City High School's graduation rate has dropped. All of the Longport students graduate. If Longport departs, the graduation rate at Atlantic City High School will be negatively impacted.

Yahn testified that before coming to Atlantic City High School, she was employed for three years at Holy Spirit High School. According to her, the teachers' expectations in the two schools differed. At Holy Spirit, students were expected to do the work. In a largely minority school, the teachers' attitude tended toward a feeling that the students could not do the work. She concluded that Atlantic City High School presents a "very diverse situation."

Walter J. Wilkins testified for Atlantic City. Wilkins has served as supervisor of guidance since 2003. He holds a bachelor's degree in math from Temple University and a master's degree in school counseling from Rowan University. He also served as a member of the Somers Point Board of Education.

Wilkins testified that he is in charge of students' requests to transfer. He noted that three Longport students currently attend Ocean City High School under the Choice Program. The parents of two of those students have contacted him about returning the students to Atlantic City High School.

Wilkins reviewed the list of AP/honors courses offered at Atlantic City High School. He concurred that if the Longport students depart, two Latin honors courses may be cancelled.

Based upon the testimony adduced at the hearing and the exhibits offered into evidence, I make the following **FINDINGS** of fact:

1. The severance of the sending-receiving relationship between the Longport Board of Education and the Atlantic City Board of Education will not result in a substantial negative impact upon the quality of the education offered by either school.

2. The severance of the sending-receiving relationship between the Longport Board of Education and the Atlantic City Board of Education will not result in a substantial negative impact upon the financial state of either institution.

3. Longport sends nine students to Atlantic City High School. All nine students are Caucasian.

4. During the 2012–2013 school year, the student population of Atlantic City High School was 2,046.

5. Of the 2,046 students, 441 were white and 1,605 were minority.

6. During the 2012–2013 school year, the Longport students constituted .44% of the total student population of Atlantic City High School (9/2,046).

7. During the 2012–2013 school year, white students constituted approximately 21.5% of the student population of Atlantic City High School. Minority students constituted 78.5% of the student population of Atlantic City High School.

8. If severance is granted and the nine Longport students depart Atlantic City High School, the white student population of Atlantic City High School will equal 21.2% (432/2,037), a .3% reduction from the present ratio.

9. The departure of the nine Longport students would result in a 2% reduction of the white student population of Atlantic City High School (9/441).

10. The sole issue to be determined is whether the severance of the sending-receiving relationship between the Longport Board of Education and the Atlantic City Board of Education would result in a substantial negative impact on the racial balance of Atlantic City High School.

LEGAL DISCUSSION

The Petition for Severance

N.J.S.A. 18A:38-11 mandates that any school district that lacks high school facilities, like Longport, must designate a high school for its pupils through a sending-

receiving relationship. The "sending" and "receiving" districts then enter into a contract where the "receiving" district accommodates the out-of-district students while the "sending" district pays a fixed rate of tuition. N.J.S.A. 18A:38-8. To subsequently change or sever such relationship between school districts requires the approval of the Commissioner of Education. Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood, 257 N.J. Super. 413, 458 (App. Div. 1992), aff'd, 132 N.J. 327, cert. denied, 510 U.S. 991, 114 S. Ct. 547, 126 L. Ed. 2d 449 (1993) (hereinafter Englewood) ("termination of a sending-receiving relationship is subject . . . to the approval of the Commissioner of Education") (citing N.J.S.A. 18A:38-13). Approval requires satisfaction of the criteria of N.J.S.A. 18A:38-13, which provides in pertinent part:

> [To change a sending-receiving relationship requires an] application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation or allocation if no substantial negative impact will result therefrom.
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> [Emphasis added.]

"[W]hen a local board of education applies for permission to alter or terminate a sending-receiving relationship with another board[, the] commissioner is required to grant the requested change in designation or allocation if no substantial negative impact will result." Englewood, supra, 257 N.J. Super. at 459 (citation omitted). The statutory analysis pursuant to N.J.S.A. 18A:38-13 for evaluating a modification request does not follow a traditional balancing process. Id. at 462. Instead, **any** finding of a substantial negative impact, regardless of the benefits or positive impacts in other areas, defeats the petition for termination of the sending-receiving agreement. Ibid. "The focus of the

Commissioner's inquiry is whether a substantial negative impact exists **at all**; if it does, severance is to be denied. . . . There is simply no place in this analysis for the weighing of positive impacts once a substantial negative impact has been found." Ibid. In determining the impact of changing a sending-receiving relationship, N.J.S.A. 18A:38-13 specifies the factors to consider, "including: the educational (offerings) and financial (budgetary) implications for both districts, the impact on the quality of education in both districts, and the effect on the racial composition of the pupil population in both districts." Ibid. Therefore, once a party has established that there would be a substantial negative impact on the racial composition, quality of education, educational offerings, or the financial standing of either district, the petition must fail.

Englewood is the seminal case regarding termination of sending-receiving relationships and its effect on the racial balance of public schools. Englewood Cliffs ("Cliffs") was an affluent, predominately white, borough that sought to terminate its sending-receiving relationship with the neighboring Township of Englewood ("Englewood"), and filed a petition with the Commissioner of the Department of Education. The Commissioner transmitted the matter to the OAL as a contested case. At the time of the hearings, Cliffs was sending only twenty-one students to Englewood, fifteen of whom were white. However, the Englewood public school, Dwight Morrow High School ("DMHS"), had an increasing population of black and Hispanic students. Englewood claimed that Cliffs sought to terminate the sending-receiving relationship because Cliffs was engaged in "white flight," as opposed to the educational reasons cited by the Cliffs board. After ninety-nine days of hearings on the matter, the administrative law judge (ALJ) made numerous findings and determined that severance of the sending-receiving relationship would have a substantial negative impact on both the racial composition and the quality of education at DMHS. Englewood, supra, 257 N.J. Super. at 439–40.

The ALJ found that the number of Englewood Cliffs students who would be departing DMHS constituted a relatively small portion of the student population. But the ALJ held that the minimal number of students affected was outweighed by the fact that the termination of the sending-receiving relationship between the two schools would give the appearance of white flight. The Commissioner affirmed.

The State Board of Education affirmed the finding below, but for different reasons.

The State Board's decision focused more on the State policy that "[e]ducational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a deterrent and handicap to the improvement of education for all." Englewood Cliffs Bd. of Educ. v. Englewood Bd. of Educ., 12 N.J.A.R. 566, 688 (1990). Though the Board stated that the State policy against segregation sought to avoid a concentration of students in a school such that it would be characterized as a "minority school with the attendant 'sense of stigma and resulting feeling of inferiority,'"

> [s]uch educational considerations do not include the beliefs and social values of the individuals attending a particular school. Rather, as set forth above, resolution of the legal and policy questions with which we have been presented rests on fundamental educational principles applicable in all educational settings as those principles have been expressed in the decisions of the United States and New Jersey Supreme Courts.
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> [Ibid.]

In other words, the Board rejected the reliance on the mere appearance of white flight as a foundation for the finding of a substantial negative impact on the quality of education. Instead, the Board focused on the connection between racial imbalance and the quality of education, noting that when there is a substantial negative impact on racial composition of a school, there is also a substantial negative impact on the quality of education at that school due to both the inherent benefits of an integrated learning environment as well as the stigma attached to "minority schools." This was made plain by the Appellate Division, which after affirming the holding of the State Board, declared that a mandate of N.J.S.A. 18A:38-13 was "to avoid withdrawals for discriminatory purposes which would have the effect of recreating segregated school systems with their inherent inequality of educational opportunity." Englewood, supra, 257 N.J. Super.

at 464. "More to the point is the interrelationship between racial balance and education . . . . These are not isolated factors. They are different sides of the same coin." Ibid.

The Commissioner embraced the State Board's decision in the subsequent decision of Board of Education of Merchantville v. Board of Education of Pennsauken, 93 N.J.A.R.2d (EDU) 464, modified, State Bd. (Jan. 7, 1998), <http://www.nj.gov/education/legal/>. In that case, the Commissioner held that "racial imbalance . . . stands as a 'deterrent and handicap to the improvement of education for all.'" Id. at 495.

The State Board also noted:

> this case does not require us to remedy racial imbalance, but asks that we maintain the existing level of diversity. While denying severance of Merchantville's sending-receiving relationship with Pennsauken cannot guarantee that racial imbalance will not develop in the future, it eliminates the possibility that racial imbalance in these school districts will be encouraged by any action we have taken.
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> [Merchantville, supra, State Bd., at 16 <http://www.nj.gov/education/legal/>.]

The Commissioner further made clear that in keeping with the Appellate Division's decision in Englewood, the consideration of the racial aspects of a severance is not strictly limited to a quantitative review, but takes into account the following conditions in determining the impact of granting severance: 1) what effect the reduction in white population at the receiving school will have; 2) whether the concentration of minorities at the receiving school would remain in the wake of severance; and 3) the demographics of the communities' minorities populations, both current and projected. Merchantville, supra, 93 N.J.A.R.2d (EDU) at 496. Thus, the issue to be determined is whether there would be an actual, present or future, racial imbalance if the petition for severance were granted.

The reasoning of the State Board in Englewood and its progeny is that there need not be a large statistical change in the number of students belonging to a

particular race in order for there to be a substantial impact on the racial balance that would result from the severance of a sending-receiving relationship. Instead, the Commissioner must determine whether terminating the relationship would result in advancing the deterioration in the balance.

As the ALJ in Merchantville stated, "[t]he better evidence is found in the figures, actual and projected, developed by persons trained in their use." Id. at 486. In each of the cases that determine whether granting severance will result in upsetting the racial balance of the receiving school, it is necessary to examine the actual numerical composition of students at that school. In Englewood, every level of review determined that granting Cliffs' petition for severance would result in only a 1.6% decrease in the number of white students attending DMHS, approximately fifteen students. Englewood, supra, 257 N.J. Super. at 434. However, these students represented 16% of the white population at DMHS. Ibid. What stood out as most important was that by granting severance, the population at DMHS would only be 10.2% white, furthering DMHS's characterization as a minority school. Ibid. Thus, the State Board "denied Cliffs' petition for severance because of the 'balance between racial and national origin groupings that would exist' in the wake of termination, and 'the negative educational implications' for DMHS which would necessarily follow severance." Id. at 448.

The holding in Englewood that even a small number of white students leaving a largely minority school would result in a substantial negative impact on the racial composition has been relied upon in subsequent cases. In confirming the Commissioner's denial of the severance in Board of Education of Belmar v. Board of Education of Asbury Park, 1989 S.L.D. 1941, 1958, aff'd, No. A-6681-95T3 (App. Div. May 26, 1998) (unreported), the State Board stated that Asbury Park's student population was 17% white at the time and that Belmar's removal of students would result in a 1% downward shift in that category. It must be noted that the State Board was also evaluating a petition from Bradley Beach, another sending school seeking to sever its relationship, that would decrease the proportion of white students by 6% at Asbury Park if its petition for severance were granted. The Board held that

> [q]uite simply, severance of either of the sending-receiving relationships involved in this case at any time relevant to this litigation would have exacerbated an already high concentration of black and Hispanic students at Asbury Park High School and would have acted as a sanction for the racial isolation of the students at that school.
>
> [Id. at 16.]

A key factor in Belmar was that Asbury Park High School would have been left with an approximately 89% minority student population if severance was granted. Similarly, the petition to sever the sending-receiving relationship in Board of Education of Mine Hill v. Board of Education of Dover, EDU 1147-99, Initial Decision (Oct. 4, 2000), aff'd as modified, Comm'r (Feb. 15, 2001), remanded, State Bd. (Aug. 1, 2001), Comm'r (Dec. 15, 2004), adopted, State Bd. (May 4, 2005), <http://njlaw.rutgers.edu/collections/oal/>, was denied where removal would lower the proportion of white students by about 8%, resulting in a minority population equaling 72% of the total school population at Dover Middle School.

The New Jersey Supreme Court addressed racial composition in North Haledon Board of Education v. Passaic County Manchester Regional High School District, 181 N.J. 161, 165 (2004), where the Court affirmed the Appellate Division's prior reversal of the State Board's decision to allow North Haledon to create a referendum which would determine whether it should pull out of the regional high school. The State Board held that North Haledon's removal would decrease the proportion of white students from 51% to approximately 40%, but that "the decline in the white population in the school is inevitable and the withdrawal of North Haledon students cannot be considered a significant contributing factor in the growth of the minority population in the high school." Id. at 175 (citations omitted). The Court reversed and held that a referendum should not be allowed, as North Haledon's removal would create a substantial negative impact on the racial composition of the regional school. Id. at 184. The Court admonished the Board, stating:

> Not every action that reduces the percentage of white students necessarily implicates the State's policy against segregation in the public schools. . . . What we do know is

> that in this case, demographic trends are contributing to a steady decrease in the number of white students attending Manchester Regional, and that North Haledon's withdrawal will accelerate this trend. Rather than use the demographic trend as an excuse for approving North Haledon's petition, the Board should have considered the ameliorative effect of denying the petition on the racial balance at Manchester Regional.
>
> [Id. at 183.]

The Court further stated that "[t]he Board also failed to consider the 'multi-racial and multicultural' opportunities lost to the students from North Haledon should the Borough succeed in its petition," pointing out that "Midland Park, the proposed receiving district for North Haledon's students, is overwhelmingly white." Ibid.

The Supreme Court's ruling demonstrates the principal that the removal of even a small number of white students from a receiving school can cause a substantial negative impact on both the students left behind and the transferring students if they are moving to a school with a higher percentage of white students than where they left. For example, the ALJ in Merchantville held that a decrease in the proportion of white students by 1.7%, resulting in an increase in the minority population from 42% to 43.7%, would not result in a significant negative impact on Pennsauken's racial composition. Merchantville, supra, 93 N.J.A.R.2d (EDU) at 486–47. However, the Commissioner and State Board disagreed and denied Merchantville's petition. The State Board held that "[i]t is axiomatic that our responsibility to insure equal educational opportunity is not limited to those situations where a significant racial imbalance has already developed." Merchantville, supra, State Bd., at 12 <http://www.nj.gov/education/legal/>. The Board continued, "[t]o the contrary, given the substantial negative educational implications of permitting our State's student populations to be separated by race and because of the difficulties involved in correcting such a situation once it has developed, it would be counterproductive to allow an existing sending-receiving relationship to be disturbed where the change may contribute to the development of racial imbalance." Id. at 12–13. Even though the minority population at Pennsauken was less than 50%, the State Board did not allow severance where the potential for imbalance existed.

In summation, the case law leads to the conclusion that exacerbation of a racially imbalanced student population necessitates denial of an application for severance of a sending-receiving relationship. But at what point is a school's student population to be deemed racially imbalanced? The State Board held in Merchantville, supra, State Bd., at 16, <http://www.nj.gov/education/legal/>:

> it is difficult to establish the exact point at which the percentage of minority students at a given school is so sharply out of balance with the composition of the society in which those students must function so as to allow that school to be characterized as a minority school and to carry the stigma attached thereto.

However, subsequent to Merchantville, the Commissioner appears to have implicitly accepted a guideline established in Board of Education of Winfield v. Board of Educ. of Rahway, EDU 7138-98, Initial Decision (Jan. 18, 2000), adopted, Comm'r (March 2, 2000), <http://njlaw.rutgers.edu/collections/oal/>.

As the ALJ in Winfield interpreted the case law, "the Board and the Appellate Division were concerned not with the relatively insignificant statistical reduction of white students . . . , but with the already high concentration of minority students . . . ." Winfield, supra, EDU 7138-98, Initial Decision, <http://njlaw.rutgers.edu/collections/oal/> . Despite the fact that by allowing Winfield to sever its relationship with Rahway the white student population would be decreased by 1.9% and would result in the minority population increasing from 54.7% to 56.6%, the ALJ and Commissioner granted the petition. According to the ALJ, "the percentage of minority students attending Rahway High School, currently 55%, cannot be characterized as imbalanced, particularly when compared to the obvious imbalance in [Englewood] (82.2%) and [Belmar] (83%)." Ibid. The ALJ appeared to be swayed by the fact that "Rahway's expert testified that any school between 40% and 60% non-white is 'in balance.'" Ibid. The ALJ continued by stating that despite "[r]ecognizing, respecting and agreeing with the State's educational policy against segregation, one must also obey the mandate of the governing statute, which recognizes and respects the sending district's say in where its children are educated and how its tax money is spent." Ibid.

Therefore, in Winfield, the Commissioner accepted the premise that any school between 40% and 60% non-white is "in balance." If that guideline is applied to the present case, it is evident that Atlantic City High School is not "in balance." The minority population of Atlantic City High School is 78.5%, a number well above the 60% figure adopted in Winfield. Significantly, the expert for the Rahway Board of Education who opined that racial balance lay somewhere between 40% and 60% non-white was Judith Ann Ferguson, the expert who testified on behalf of Longport in this case. While Ferguson did not address this issue in her before this tribunal testimony, neither did she disavow her prior testimony in Winfield.

Whether the receiving school sought to be severed is racially imbalanced is a threshold question that must be addressed before any further analysis can be conducted. In the case at bar, the impact of the departure of the nine Longport students is, at best, minimal. The departure of the nine Longport students will result in a .3% change in the racial composition of Atlantic City High School. Specifically the white population of Atlantic City High School will be reduced from 21.5% to 21.2%. Longport bases its petition for severance on the fact that the Commissioner has allowed severance in a number of cases where the differential has been far greater. See Winfield, supra, EDU 7138-98, Initial Decision (Jan. 18, 2000), adopted, Comm'r (March 2, 2000), <http://njlaw.rutgers.edu/collections/oal/>; Saddle River Bd. of Educ. v. Ramsey Bd. of Educ. and N. Highland Bd. of Educ., Dkt. No. 358-7/98; In re Application of the Bd. of Educ. of Boonton and Lincoln Park, EDU 5623-04, Initial Decision (Dec. 23, 2005), adopted, Comm'r (April 25, 2006), <http://njlaw.rutgers.edu/collections/oal/>; Bd. of Educ. of Twp. of Boonton v. Bd. of Educ. of Town of Boonton, 92 N.J.A.R.2d (EDU) 235. But in none of these cases did the minority population of the severing receiving district exceed the 60% bright line of minority students established in Winfield.

During the hearing, Dr. Mastrobuono opined that the departure of even one white student would have a substantial negative impact on the racial balance of Atlantic City High School. While at first glance Dr. Mastrobuono's opinion seemed extreme, when read in conjunction with the case law it is evident that his opinion dovetails with the prior holdings of the Commissioner. What the Commissioner has consistently stated is that if

the school is racially imbalanced, then any action that will in any way exacerbate that imbalance is impermissible.

In the final analysis, the case law has established a two-step process for determining whether severance of a sending-receiving relationship will result in a substantial negative impact. They are: Step 1—Is the receiving district in racial imbalance; and Step 2—If not, will the departure of the sending district's children create imbalance or further exacerbate any existing imbalance resulting in a substantial negative change in the racial balance of the school? Step 2 requires a detailed statistical analysis of the student population of the districts involved. But in order to get to Step 2, the petitioner must meet the test established in Step 1, that is, it must show that the receiving district is not racially out of balance.

This two-step analysis is only logical. If a school is racially imbalanced, then, by definition, moving even one white student from that school will only exacerbate the situation. Inevitably, the granting of severance under those circumstances would make a bad situation worse. In short, if the school is racially imbalanced to begin with, then there is no way that severance cannot have a substantial negative effect, unless the sending district itself contains a high percentage of minority students.

The case law provides clear and convincing evidence that a finding of racial balance is an essential first step before severance can be considered. It is instructive to note that severance has never been granted in a reported case where the minority population of the receiving district sought to be severed from exceeds the 60% figure postulated by Ferguson in Winfield. Those cases include Englewood Cliffs (88.2% minority); Belmar (83% minority); Mine Hill (73.3% minority); and Board of Education of Absecon v. Board of Education of Pleasantville, 1988 S.L.D. 1021, Comm'r (June 1, 1988), aff'd, State Bd. (Oct. 5, 1988) (93.6% minority). In Merchantville, the Commissioner prohibited severance when Pennsauken High School had a minority population of 50.3%. Similarly, in North Haledon Board of Education, the New Jersey Supreme Court denied severance when Manchester Regional High School had a minority population of only 46.3%. The latter two cases fall within Ferguson's 40% to 60% range.

On the other hand, the cases relied upon by Longport all concerned receiving districts with minority populations below 60%. Those cases include Lincoln Park (23% minority); Boonton (13.3% minority); and Board of Education of Ho-Ho-Kus v. Board of Education of Midland Park, 96 N.J.A.R.2d (EDU) 964 (8% minority). The highest minority population percentage where severance was granted was in Winfield, a case where Rahway High School had a minority population of 54.8%. It was in that case that the Commissioner first appeared to embrace Ferguson's 40%–60% range for a racially balanced school.

The holdings in Merchantville and Winfield demonstrate that the line between racial balance and imbalance remains uncertain. In future cases, the Commissioner may choose to clarify that boundary, or leave it flexible and allow cases that fall within the 40%–60% range to be decided based upon other factors.

But what is clear is that Atlantic City High School is unquestionably in a state of racial imbalance. In its brief, relying primarily on Englewood, Longport attempts to argue that the dividing line should be above 80%. In light of its own expert's definition of racial imbalance as a school with a 40% to 60% minority population, that argument must necessarily fail.

The minority population of Atlantic City High School is presently 78.5%. If the Longport students are permitted to withdraw, that percentage will increase to 78.8%. While the percentage of increase is minimal, the starting point is so egregiously out of balance that the petition for severance must fail. Regardless of whether the bright-line number of 60% established in Winfield represents a final determination by the Commissioner or whether that number may be modified, under no rational scheme of perception can a 21.2:78.8 white-student-to-minority-student ratio be deemed to be racially balanced. Subsequent case law may ultimately show that the 60% boundary for racial balance is not a final figure. But it is instructive to note that, aside from the Winfield case, the Commissioner has never authorized severance in a situation where the receiving district maintained a minority-student population in excess of 50%.

The petition for severance must be **DENIED**.

The Petition for Dual Designation

In the alternative, petitioner Longport seeks approval to establish a dual sending-receiving relationship with both Atlantic City High School and Ocean City High School.

The petition for the dual sending-receiving relationship fails on two grounds. First, to grant a dual relationship after denying severance would be to condone fragmentation of racial imbalance through another process. The Commissioner, in Englewood, as cited by the Appellate Division, 257 N.J. Super. at 445–46, held:

> Such a relief would certainly serve to legitimize what has been found to be impermissible in this case, namely, the flight of 76 Cliffs students to THS which has contributed to the serious racial imbalance at DMHS. The establishment of a dual sending-receiving relationship would in essence give legal/State sanction to such flight which must be combated not facilitated. Just as severance of a sending-receiving relationship will not be permitted if substantial negative impact results, neither shall a dual sending-receiving relationship be approved when substantial negative impact results. Allowing Cliffs parents to select between THS and DMHS would only serve to exacerbate on existing serious racial imbalance at DMHS and would impact on educational quality in the same manner as severance.
>
> Further, the Cliffs Board is wrong in its assertion that the flight of Cliffs students has been exonerated because educational reasons for severance were found to have been advanced by the Cliffs Board. As previously stated, no one could seriously believe that racial prejudice and circumvention of integration is not at play in this case. Thus, the Commissioner again emphasizes that even if legitimate educational reasons are advanced for severance or the establishment of a dual sending-receiving relationship, neither will be granted where compelling reasons, such as substantial negative impact on racial composition and educational quality, as herein, outweigh the educational benefits sought by the sending district in a new relationship with another district. While finding that educational reasons existed for the Cliffs Board's request for severance in this matter, such acknowledgment does not detract from the

> ALJ's determination and the Commissioner's affirmance that DMHS provides a broad, comprehensive educational program which is both thorough and efficient and capable of providing more than adequate preparation for post-secondary education.

Longport relies upon Saddle River, supra, Dkt. No. 358-7/98, in support of its application. That case is inapplicable. First, it must be noted that Saddle River was not a contested case. The Commissioner's decision states:

> The Board of Education of the Borough of Ramsey having joined with petitioner in requesting a modification of the sending-receiving relationship between itself and petitioner; and the Board of Education of the Northern Highlands Regional High School District having also joined the petitioner in its request . . . .

In other words, all parties involved agreed to creation of the dual relationship. More significantly, in Saddle River, the prior receiving district's minority population equaled 3.7% before severance, and 3.9% after severance. The original minority population of 3.7% is in no way comparable to Atlantic City's 78.3%.

Accordingly, the petition for dual relationship must be **DENIED** on the basis of racial imbalance.

But the petition for dual relationship fails for another reason. Let us assume that white flight played no part in the decision of Longport to seek a dual relationship. At the hearing, Carl Tripician, the Board president, testified that the primary motivation behind the petition was that the parents of Longport want their children to have a choice. If we accept Tripician at his word, then the only possible conclusion is that Longport seeks to circumvent the existing legislative infrastructure. As Atlantic City correctly notes in its brief, petitioner's students have a choice. In 2010, the Legislature enacted N.J.S.A. 18A:36B-14 through -24, the "Interdistrict Public School Choice Program Act." That program affords the children of Longport a process whereby they may seek entry to Ocean City High School. In point of fact, according to the testimony, three Longport students were admitted to Ocean City High School under the Choice Program, and are

now students in that institution. In short, Mr. Tripician's complaint has been satisfied. Students of Longport have a "choice."

But what Longport seeks here is even more "choice." Longport seeks a guarantee that all twenty-four of its present high-school-aged children have the choice to attend Atlantic City High School or Ocean City High School. In short, Longport seeks to expand on the parameters of the Interdistrict Public School Choice Program.

Longport may not be permitted to do so. At some point in the future, the law in New Jersey may broaden the choice option for its students. But unless and until the Legislature takes such action, Longport must live within the parameters established by N.J.S.A. 18A:36B-14 through -24. It cannot end-run the Choice Program.

For the reasons set forth above, the petition for a dual sending-receiving relationship must be **DENIED**.

ORDER

I **ORDER** that the petition for severance of the sending-receiving relationship between the Longport Board of Education and the Atlantic City Board of Education be **DENIED**, and that the petition for such relief be **DISMISSED**.

I **ORDER** that the petition seeking the establishment of a dual sending-receiving relationship between the Longport Board of Education and both the Atlantic City Board of Education and the Ocean City Board of Education be **DENIED**, and that the petition for that relief be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Bruce M. Gorman

June 26, 2013
DATE

BRUCE M. GORMAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/sd

WITNESSES

For Petitioner:

Judith Ann Ferguson
Carl Tripician
Jann Cohen
Erik J. Ortolf

For Respondent Atlantic City Board of Education:

Wayne W. Thomas
Daniel Mastrobuono
Sherry Yahn
Walter J. Wilkins

For Respondent Ocean City Board of Education:

None

EXHIBITS

For Petitioner:

P-1 N.J.S.A. 18A:38-13
P-2 Tuition Contract Agreement 2012–2013
P-3 Feasibility Study, 11/14/11
P-4 Addendum to Feasibility Study
P-5 Longport Tuition Projection, 2012–2013
P-6 Atlantic City High School Anticipated Receiving Revenue 2012–2013
P-7 Longport Enrollment 2012–2013
P-8 Longport High School Enrollment 2012–2013
P-9 Atlantic City High School Longport Enrollment Summary 2012
P-10 High School Option Letter & Surveys, 6/12/12
P-11 Longport Student Preferences 2012–2013

P-12 Ocean City High School Letter to Longport BOE 2/13/12

P-13 Ocean City High School Choice Program Literature

P-14 Atlantic City High School 2010–11 School Report Card

P-15 Ocean City High School 2010–11 School Report Card

P-16 Population Comparison of High School Severance Petitions

P-17 Curriculum Vitae of Judith Ann Ferguson, Ed.D.

P-18 Not admitted

P-19 Not admitted

P-20 Honor Classes

For Respondent Atlantic City Board of Education:

AC-1 Atlantic City High School Ethnic Summary Chart 2012

AC-2 2010–11 Atlantic City High School Report Card

AC-3 Atlantic City High School Ethnic Summary Charts by Municipality 2012

AC-4 Atlantic City High School Ethnic Summary Charts 2000–2011

AC-5 Report of Daniel R. Mastrobuono, Ed.D.

AC-6 Curriculum Vitae of Daniel R. Mastrobuono, Ed.D.

For Respondent Ocean City Board of Education:

OC-1

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 16224-13
AGENCY DKT. NO. 112-4/12
(ON REMAND EDU 8152-12)

BOARD OF EDUCATION OF THE BOROUGH OF LONGPORT, ATLANTIC COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY, AND BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, ATLANTIC COUNTY,
Respondents.

George K. Miller, Jr., Esq., for petitioner (Miller, Gallagher & Grimley, attorneys)

Kim C. Belin, Esq., for respondent Atlantic City Board of Education (Cooper Levenson, attorneys)

Michael P. Stanton, Esq., for respondent Ocean City Board of Education (McCrosson & Stanton, attorneys)

Record Closed: February 19, 2014 Decided: March 7, 2014

BEFORE **LAURA SANDERS**, Acting Director and Chief ALJ:

STATEMENT OF THE CASE

By decision filed November 6, 2013, the Commissioner of Education remanded the initial decision in OAL Dkt. No. EDU 08152-12, Board of Education of the Borough of Longport, Ocean County v. Board of Education of the City of Atlantic City, Atlantic County, and Board of Education of the City of Ocean City, Cape May County, to the undersigned "for whatever action is deemed appropriate." The remand was a response to a motion from the Longport Board of Education (Longport). In its motion, originally characterized as a motion to supplement the record, Longport sought a rehearing on grounds that the record and the initial decision were irretrievably tainted by an impermissible conflict or appearance of conflict of interest on the part of the administrative law judge (ALJ). The allegation is that Administrative Law Judge Bruce M. Gorman rendered a decision in a matter before him for the purpose of improving his son's client's chances of success in a different matter before an administrative law judge in a different office.

In response to the Commissioner's directive, I have examined the allegations, the records of the Office of Administrative Law (OAL), the entire record in EDU 08152-12, the case law on severing sending-receiving relationships, the OAL rules, the precedents regarding conflicts, and the certification of ALJ Bruce Gorman dated February 3, 2014.

Evidence in Support of the Taint Allegation

Longport offers three pieces of evidence in support of its allegation that the ALJ was focused on his son's case and not his own. One is early knowledge of the initial decision by ALJ Gorman's son. The second is manipulation of the record by omitting an exhibit and using a number from another document. The final is a challenge to the legal analysis.

a. Timing and the initial decision

A recitation of the procedural histories of the two matters is warranted. The OAL records indicate the following. Borough of Merchantville Board of Education, Camden

County v. Township of Pennsauken Board of Education, Camden County, EDU 01927-12, was filed on February 14, 2012, and originally assigned to the Trenton/Atlantic City Assignment Judge, Joseph F. Martone. Pending ALJ Martone's retirement, it was reassigned to ALJ Elia Pelios on June 13, 2013. That matter is still pending. The matter in question here, EDU 08152-12, was filed on June 16, 2012, and assigned to ALJ Bruce Gorman. Both cases involve interpretation of N.J.S.A. 18A:38-13, as it applies to the severance of sending-receiving relationships. More specifically, both involve changes in student populations of 2 percent or less.

About a month before the Longport matter was filed, on May 14, 2012, Michael E. Sullivan, Esq., for the law firm Parker McCay, P.A., signed a brief in support of Pennsauken's motion to dismiss Merchantville's appeal, with Brett E. J. Gorman, Esq., on the brief. Brett E. J. Gorman, who is ALJ Gorman's son, also participated "on the brief" in Sullivan's short reply brief on June 28, 2012. Following Judge Martone's denial of the motion, Brett E. J. Gorman on January 17, 2013, signed on behalf of Parker McCay a request to the Commissioner for interlocutory relief, which was eventually denied. The OAL records indicate that after January 17, 2013, all documents were signed by Michael Sullivan, with no mention of Brett E. J. Gorman. Only Michael Sullivan appeared for Parker McCay before Judge Pelios during the hearings on Merchantville v. Pennsauken in September and early October 2013.

ALJ Gorman heard the Longport matter on February 1, March 26, and March 28, all in 2013. Following the receipt of post-hearing briefs, the record closed on May 14, 2013. ALJ Gorman signed his initial decision on June 26, 2013.

Per usual OAL practice, the initial decision was sent by a judicial assistant to the parties and the Commissioner through email. The OAL's case records indicate that the Commissioner accepted receipt on June 26, 2013, and the email went to counsel for the Atlantic City Board of Education and the Longport Borough Board of Education on June 26, 2013. Sometime afterward, the law firm representing Atlantic City received a request for a copy of the decision from Brett E. J. Gorman, and the firm forwarded it to him. (See certification of William S. Donio, Esq., filed with Commissioner in Atlantic City's brief in opposition to motion to supplement the record.) A prehearing brief in the

Merchantville v. Pennsauken matter, dated July 22, 2013, and signed by Michael E. Sullivan, Esq., on behalf of Parker McCay, P.A., cited the initial decision extensively on behalf of the law firm's client, Pennsauken.

One of the key components of Longport's complaint is the allegation that the Gormans must have been colluding because Attorney Gorman called the law firm representing Atlantic City to seek a copy of the initial decision, which was not available at that time on any of the usual OAL publication sites.

Post-remand, the undersigned's initial attempt to locate the decision on the Rutgers University Law Library—Newark or LexisNexis websites failed. On inquiring with the OAL staff, I learned that the staff member responsible for forwarding OAL decisions to the various publishing sites keeps records of when she does so and had no record of ever receiving or sending the decision. Apparently, the judicial assistant forgot to provide her with a copy, which unfortunately has occurred with some frequency in all three OAL offices. The staff member located the decision in the OAL internal library on December 27, 2013, and it was finally published on the Rutgers University Law Library—Newark website on January 7, 2014. Following discussions about how to put an end to this longtime problem, the OAL has determined to utilize its relatively new case-management system to add the staff member and a backup as group members for almost all cases, which should trigger an email copy of an initial decision to them at the same time the decision is released to the parties. With regard to Judge Gorman's responsibility, it should be noted that no ALJ is responsible for the OAL's publication of decisions; that is purely a staff function. Unsurprisingly, Judge Gorman's certification indicates that he thought his secretary sent the initial decision to the OAL Clerk's Office. (See section below entitled, "Did ALJ Gorman collude with Attorney Gorman on the case?" for discussion of certification related to pre- and post-initial decision conversations.) As it happens, neither the staff member responsible for publication nor her backup are assigned to the OAL Clerk's Office.

b. Manipulation of the record

Longport states that ALJ Gorman "omitted the Stipulation of Facts from the record provided to the Commissioner and consequently changed the racial identification of eight . . . students[,] favoring the Atlantic City B.O.E.'s position in the case." (Motion, and also Letter to Commissioner, dated July 12, 2013.) This, counsel contends, "manipulated the actual numbers of student enrollment," clouding the entire opinion, and "warrants the strictest investigation of the true facts and evidence of this case." (Letter dated July 12 at 2.)

The hearing transcript from March 28 states that a stipulation of facts, marked as P-18, was entered into evidence. (Tr. March 28, at 173.) The initial decision states that P-18 was not admitted. The bundle of exhibits that was returned from the Commissioner's Office included a free-floating document entitled "Joint Stipulation of Facts." The contents of this document are identical to the twenty-nine stipulated facts listed in Longport's post-hearing brief on pages three through six. Longport's brief does not give any exhibit reference for the stipulated facts. Additionally, in Longport's exceptions and reply to Atlantic City's exceptions filed with the Commissioner, it made no mention of the exhibit. Nor did it complain about the small variance between the figure in P-18 and that used in the decision. The initial decision relies on the March 28, 2013, testimony from an Atlantic City High School administrator, Sherry E. Yahn, concerning a State-mandated ethnic summary of the student population at Atlantic City High School, which was entered as Exhibit AC-1. (Tr. March 28, at 67.) The document carries two notations—"Atlantic City High School, 2012" at the top, and "January 30, 2013," at the bottom. Yahn testified that January 30 is the day the document was printed. (Ibid.) Exhibit AC-1 states that the number of students in Atlantic City High was 2,046, while the stipulation states that "[t]he total ACHS student population for 2012–2013 is 2,040." With regard to minority versus nonminority enrollments, AC-1 states that 441 students were white, while the stipulation states that 442 students were non-minorities. When calculating the percentages, the data in AC-1 results in 21.6 percent white students; the data in the stipulation, 21.7 percent. The fact that the percentages are nearly identical might explain why Longport made no objection to the admission of AC-1 into evidence. (Id. at 162.) Cross-examination of Yahn runs from pages 92

through 120 of the March 28 transcript, and counsel for Longport asked her about the 2,046 figure on pages 106 and 107. Although counsel explored the figures, at no point in that cross-examination did counsel attack the accuracy of the 2046, or the 441. Nor did counsel raise the issue of the different number in the stipulations. The witness did offer that by the time of her testimony in March, there would have been "drops and adds" since December. (Id. at 93.) ALJ Gorman's certification states:

> if the record shows I admitted a Stipulation of Facts into evidence and then did not list it in the ID, then I was in error. I no longer have access to the file, so I cannot confirm what the Longport allegation refers to. If this omission occurred, it was an honest oversight by both Sharon Danks [the now-retired judicial assistant in the OAL's Atlantic City office], and myself. This was a complex case with many exhibits. If one was mislabeled, then it is my fault. But it was an honest error, and not intended to alter the facts.
>
> [Gorman Certification, paragraph 28.]

An ALJ has an obligation to accurately list the exhibits and properly consider them, and, clearly, the failure to do so here was an error. However, Longport itself did not label the stipulation in its own brief, and the use of facts from a State report when the report was not the subject of any objection does not constitute an unfair or manipulative characterization of the record made at trial.

c. Creation of a legal standard unsupported by statute or case law

The third piece of evidence is the allegation that ALJ Gorman created a new legal test, "purportedly derived from prior decisions of the Commissioner" and mandating summary denial "of any petition for severance or dual designation upon a determination that the current receiving district is 'racially imbalanced.'" (Remand, Commissioner of Education.) The specific allegation from Longport is that ALJ Gorman created "a new standard declaring that the loss of one student creates a substantial negative impact to prevent severance," thereby helping the legal position of his son's client in Merchantville v. Pennsauken. (See Motion to Supplement the Record, point

22.) The source of this comment is likely the paragraph explaining that a two-step analysis is logical because

> [i]f a school is racially imbalanced, then, by definition, moving even one white student from that school will only exacerbate the situation. Inevitably, the granting of severance under those circumstances would make a bad situation worse. In short, if the school is racially imbalanced to begin with, then there is no way that severance cannot have a substantial negative effect, unless the sending district itself contains a high percentage of minority students.
>
> [Initial Decision at 31.]

The one-student language was drawn from testimony:

> During the hearing, Dr. Mastrobuono opined that the departure of even one white student would have a substantial negative impact on the racial balance of Atlantic City High School. [Tr. March 28, at 42 and 49–50.] While at first glance, Dr. Mastrobuono's opinion seemed extreme, when read in conjunction with the case law it is evident that his opinion dovetails with the prior holdings of the Commissioner. What the Commissioner has consistently stated is that if the school is racially imbalanced, then any action that will in any way exacerbate that imbalance is impermissible.
>
> [Id. at 30–31.]

As pointed out by Longport in its closing brief, Mastrobuono also acknowledged that in his written reports he did not identify a substantial impact on racial diversity from allowing Longport to enter other sending-receiving relationships. (Tr. March 28, at 50.) However, the transcript also clearly shows that he did not back away from his concern that the move would be the start of a slippery slope, with other sending districts also moving to sever. (Id. at 51.)

The OAL's internal records indicate that extensive legal research was done on this matter by OAL law clerk Jason Fortenberry. Since the OAL's four law clerks and two research staff support all of the ALJs in all three offices, it is common for ALJs to

send requests for research via email. Most of the information contained in the lengthy email conversation over three months between ALJ Gorman and Jason Fortenberry is covered by the deliberative-process privilege, which "permits the government to withhold documents that reflect advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." Educ. Law Ctr. v. N.J. Dep't of Educ., 198 N.J. 274, 285–86 (2009) (quoting In re Liquidation of Integrity Ins. Co., 165 N.J. 83 (2000)). "[T]he privilege is necessary to ensure free and uninhibited communication within governmental agencies so that the best possible decisions can be reached." Id. at 286. The privileged document must be (1) "pre-decisional," which means that "'it must have been generated before the adoption of an agency's policy or decision,'" and (2) deliberative, which means that the document "contains opinions, recommendations, or advice about agency policies." Ibid. (quoting Integrity, supra, 165 N.J. at 84–85).

> [T]he key to identifying deliberative material must be how closely the material (including the selection of "factual" or "informational" material) relates to the "formulation or exercise of . . . policy-oriented judgment or [to] the process by which policy is formulated[.]" Deliberative material need not, in all instances, expressly reflect an overt opinion, recommendation, or advice when a discretionary decision is in development. And, pre-decisional documents do not lose their protection from unwarranted public scrutiny merely because they may contain numerical or statistical data or information used in the development of, or deliberation on, a possible governmental course of action.
>
> [Id. at 295 (citations omitted).]

Draft documents of a public agency are subject to deliberative-process-privilege protection. In Ciesla v. New Jersey Department of Health and Senior Services, 429 N.J. Super. 127, 140–41 (App. Div. 2012) (citation omitted), the Appellate Division noted:

> By their very nature, draft documents are preliminary and subject to further revision. Tentative findings and recommendations within them may be reconsidered, qualified, supplemented, withdrawn, and even, in some instances, radically changed to reflect entirely opposite conclusions. Given their non-final character, it makes

> eminent sense to treat such pre-decisional drafts as protected materials within the umbrella of the deliberative process privilege. Without such protection, policy advisers would be reluctant to express on paper or a computer screen their tentative thoughts on a pending issue, lest their words be prematurely launched into the public domain.

Here, the OAL's internal records include thirty-one emails, two lengthy legal memoranda, a chart, and early drafts of the initial decision. Most of the email content and the two memoranda reflect efforts to formulate a coherent theory of case law using all of the cited decisions, which are from the period 1988 (Bd. of Educ. of Absecon v. Bd. of Educ. of Pleasantville, 1988 S.L.D. 102) through 2004 (Bd. of Educ. of Lincoln Park v. Bd. of Educ. of Boonton, EDU 05623-04, Initial Decision (December 23, 2005), adopted, Acting Comm'r (April 25, 2006), <http://njlaw.rutgers.edu/collections/oal/>, and N. Haledon Bd. of Educ. v. Passaic Cnty. Manchester Reg'l High Sch. Dist., 181 N.J. 161 (2004)). Some of the cases involve decisions first by the Commissioner and then by the State Board of Education, a process that no longer applies. (See Bd. of Educ. of Mine Hill v. Bd. of Educ. of Dover, EDU 01147-99, Comm'r (Feb. 15, 2001), remanded, State Bd. (Aug. 1, 2001), Comm'r on remand (Dec. 15, 2004), adopted, State Bd. (May 6, 2005), <http://njlaw.rutgers.edu/collections/oal/>.) In contrast, Board of Education of the Township of Boonton v. Board of Education of the Town of Boonton, 92 N.J.A.R.2d (EDU) 235, was a Commissioner's final decision, while Board of Education of Englewood Cliffs v. Board of Education of Englewood, 257 N.J. Super. 413 (App. Div. 1992), aff'd, 132 N.J. 327 (1993), cert. denied, 510 U.S. 991, 114 S. Ct. 547, 126 L. Ed. 2d 449 (1993), is a New Jersey Supreme Court decision for which United States Supreme Court review was denied. Thus, while it may not be wholly accurate to say "the Commissioner determined" in relation to all of the cited decisions, because of the varying processes involved, what the extensive OAL internal legal deliberation does demonstrate is an effort at defining what the controlling case law says, even if the final decision makers happened to be different entities within the legal process. Therefore, the portions of the emails that concern that deliberation are privileged deliberative material, and the legal memoranda are not a part of this decision. The same is true of the initial decision drafts.

However, because ALJ Gorman included the entirety of the original email requesting research in Paragraph Six of his certification, the initial email of February 12, 2013, to Sandrya Porter, director of research, is presented in full below. For the same reason, a portion of one of the legal memorandums is included. Subsequent emails are presented in part, with a description of the privileged matter. The initial email went as follows:

> Sandrya,
>
> I have a research project. I would like the memo by March 22, if possible.
>
> The facts are as follows. The Longport BOE has a send/receive relationship with Margate Elementary (K–8) and Atlantic City HS (9–12). Longport wants to either: 1) Sever with ACHS and form a send/receive with Ocean City HS; or 2) in the alternative, form a "joint" send/receive relationship with both ACHS and OCHS, giving Longport parents a "choice". I note that the "choice" has nothing to do with the recent legislation about school choice, but is based on provisions of NJSA 18A:38-13.
>
> Here is the conundrum. After hearing Longport's expert, it is my impression that Longport's petition is premised on little more than "white flight". ACHS has an 80% minority population while OCHS has a 9% minority population. Longport's student body is completely white. The expert found the two high schools identical in terms of academics. There seems to be no bona fide reason for the petition other than "white flight" (which Longport of course vigorously denies).
>
> The problem is this. The case law sets a standard of "substantial negative impact" on three categories: academics, finance, and race. It is my understanding that the case law relies upon statistical analysis. Where race is concerned, if the percentage change in the racial composition of the respective schools is minimal, there is no "substantial negative impact", and therefore the severance is approved.
>
> Here's where the case becomes murky. Altho it is my initial impression that this case is primarily concerned with white flight (I have not prejudged and could change my mind), the percentage impact on the racial composition of ACHS and

> OCHS is negligible. This is because Longport has only 24 students. It is a very small municipality consisting primarily of summer homes and having a tiny year round population. Consequently, the impact of the 24 students on ACHS and OCHS is less than minimal.
>
> Accordingly, here are the two issues I need researched:
>
> 1. What are the precise criteria for granting or denying severance of a send/receive relationship?
>
> 2. Regarding the issue of race, is it possible for a town to be "too small to matter", thereby effectively permitting white flight?
>
> I have briefs from the parties which I can supply. I am not satisfied with the analysis contained in either brief, and neither brief addresses the issue of "too small to matter".
>
> I may be wrong, but my impression is this could be a significant case within the "school choice" issue.
>
> Thanks.
> BMG
>
> [Gorman Certification.]

Through an email dated February 13, 2013, Porter advised that she would let the ALJ know who would get the assignment and asked whether the case was EDU 8152-12 (Email 2), to which he responded, "That's the one" (Email 3). By email dated February 25, 2013, Porter assigned the research to Fortenberry (Email 4), who on the same day emailed ALJ Gorman to say first, "I will get to work on this asap, but delivery will be close to 3/22" (Email 5). He went on to say he has "some experience with this issue," as he had been researching yet a third sending-receiving OAL matter. (Email 5.) Fortenberry wrote, "It looks like you are requesting general legal research on the two identified issues, so unless there are additional facts you think I need beyond what is provided below, I don't see needing the briefs of the parties. However, I do have a couple of questions," which he then outlined. (Ibid.)

On February 27, 2013, ALJ Gorman responded to Fortenberry's two questions, saying that no written sending-receiving agreement had been offered by the parties, and

that the relationship between Longport and ACHS goes back seventy-five to one hundred years. ALJ Gorman wrote: "There are 24 Longport students. 9 attend ACHS. 2 or 3 (2 I think) attend OCHS as choice students. The rest attend private schools, primarily Holy Spirit HS." He also raised two other legal issues for Fortenberry to research. (Email 6.) On Thursday, February 28, Fortenberry responded, "Thanks for the reply. At this point I think I am clear on the issues. I will include a discussion on the Choice Act as requested. I will be in touch as soon as I have something." (Email 7.)

On March 27, 2013, Fortenberry provided both an eighteen-page legal memorandum and a cover email with three paragraphs of short-form legal analysis. (Email 8.) Fortenberry also noted, "Most of the cases discussed here are 15 to 20 years old, so some are not electronically available. If you need copies of any cases, want to discuss further, or need me to revise anything, just let me know." (Ibid.) ALJ Gorman states in his certification that although he originally expected to rule for Longport, "My thought process changed when I received Mr. Fortenberry's memo, . . . which I did not read until after the trial closed on March 28." (Gorman Certification, paragraph 8.) ALJ Gorman continued:

> I reproduce below the introduction to the memo, because the introduction formed the basis for the ultimate Initial Decision. Mr. Fortenberry wrote:
>
> > **ISSUE:**
> >
> > What are the precise criteria for granting or denying a request to terminate a sending-receiving relationship? Can a sending district be too small to matter, thereby effectively permitting "white flight"? Finally, provide an overview of the School Choice Act.
> >
> > **BRIEF ANSWER:**
> >
> > The Commissioner is given supervisory authority over all send-receive relationships and the alteration and termination of those relationships. Case law shows that termination of send/receive relationships is subject not only to the desires of the schools but also those of the Commissioner (such as the overarching goal to create integrated schools). The question of

> whether the severance should ultimately be granted is based on the Commissioner's determination of whether there would be a "substantial negative impact" to either school district. This analysis requires a feasibility study addressing the factors defined in the statute as to any impact racially, educationally, financially, or in the area of facilities on both school districts.
>
> In the context of determining racial impact, the *primary concern* is whether the termination would tend to violate the state policy against segregation and endanger the school into becoming or enhancing its status as a "minority school" with its attendant stigma. *The Commissioner has generally held that the termination of a relationship which would increase or maintain a minority population of a school at 50% or more would be the equivalent of State support for segregation and should not be allowed.* The small number of students potentially being removed is irrelevant except to the extent of determining the minority population percentage before and after the removal. However, where the percentage of minority students is increased but is still less than 50%, the Commissioner has not been as consistent in determining whether the relationship should be maintained.
>
> (Emphasis added)

[Gorman Certification, paragraph 8.]

ALJ Gorman's certification points out that Fortenberry's thesis was that the Commissioner has never permitted severance when the minority population of the receiving district exceeds 50 percent. ALJ Gorman stated:

> What is essential to understand is that this memorandum crystallized my thinking and formed the basis for my Initial Decision. The decision is based on the 50% (later 60%) threshold, and on Mr. Fortenberry's statement that, "The small number of students potentially being removed is irrelevant except to the extent of determining the minority population percentage before and after the removal."
>
> [Gorman Certification, paragraph 9.]

On May 15, 2013, ALJ Gorman emailed Fortenberry, "Under separate cover, we have forwarded the post-trial briefs in the above matter for your review. Please provide me with your thoughts. As I go forward with the ID, I anticipate I will have random questions for you . . . ." (Email 9.) He went on to pose a series of new questions; said, "I would also like to review the cases set forth in Exhibit A attached to Longport's brief"; and then sought additional information from that review. (Ibid.) On the same day, Fortenberry replied, "I have received the briefs. I will thoroughly review them and compile the analysis of Longport's Exhibit A and, with your consent, have a response by next Tuesday (5/21). In the mean time [sic]), please send any questions at your leisure." (Email 10.) He then provided a six-point response and legal analysis, ending with, "Please let me know if you would like to discuss or would like more detail." (Ibid.)

With regard to this exchange, ALJ Gorman, in paragraph 11 of his certification, notes,

> Mr. Fortenberry supported his thesis with extensive research contained in his eighteen page memorandum. In his memorandum, he began with the Englewood Cliffs case, the first case to address the severance issue, and traced the development of the case law over the past quarter century. He delineated the cases where severance was permitted and where severance was denied. Taking the case law as a totality, he concluded that the Commissioner has drawn a line. When severance results in a minority student population of the receiving district that exceeds 50%, the policy against segregation is violated and severance must be denied.

On May 16, 2013, ALJ Gorman asked for cases where the Commissioner had allowed severance, and then asked for the percentage of white and minority populations and the percentage of change if severance was permitted, for each case where the Commissioner permitted severance. (Email 11; Paragraph 18 of the Gorman Certification.) Shortly afterward on the same day, ALJ Gorman emailed Fortenberry that he thought a part of his thesis was off, and that he should take a look at Board of Education of Winfield v. Board of Education of Rahway, EDU 7138-98, Initial Decision (Jan. 8, 2000), adopted, Comm'r (March 2, 2000),

<http://njlaw.rutgers.edu/collections/oal/>, which could be read as moving the 50 percent to 60 percent. (Email 12.) About two hours later, Fortenberry responded with a discussion of his own opinion on Winfield and its relationship to other cases, ending with "P.S., I'll compile the requested stats shortly." (Email 13.) On May 20, ALJ Gorman said, "I want to expand my request for info." He then asked five new questions. (Email 14.) Later the same day, he asked Fortenberry for a reaction to his thought process, and laid out two paragraphs of analysis. (Email 15.) As ALJ Gorman notes in Paragraph 23 of his Certification, Email 15 is the place that he first proposes the two-step analysis.

> It seems to me that de facto, the case law sets up a 2 step process for adjudicating these cases. The steps are: 1) Is the receiving district (the one the students are leaving) in racial balance; and 2) if so, is there a substantial negative process. The case law does not appear to affirmatively state that analytical process. Indeed there appears to be language in Merchantville [Bd. of Educ. of Merchantville v. Bd. of Educ. of Pennsauken, EDU 5702-88 and EDU 4063-89, 93 N.J.A.R.2d (EDU) 464 (Comm'r, Sept. 16, 1992), modified, (State Bd. #48-92, Jan. 7, 1998), http://www.nj.gov/education/legal/sboe/1998/mersupre.pdf, that affirmatively denies such a process is utilized. But my reaction is that the net effect of the case law over the last quarter century effectively creates the two-step analysis. Please give me your thoughts as well as any language you deem relevant to this analysis. Thank you.

Shortly afterward, he sent a second email explaining why exactly he was looking for the additional data. (Email 16.) Late in the day, Fortenberry responded, "Judge Gorman, I don't have a substantive response at the moment, and don't want to comment until I give your questions more consideration. I will be spending tomorrow entirely on this case and expect to get some information to you by end of day, although it may be a couple of days to complete everything requested. However, I just wanted to let you know that I have received your emails and am compiling the material." (Email 17.) As noted in ALJ Gorman's Certification at paragraph 23, Fortenberry concurred.

On May 22, 2013, Fortenberry said,

> Attached are my thoughts on the post-trial briefs . . . . I wrote the memo somewhat conversational and informal, thus I have not cited all my opinions. So, if you would like me to expand or provide legal analysis to any comment I have made, please let me know. Also if at any point you would like a conference call to discuss any concerns, just let me know as well. Finally, I am working to compile the requested [remainder privileged material].
>
> [Email 18.]

About four hours later, Fortenberry advised ALJ Gorman,

> Longport cites to a case called Saddle River Bd. of Ed. v. Ramsey Bd. of Ed. and Northern Highlands Bd. of Ed., 1998 S.L.D. Aug 28. I cannot find this case. Did they provide you a copy by chance that I could get? If not, should I contact counsel to request a copy? Otherwise, how would you like me to proceed as Longport relies heavily on this case? Just fyi, this citation is troublesome because the volumes entitled "New Jersey School Law Decisions" ceased publication in 1992. Between 1992 and July 10, 1997, all commissioner decisions should be cited in N.J.A.R. 2d. After July 1997, decisions should be cited to the Rutgers website. Since this is a 1998 decision, it should be on the website, but I cannot find it, nor can I find any other case that has ever cited to it.
>
> [Email 19.]

At some point, Fortenberry contacted counsel for Longport, and on May 24, 2013, Brittany J. Camp, Esq., emailed, "Please see attached PDF of the Petition and Commissioner Decision for Saddle River BOE v. Ramsey & Northern Highlands BOEs. I will look through our file to see if there are any other related documents. If you have any questions, please do not hesitate to ask." (Email 20.) Later that day, Fortenberry emailed Camp, "Thank you Brittany and I appreciate the prompt response! Upon review, it does not appear that this decision explicitly states the statistics cited in Exhibit A to Petitioner's Post-Trial Brief. I imagine the statistics are in the feasibility study referenced in the Saddle River Petition. Do you have access to that study or another

source for the statistics cited? No rush on this, I know it is Friday before a holiday!" (Email 21.) On the same date, Fortenberry forwarded to ALJ Gorman a four-page legal memorandum evaluating the post-trial briefs. Also on May 24, Camp emailed Fortenberry that she had dug up the feasibility study, scanned it, and was sending it. "The racial impact section (VI) begins on page 60 of the report. The relevant numbers used to calculate the statistics displayed in Exhibit A of our brief came from the numbers found on page 62 of the study." (Email 22.) On Friday, May 24, late in the day, Fortenberry provided the ALJ "a statistical summary of all relevant cases on sending-receiving relationships" after 1986. At that point, he had not included Saddle River because he did not have all the figures. An additional paragraph discusses his analysis of the research. (Email 23.)

On May 28, 2013, Fortenberry provided ALJ Gorman with an updated chart including Saddle River, a copy of the feasibility study, and two pages of legal analysis about the study and the petition. (Email 24.) A copy of the chart is attached as Exhibit 1. Fortenberry also responded with four paragraphs of legal argument to ALJ Gorman's questions from May 20.

On June 5, 2013, ALJ Gorman asked Fortenberry to look at the draft initial decision, stating, "I have never before asked a law clerk to review a final decision, but given your immersion in this case, I would like your reaction." (Email 26.) Fortenberry replied on June 6 that he "appreciated the vote of confidence," and asked whether the ALJ wanted him to fix typographical errors in the document or use the "track-changes" mechanism. (Email 27.) On June 7, 2013, ALJ Gorman responded that he would utilize the OAL's staff editor to do that work, adding, "Let me know if you see anything substantive that should be changed." (Email 28.) Later in the day, Fortenberry responded with five comments, finishing with, "I don't see any other substantive issues. Hope the thoughts help some. Please let me know if I need to discuss further." (Email 29.) On June 10, 2013, ALJ Gorman emailed Fortenberry with what he had decided about the five issues, and asked him, "Check out 2 and 4 and get back to me. I leave for vacation Wednesday, and I have to have it to [OAL internal editor] before I leave. Thanks." (Email 30.) On the same day, Fortenberry responded with two minor

comments, noted that he would be helping the OAL editor with the proofreading, and made the comment, "I think the decision is good to go at this point." (Email 31.)

In his certification, ALJ Gorman has stated expressly, "I did not write the Longport decision to benefit my son. The decision represents my best effort to unravel a complex problem."

What is a conflict?

The primary relationship tests in N.J.A.C. 1:1-14.12(a) require an administrative law judge to withdraw when the ALJ:

> 1. Is by blood or marriage the second cousin of or is more closely related to any party ***to the proceeding***;
>
> 2. Is by blood or marriage the first cousin of or is more closely related to any attorney ***in the case***. This proscription shall extend to partners, employers, employees, or office associates of any such attorney;
>
> 3. Has been attorney of record or counsel ***in the action***.
>
> [Emphasis added.]

Clearly, none of the above three apply, as ALJ Gorman had no blood or marriage ties to any party or attorney in the proceeding, nor has he been attorney of record or counsel in the Longport matter.

The above segments of the rule amplify certain portions of the Code of Judicial Conduct for Administrative Law Judges, which states in Canon 2B that "An administrative law judge shall not allow family, social, political, or other relationships to influence the judge's judicial conduct or judgment." N.J.A.C. 1:1, Appx.

Other segments of N.J.A.C. 1:1-14.12(a) state that an ALJ shall withdraw from participation in a proceeding if the judge:

> 5. Is interested in the event of the action; [or]
>
> . . . .
>
> 7. When there is any other reason which might preclude a fair and unbiased hearing and decision, or which might reasonably lead the parties or their representatives to believe so.

These latter sections echo portions of Canon 2A, which states, "An administrative law judge shall respect and comply with the law and at all times shall act in a manner that promotes public confidence in the integrity and impartiality of the administrative judiciary." N.J.A.C. 1:1, Appx. They also are consistent with the second section of Canon 2B, which requires an administrative law judge to refrain from conveying or permitting others to convey "the impression that they are in a special position to influence the judge." Ibid.

In evaluating the existence of inappropriate conduct, evidence of such behavior is to be determined by an objective standard, namely, whether a reasonable, fully informed person would have doubts about the judge's impartiality. DeNike v. Cupo, 196 N.J. 502, 517 (2008). As the Supreme Court explained, if the judge's conduct gives the public "reason to lack confidence in the integrity of the process and its outcome," any decision rendered would have to be reversed and the matter retried. Ibid. The most recent precedential case in the area is Kane Properties, LLC v. City of Hoboken, 214 N.J. 199, 221 (2013), which involved a city solicitor who had been attorney of record to a party in a zoning matter brought before the City Council. There, the Supreme Court found that the solicitor's involvement in the matter before the City Council caused enough appearance of impropriety to invalidate the original City Council action.

In terms of OAL precedents, I have located four decisions.

- In re the Appeal of the Revocation of Registration of Burlington Environmental Management Services, Inc., No. A-5737-81T1, an unpublished Appellate Division decision filed October 20, 1983, affirming the Commissioner of Environmental Protection's determination that he had the authority to make a de novo review of an

allegedly tainted record for the purpose of determining whether the record was proper, and his decision to affirm the initial decision of the ALJ in the matter. The allegation was that the ALJ had instituted suit against the principal of the corporate entity at a time years before when the ALJ was in private practice and had been representing a private client.

- In re the Tenure Hearing of Fargo, School District of the Borough of North Arlington, Bergen County, 92 N.J.A.R.2d (EDU) 172, in which the Commissioner of Education conducted a de novo review of a record allegedly tainted by the bias of an ALJ who was suing the OAL over "sexual harassment/discrimination." The teacher contended that since allegations of sexual improprieties were involved, the ALJ should not have heard the case. Upon extensive de novo review, the Commissioner determined that the true challenge was to the legal conclusions, not to the adequacy of the record developed. The Commissioner then reviewed the record extensively, adopting some findings, and modifying others, and reached an independent conclusion that the revocation of tenure was warranted.

- Monmouth Ridings v. Maxim Sewerage Corporation, 92 N.J.A.R. 2d (OAL) 10, in which now Justice Jaynee LaVecchia, who then was the OAL director, refused to disqualify an ALJ for bias where the allegation was that the ALJ had a prior work association with the petitioner's counsel. It was more than five years since the judge had worked for the petitioner's counsel. The counsel during that time had represented Orange and Rockland Utilities Company in proceedings before the Board of Public Utilities in matters in which the judge was appearing on the other side. In rejecting the idea that such a sweeping disqualification was appropriate, the Director noted prior precedent stating that an ALJ did not have to disqualify herself from hearing a case because she previously had been associated with the head of the transmitting agency while she was in private practice and had been appointed as an agency hearing officer by that person. Sheeran v. Progressive Life Ins. Co., 182 N.J. Super. 237 (App. Div. 1981).

- In re Williams, Jr., No. A-0837-11T4 (App. Div. August 6, 2013), <http://njlaw.rutgers.edu/collections/courts/>, certif. denied, 2014 N.J. LEXIS 162 (N.J. January 24, 2014), in which the appellate panel required a rehearing before a new administrative law judge on grounds that "an objectively reasonable, fully informed member of the public would perceive that participation by the ALJ in these proceedings calls into question his impartiality," and "the lack of recusal of the ALJ irretrievably tainted the action taken thereafter by the Commission, and its decision must be set aside." Williams contended that ALJ Gorman's credibility decision on a witness was tainted by the fact that the witness was being represented in a lawsuit against Atlantic City over the same set of facts by his son's law firm, Parker McCay. Although Williams's counsel did not explicitly raise the issue before the ALJ, the panel held that its disclosure in a footnote in a motion should have been enough to trigger sua sponte recusal by the ALJ.

Did ALJ Gorman collude with Attorney Gorman on the case?

In his certification concerning his conversations with his son, ALJ Gorman has explained that when his two sons began practicing law in this state, he laid down certain guidelines for their future communication. One was not discussing each other's cases. "Obviously I could not talk to them about cases I was handling, but I also did not want to discuss the substance of any case either of them was handling. I thought the idea of my sons receiving legal advice from a sitting judge was fraught with problems. Accordingly, we drew a "Chinese wall" between us." (Gorman Certification at paragraph 45.)

With regard to contacts with Brett E. J. Gorman during the time he was deciding Longport, ALJ Gorman has certified that he and his son generally speak on the phone four or five times per week. (Id. at paragraph 46.) ALJ Gorman recalled a routine phone call in late May or early June in which, when asked about his day, the ALJ responded that he was trying to write a severance case involving Atlantic City. "It was an offhand response, and I saw nothing improper in this statement, since my participation in the case was a matter of public record. That was the sum and

substance of that conversation. . . . I did not discuss the merits of the Longport case with him at that time." (Id. at paragraph 47.) Perhaps three weeks later, Attorney Gorman asked if ALJ Gorman had issued the severance decision yet and he said no. "Although I wondered why he was asking, again I thought it best not to know. And again, I did not discuss the merits of the Longport case with him." (Id. at paragraph 48.) Perhaps two to three weeks after that, when his son again queried whether the decision was out, ALJ Gorman said it was. "By this time, I had completed the decision and it had been forwarded to the Clerk's Office for dissemination. Since the decision was out of my hands and was now public record, I saw no reason not to tell him. Consequently, I told him the decision was out. That is all that was said. I did not discuss the contents of the decision with Brett." (Id. at paragraph 49.) ALJ Gorman certified, "Brett never told me that he was involved in a similar case. I had no knowledge of why he was interested in my decision. Assuming he was doing research for an ongoing case, I had no knowledge of the issues in the case, or which side of the case Brett was on. . . . [T]hese conversations took place long after I received the Fortenberry memorandum of March 27. By the time these conversations took place, I had already decided to resolve the Longport case on the basis of the Fortenberry memorandum." (Id. at paragraph 52.)

Application of standard to this case.

The evidence in this matter demonstrates that the only segment of N.J.A.C. 1:1-14.12(a) applicable is the portion that states that an ALJ shall withdraw from participation in a proceeding "(7) When there is any other reason which might preclude a fair and unbiased hearing and decision, or which might reasonably lead the parties or their representatives to believe so."

This leaves the question of whether an appearance of impropriety existed. As the Court noted in Kane Properties, the appearance-of-impropriety evaluation does not require proving actual prejudice; rather, to establish an appearance of impropriety, "an 'objectively reasonable' belief that the proceedings were unfair is sufficient." (Kane Properties, supra, 214 N.J. at 222 (quoting DeNike v. Cupo, supra, 196 N.J. at 517).) However, "it remains true that an appearance of impropriety must be 'something more than a fanciful possibility,' and 'must have some reasonable basis.'" Kane Properties,

supra, 214 N.J. at 222 (quoting Higgins v. Advisory Comm. on Prof'l Ethics of Supreme Court, 73 N.J. 123, 129 (1977)).

Longport alleges that ALJ Gorman had a reason that "might preclude a fair and unbiased hearing and decision, or which might reasonably lead the parties or their representatives to believe so." The question is whether suspicion here is based on reason or mere speculation. For the reasons cited below, I **CONCLUDE** that it is speculation. Here, an objective analysis of the internal process leading up to the initial decision provides no indication of any attempt to skew the record or twist existing case law, or to create some sort of advantage for a party external to the proceedings. The OAL staff made a publishing error that did not get discovered and fixed until December and January. ALJ Gorman had nothing to do with it. ALJ Gorman did make an error in failing to properly identify an exhibit. But the figures about which Longport complains were drawn from a different exhibit, a required State report, whose admission was not the subject of an objection by Longport. Moreover, the difference in the figures is quite small, so much so that Longport did not raise it when actually trying the case. Finally, the legal memoranda and internal email evidence a lengthy debate over how properly to present existing and procedurally complicated law in a coherent fashion. Longport is free to disagree with that analysis, and has indeed appropriately filed exceptions to the ALJ's view of the law.

Additionally, the attempt to equate Williams with the current matter stretches too far. ALJs standardly recuse from cases in which a family member is a party, a witness, or a potential witness. They also recuse routinely from cases brought by law firms for which they used to work. Although the Williams case is not precedential, it stands for the proposition that once there is any evidence to suggest that a judge has or should have had notice that a relative's law firm has some relationship to a witness, the judge must recuse. This is in sharp contrast to the current situation, where the law firm is not in front of the judge, has no relationship to any witness, and is trying a case before a separate ALJ in an OAL office located hours away.

Inasmuch as the taint allegations have proved to be without foundation, everyone is now fully aware that the stipulations should have been marked as P-18, and the factual information is now corrected, there is no reason to inflict upon the public the cost of rehearing or rearguing before a different ALJ. I **CONCLUDE** that the record is a proper one, and can be appropriately returned to the Commissioner for such final decision as he determines.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 7, 2014
DATE

Laura Sanders
LAURA SANDERS
Acting Director and Chief
Administrative Law Judge

Date Received at Agency: March 7, 2014

Date Mailed to Parties: March 7, 2014

/caa

EXHIBITS

Exhibit A Chart

Certification of Bruce M. Gorman

239-14

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ANGELA NORWARD, STATE- OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In February 2014, the Commissioner of Education issued an Order to Show Cause, served upon respondent by the petitioner, requiring her to show cause why an order should not be entered suspending her teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 for resigning her position on inadequate notice. The respondent failed to answer the order. Respondent was duly advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation raised by the Board to be deemed admitted, and might result in summary decision by the Commissioner.

There being no response to the order to show cause, the Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and justify suspension of respondent's certification. Accordingly, summary decision was granted to petitioner, and respondent's certificate was suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 6/06/14

AGENCY DKT. NO. 35-2/14

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ANGELA NORWARD, STATE- OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY.	COMMISSIONER OF EDUCATION DECISION

For Petitioner, Brown & Connery

Respondent: No appearance by or on behalf of Angela Norward

This matter was opened before the Commissioner of Education on February 12, 2014, by way of an Order to Show Cause served by petitioner, State Operated School District of Camden, upon respondent, Angela Norward, requiring respondent to show cause why an order should not be entered suspending her teaching certificate, pursuant to *N.J.S.A.* 18A:26-10, for resigning without providing the amount of notice required by her contract with respondent, and for failing to provide the 60 days notice required by law. By notice dated February 14, 2014, the Bureau of Controversies and Disputes (the Bureau) acknowledged receipt of proof of service upon respondent of the order to show cause.

On March 13, 2014, the Bureau sent respondent a final notice – via regular and certified mail – directing respondent to file an answer within ten days. The final notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The notice sent by regular mail was not returned, and no answer to the order to show cause has been filed as of this date.

As stated above, the final notice to respondent clearly advised that if an answer was not filed within ten days of receipt of same, each allegation in the papers supporting the

order to show cause would be deemed to have been admitted and the Commissioner might decide the matter on a summary basis. The Commissioner now concludes that the allegations, which respondent has chosen not to deny, may be deemed admitted pursuant to *N.J.A.C.* 6A:3-1.5(e), and are sufficient to justify an order suspending respondent's teaching certificate.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, pursuant to *N.J.S.A.* 18A:26-10.[1] A copy of this decision shall be forwarded to the State Board of Examiners for implementation of the suspension.



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/06/14

Date of Mailing: 6/06/14

[1] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

W.H., III, on behalf of minor children W.B.H. AND X.Q.H.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of his children in March 2013. A hearing at the Office of Administrative Law (OAL) was scheduled for March 27, 2014, but petitioner failed to appear despite having received appropriate notice and provided no explanation for his nonappearance. Counsel for the Board did appear on March 27, 2014, and the ALJ conducted a hearing at which the Board presented testimony and *ex parte* proofs in support of its claim for tuition reimbursement.

The ALJ found that: petitioner failed to appear and prosecute his appeal of the Board's decision; based on the testimony of the school district's residency investigator, W.B.H. and X.Q.H. live in Trenton with their mother; no evidence was presented by the petitioner to refute the Board's proofs; and the Board's Attendance Officer testified that the total amount of tuition due and owing for the ineligible attendance of petitioner's children is $35,394. The ALJ concluded that the determination of the Board that W.B.H. and X.Q.H. were not domiciled in Ewing should be upheld, and accordingly dismissed the petition and granted the Board's claim for tuition in the amount of $35,394.

The Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 6/06/14

OAL DKT. NO. EDU 4900-13
AGENCY DKT. NO. 69-3/13

W.H., III, on behalf of minor children W.B.H. AND X.Q.H.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is the question of whether petitioner's minor children were entitled to free public educations in respondent's school district. Upon review of the record and Initial Decision of the Office of Administrative Law (OAL),[1] the Commissioner concludes that they were not so entitled.

Petitioner failed to attend the properly noticed hearing in the OAL, and has not subsequently communicated reasons for his absence. As a result, the evidence presented by respondent concerning 1) the ineligibility of the minor children for a public education in its district, and 2) the tuition owed by petitioner for the education of his children in respondent's district, is unrebutted. The Administrative Law Judge (ALJ) concluded, therefore, that respondent was justified in disenrolling petitioner's children, and that petitioner owes respondent $35,394 in tuition, as testified to by respondent's attendance officer, David Mikalauskas.

The Commissioner agrees. Accordingly, the petition is dismissed and petitioner is ordered to pay respondent tuition in the amount of $35,394. The Commissioner also reminds

[1] Neither party filed exceptions to the Initial Decision.

petitioner of his obligation to ensure that his children are enrolled in the appropriate school district or private school – or are home schooled.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/06/14

Date of Mailing: 6/06/14

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4900-13
AGENCY DKT. NO. 69-3/13

W.H., III ON BEHALF OF MINOR CHILDREN, W.B.H. AND X.Q.H.V.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,
Respondent.

No appearance by W.H. III, petitioner

Joseph L. Rosselle, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: March 27, 2014 Decided: April 22, 2014

BEFORE **LINDA M. KASSEKERT**, ALJ:

STATEMENT OF THE CASE

On or about March 1, 2013, petitioner, W.H. III, received a letter from respondent, Ewing Township Board of Education (Ewing Township) that informed

petitioner that his two sons, W.B.H. and X.Q.H. had been removed from the Ewing Township school district. A vote of the members of the BOE occurred at a meeting on February 26, 2013, wherein it was determined that petitioner's two sons did not reside in Ewing Township. Petitioner contested the determination and timely appealed to the Commissioner of Education. Respondent seeks tuition in the amount of $17,574 for the period of April 11, 2012, to June 21, 2013, for W.B.H. and $17, 820 for the same period for X.Q.H.

PROCEDURAL HISTORY

The Department of Education, Bureau of Controversies and Disputes, transmitted this case to the Office of Administrative Law (OAL) on April 10, 2013, for a hearing pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Written notice of a hearing scheduled for March 27, 2014, at the OAL Mercerville was sent to the parties on November 29, 2013. The Board, through its counsel, appeared on the scheduled date, and at the scheduled time and place. Petitioner failed to appear as directed. The matter was held open until 10:00 a.m. that morning and the undersigned's judicial assistant attempted to call the petitioner numerous times on his last known cell phone number and got a "fast busy signal."

As the respondent BOE is requesting tuition payments from the petitioner, the undersigned heard testimony with respect to those issues and the record was closed on March 27, 2014.

TESTIMONY

For Respondent

Robert Smith

Mr. Smith is an Investigator with the Ewing Township school district. He has been doing residency investigations for twelve years. Prior to this he worked for the City of Trenton as a police officer and in the detective bureau. He identified R-1 as his

investigation into this matter. He started his investigation on April 11, 2012, at the petitioner's residence located at 120 P. Ave in Ewing, arriving at 6:45 a.m. He stated he left at 8:00 a.m. without seeing any juveniles leaving the residence and noted that W.B.H. was in school on that day and on time. He stated that the next day, April 12, 2012, he went to 274 A. Avenue in Trenton at approximately 6:45 a.m. At 7:10 a.m. he observed two male juveniles and an adult female exit the house and get into a blue Chevrolet with New Jersey license plates. He started to follow the vehicle but lost sight of it. On Friday, April 13, 2012, at 6:30 a.m. he was again at 274 A. Avenue. At 7:03 a.m., he saw three juvenile males come out of the residence. He stated that there was one taller male and two shorter males. All three got into the same blue Chevrolet. An adult female also got in the car and they drove off. Mr. Smith followed the car to the main entrance of Ewing High School, stopped, and the taller male got out. The car then drove up Parkway Avenue and drove to Chelsea Avenue where it was parked. Upon the arrival of the school bus, one juvenile got out of the car and boarded the bus.

Mr. Smith reported that the following Monday, April 16, 2012, the blue Chevrolet was parked in front of 274 A. Avenue. At 7:00 a.m., three juvenile males and an adult female came out of the house and got into the car. Mr. Smith followed the car where it turned into the entrance of Ewing High School. Mr. Smith proceeded to Chelsea Avenue where the blue Chevrolet arrived at 7:34 a.m.; two juveniles were in the car. On Wednesday, April 18, 2012, Mr. Smith again observed the three juvenile males and adult female exiting the residence at 274 A. Avenue. He followed them to Ewing High School and then to Chelsea Avenue. The school bus arrived and one juvenile boarded the bus. Mr. Smith stated that he was later advised that X.Q.H. was wearing clothing that matched what he observed and that he also wears eyeglasses. On Friday, April 20, 2012, Mr. Smith again observed the juveniles and adult female coming out of 274 A. Avenue at 7:02 a.m. At 7:25 a.m. the vehicle arrived at Ewing High School and at Chelsea Avenue at 7:35 a.m.

Mr. Smith did additional investigations on April 23, 2012, April 24, 2012, April 26, 2012, April 27, 2012, April 30, 2012, May 1, 2012, May 7, 2012, and May 8, 2012, with the same results. He stated at no time did he observe the juveniles leave from the 120 P. Avenue address in Ewing, only the 274 A. Avenue address in Trenton.

At the start of the 2012-2013 school year, Mr. Smith again resumed his investigations. These investigations were conducted on September 13, 2012, September 18, 2012, September 19, 2012, September 20, 2012, September 21, 2012, September 25, 2012, September 27, 2012, September 28, 2012, October 4, 2012, October 5, 2012, October 19, 2012, December 10, 2012, and December 21, 2012. On October 19, 2012, he determined that the taller male juvenile was W.B.H. He testified that at no time did he observe the youth exiting from the Ewing address; that each time it was from the Trenton address

David Mikalauskas

Mr. Mikalauskas is the Attendance and Residency Officer for the respondent. He has been an employee there for twenty-five years. His job requires that he verify that only students who reside in Ewing attend Ewing Township schools. He identified an Attendance/Residency Complaint Form (R-2) which indicated that W.B.H. was arrested in front of Ewing High School on March 23, 2012. At the time of the arrest W.B.H. told the police that his address was on A. Avenue in Trenton. As a result of receiving this information, Mr. Mikalauskas assigned this matter to Mr. Smith to investigate.

Mr. Mikalauskas also identified R-3, a letter he had written on May 21, 2012, to W.H., III and N. H. the father and mother of W.B.H. and X.Q.H. This letter stated:

> After a thorough investigation, it has been determined that your children do not reside at 120 P. Avenue in Ewing, N.J. with Mr. H. Additionally our investigation shows that the children reside with their mother, Ms. N.H. at 274 A. Avenue in Trenton, NJ.
>
> Based on this information W. is no longer eligible to attend Ewing High School and X. is no longer eligible to attend Fisher Middle School. Please contact the schools to process your children's transfer out of the Ewing School District by Wednesday, June 20, 2012. Failure to contact Ewing High School and Fisher Middle Schools will result in your students disenrollment on the date mentioned above.
>
> If you accept these reasons, the student will be removed from school in this district and you are advised that state compulsory education law

> requires you to ensure that any student between the ages of 6 and 16 is enrolled in public or private school or receives instruction elsewhere than at a school (home schooling). In the absence of your written indication that the student will be receiving education in compliance with that law, we will contact the school district of your domicile or residence, or an appropriate social service agency, to provide the student's name and you name/address, so as to ensure that the student receives an education as required by law.
>
> If you do not accept these reasons, you may request a hearing before the Board of Education and the student will be permitted to continue in school until the Board makes its determination following the hearing. At the hearing, you may present additional evidence in support of your claim, and the Board will notify you in writing of its final decision to the Commissioner of Education and advise of your rights and responsibilities with regard to the student's continued attendance at school, as well as the possibility of tuition assessment.

Mr. Mikalauskas stated that the children were disenrolled as of June 21, 2012, however, W.H., III appealed the matter on September 6, 2012. He stated that the Ewing Board of Education, at its February 26, 2013, meeting determined that W.B.H. and X.Q.H. were not domiciled in Ewing and not entitled to a free public education in the Ewing Township school district.

Mr. Mikalauskas testified that he calculated the amount of tuition due the Ewing Township school district. He stated that with respect to W.B.H. the tuition was $17,574 per year. He divided the yearly tuition of $13,754 by 180 school days. This equaled $76.41 per day. He multiplied that number by 230 days for the period of April 11, 2012, to June 21, 2013, and determined that the amount of tuition owed was $17,574. Similarly, with respect to X.Q.H., he took the tuition of $13,947 per year, divided this by 180 days. This gave him a cost of $77.48 per day which he multiplied by 230 days, and determined that the tuition owed was $17,820.

FACTUAL DISCUSSION

Based on the testimony and the evidence presented, I **FIND** the following as **FACT**:

1. The Ewing Township Board of Education had good cause to request a residency investigation with respect to W.B.H. and Q.X.H. when W.B.H. was arrested in front of Ewing High School and gave a Trenton address to the police.
2. The investigation of residency entailed thirteen investigations from April 11, 2012, to May 8, 2012, and thirteen investigations from September 13, 2012, to December 21, 2012. At no time did the investigator see the children leaving from the 120 P., Ewing address.
3. On all occasions, the investigator saw the children and an adult female leaving from the 274 A. address in Trenton. The investigator saw W.B.H. dropped off in front of Ewing High School and Q.X.H. dropped off at a bus stop on Chelsea Avenue, where he boarded the bus.
4. On March 27, 2012, the respondent advised the appellant that as a result of the investigation the children would be disenrolled from the district. The letter also advised the appellant of his appeal rights.
5. On June 21, 2012, the children were disenrolled.
6. On September 6, 2012, the appellant appealed the district's determination.
7. On February 26, 2012, the Ewing Township Board of Education considered this matter and determined that W.B.H. and X.Q.H. were not domiciled in Ewing Township and not entitled to a free public education in the school district.
8. On March 22, 2013, the appellant appealed this matter to the Commissioner of Education, whereupon it was transmitted to OAL for a hearing scheduled for March 27, 2014.
9. The appellant failed to appear at the March 27, 2014, hearing.
10. The respondent has determined that tuition is owed to the Ewing school district for W.B.H. in the amount of $17,574 and for X.Q.H. in the amount of $17,820.

LEGAL DISCUSSION AND CONCLUSION

Public schools are required to provide a free education to individuals between the ages of five and twenty years who are domiciled within the school district. N.J.S.A. 18A:38-1(a). A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district. N.J.A.C. 6A:22-

3.1(a)(1). The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374–76 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S. Ct. 1357, 143 L. Ed.2d 518 (1999). A person may have many residences but only one domicile. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001).

Where a local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents as follows:

> The parent or guardian may contest the board's decision before the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection.

Criteria for proof of residency for purposes of establishing eligibility for school-district placement is found at N.J.A.C. 6A:22-3.4(a):

> (a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:
>
> 1. Property tax bills; deeds; contracts of sale; leases; mortgages; signed letters from landlords; and other evidence of property ownership, tenancy, or residency;
>
> 2. Voter registrations; licenses; permits; financial account information; utility bills; delivery receipts; and other evidence of personal attachment to a particular location;
>
> . . . .

> 4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location, or to support the student;
>
> . . . .
>
> 6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others, as appropriate;
>
> . . . .
>
> 8. Any other business record or document issued by a governmental entity.
>
> (b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by an applicant.
>
> (c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form or subset of documents without regard to other evidence presented.

In this matter no evidence was presented by the petitioner that W.B.H. or Q.X.H. resided in Ewing Township, therefore I **CONCLUDE** that W.B.H. and Q.X.H. were not domiciled in Ewing Township and therefore not entitled to a free public education in the Township schools. I **CONCLUDE** that the petitioner abandoned the petition of appeal he filed before the Commissioner of Education on March 22, 2013. I also **CONCLUDE** the respondent is due tuition reimbursement in the amount of $17,574 for W.B.H. and $17,820 for Q.X.H.

ORDER

Based upon the foregoing, it is **ORDERED** that petitioner's appeal with respect to this matter is **DISMISSED** with prejudice. Petitioner is hereby **ORDERED** to reimburse respondent for tuition costs in the amount of $17,574 for W.B.H. and $17,820 for Q.X.H.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions.: A copy of any exceptions must be sent to the judge and to the other parties.

April 22, 2014

DATE

Linda M Kassekert

LINDA M. KASSEKERT, ALJ

Date Received at Agency: 4/22/14

Date Mailed to Parties: 4/22/14

/lam/mph

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

Robert Smith

David Mikalauskas

LIST OF EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Investigation Report

R-2 Attendance/Residency Complaint form

R-3 May 21, 2012 disenrollment letter

241-14

STATE BOARD OF EXAMINERS DKT. NO. 1112-120
AGENCY DKT NO. 2-2/14A

IN THE MATTER OF THE REVOCATION OF :
THE CERTIFICATES OF DONALD SALAAM :
BY THE STATE BOARD OF EXAMINERS. :

COMMISSIONER OF EDUCATION

DECISION

Order of Revocation by the State Board of Examiners, January 24, 2014

For the Respondent-Appellant, Stephen J. Kaflowitz, Esq.

For the Petitioner-Respondent State Board of Examiners, Angela L. Velez, Deputy Attorney General (John J. Hoffman, Acting Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Donald Salaam's appeal of the State Board of Examiners' (Board) Order of January 24, 2014, revoking his Teacher of the Handicapped Certificate, Substance Awareness Coordinator Certificate of Eligibility with Advanced Standing, Principal Certificate of Eligibility and Supervisor Certificate. On appeal, the appellant argues that a video recording of the incident at issue in this case should not have been admitted into evidence at the Office of Administrative Law because it was not properly authenticated. The appellant also contends that the Commissioner should reject the Board's decision revoking his certificates and impose a two year suspension of his certificates.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

After full consideration of the record and all submissions, the Commissioner finds that the record adequately supports the Board's determination that the appellant engaged in unbecoming conduct and that the revocation of the appellant's certificates was the appropriate penalty. There is nothing in the record to suggest that the Board's decision was arbitrary, capricious or unreasonable, and as a result the Commissioner finds no basis upon which to disturb the decision of the State Board of Examiners.

Accordingly the decision of the State Board of Examiners is affirmed for the reasons expressed therein.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/06/14

Date of Mailing: 6/06/14

*This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

242-14

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE	:	COMMISSIONER OF EDUCATION
OF AMIR MCNAIR, NORTH HUDSON	:	DECISION
ACADEMY, SOMERSET COUNTY.	:	

SYNOPSIS

In December 2013, the Commissioner of Education issued an Order to Show Cause requiring respondent to show cause why an order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9 – for resigning his position on inadequate notice. The respondent failed to answer the order. Respondent was duly advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation raised by the Board to be deemed admitted, and might result in summary decision by the Commissioner.

There being no response to the order to show cause, the Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and justify suspension of respondent's certification. Accordingly, summary decision is granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 6/06/14

AGENCY DKT. NO. 305-12/13

IN THE MATTER OF THE SUSPENSION	:	
OF THE TEACHING CERTIFICATE	:	COMMISSIONER OF EDUCATION
OF AMIR MCNAIR, NORTH HUDSON	:	DECISION
ACADEMY, SOMERSET COUNTY.	:	

For Petitioner, Robert S. Feder, Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on December 9, 2013, by way of an Order to Show Cause served by petitioner (North Hudson Academy) upon respondent (Amir McNair), requiring respondent to show cause why an order should not be entered suspending his teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by his contract with petitioner. By notice dated December 16, 2013, the Bureau of Controversies and Disputes (Bureau) acknowledged receipt of proof that the Order to Show Cause had been served upon respondent and directed respondent to answer within 20 days.

No answer having yet been received, on January 9, 2014, the Bureau sent respondent a second notice – via regular and certified mail – directing that he file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The certified mail return receipt card indicates that the January 9, 2014 notice was delivered on January 14, 2014.

No answer having yet been received, on January 28, 2014, the Bureau sent respondent a final notice – via regular and certified mail – directing that he file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The certified mail return receipt card indicates that the January 28, 2014 notice was delivered on February 15, 2014. No answer to the Order to Show Cause has been filed as of this date.

The affidavit submitted by the petitioner in this matter states that the respondent entered into a contract with the petitioner for the 2013-2014 school year; the respondent did not appear at school on September 30, 2013 and called on October 2, 2013 to say he would not be at school; and the respondent was never seen or heard from again. The respondent has not denied petitioner's allegations; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certification pursuant to *N.J.S.A.* 18A:26-10.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certification is suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/06/14

Date of Mailing: 6/06/14

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division

243-14

AGENCY DKT. NO. 1-1/14A
SEC DKT. NOS. C16-13 and C22-13 (consolidated)

JAMES MESSNER AND ROBERT CONDO,	:	
COMPLAINANTS,	:	
V.	:	
STACY GRAY, DEPTFORD TOWNSHIP BOARD OF EDUCATION, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
WALTER BERGLUND,	:	
COMPLAINANT,	:	
V.	:	
STACY GRAY, DEPTFORD TOWNSHIP BOARD OF EDUCATION, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

The record of this consolidated matter and the decision of the School Ethics Commission (Commission) have been reviewed. This matter involves an appeal of the Commission's December 19, 2013 decision finding that the Respondent-Appellant Stacy Gray (respondent) violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g) of the Code of Ethics for School Board Members for sharing an audio recording of a portion of the Deptford Township Board of Education's (Board) executive session with her attorneys. The Commission recommended a penalty of reprimand for the violation. The respondent filed a Notice of Appeal appealing the Commission's finding of a violation pursuant to *N.J.A.C.* 6A:4-1.3(c).[1]

In her appeal to the Commissioner, the respondent does not dispute the Commission's factual findings, but rather contends that she did not violate *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-

[1] The petitioners did not file a reply to respondent's brief in support of her appeal.

24.1(g). The respondent maintains that the sharing of her recording with her attorneys did not have the potential to compromise the Board because her attorneys had a professional obligation not to violate the Board's right to confidentiality. The respondent also stressed that the contents of the recording were never shared with the public.

Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission as to a determination of a violation of *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g) is supported by sufficient credible evidence. The evidence in the record fully supports the Commission's determination that the respondent breached the confidentiality of the Board's deliberation during the executive session by sharing the recording with two individuals who would not have been permitted to attend the executive session. As a result, the Commissioner finds that the Commission's determination that the respondent violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g) was not arbitrary, capricious or contrary to law. *N.J.A.C.* 6A:4-4.1(a).

The Commissioner also accepts the Commission's recommendation – for the reason expressed in the Commission's decision – that a reprimand is the appropriate penalty in this matter. In so ruling, the Commissioner is satisfied that the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Therefore, the Commission's recommended penalty in this matter will not be disturbed.

Accordingly, IT IS ORDERED that Stacy Gray is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/09/14
Date of Mailing: 6/10/14

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

JAMES MESSNER AND ROBERT CONDO **v.** **STACY GRAY** ***DEPTFORD TOWNSHIP BOARD OF EDUCATION,*** ***GLOUCESTER COUNTY*** **AND** **WALTER BERGLUND** **v.** **STACY GRAY** ***DEPTFORD TOWNSHIP BOARD OF EDUCATION,*** ***GLOUCESTER COUNTY***	**BEFORE THE SCHOOL ETHICS COMMISSION** **Docket Nos. C16-13 and C22-13 Consolidated** **DECISION**

PROCEDURAL HISTORY

This matter arises from two complaints filed by two Deptford Township board members and one Deptford Township employee, alleging that Stacy Gray, a new member of the Deptford Township Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. On April 1, 2013, James Messner and Robert Condo filed a complaint, docketed as C16-13, specifically alleging that the respondent violated N.J.S.A. 18A:12-24.1(a), (d), (e), (g), and (i) of the Code of Ethics for School Board Members (Code). Later, on June 4, 2013, Walter Berglund filed a complaint, docketed as C22-13, specifically alleging that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (e), (g), and (i) of the Code. The respondent filed answers to both complaints on May 17, 2013 and July 5, 2013, respectively. Both complaints alleged they were frivolous, pursuant to N.J.S.A. 18A:12-29(e).

By letter dated July 8, 2013, the parties in both matters were notified that the School Ethics Commission would review these complaints on July 30, 2013. At its meeting on July 30, 2013, pursuant to N.J.A.C. 6A:28-10.8(a), the Commission found the complaints not frivolous in accordance with the standard set forth at N.J.A.C. 6A:28-1.2 and voted to retain the complaints docketed as C16-13 and C22-13 for a consolidated hearing at a later date due to a commonality of issues and facts.

The Commission notified the complainants and respondent by letter of September 10, 2013, that on October 29, 2013, it would conduct a plenary proceeding to hear testimony and consider evidence in support of their respective positions. The complainants, James Messner, Robert Condo and Walter Berglund appeared *pro se*, and the respondent appeared with her attorney, Arthur

Margeotes, Esq. Accordingly, the Commission heard testimony on all Counts of the complaints. After hearing all testimony, as summarized below, the Commission did not close the record until it had an opportunity to continue the discussion of the matter at its next meeting. At that meeting on November 26, 2013, the Commission closed the record and tabled the matter for the next meeting. At the December 19, 2013 meeting, the Commission voted to find a violation of N.J.S.A. 18A:12-24.1 (e) and (g) of the Code of Ethics for School Board Members, to dismiss the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), and (i) of the Code and to recommended the penalty of reprimand.

SUMMARY OF THE RECORD

After opening statements, the Commission advised the parties that issues regarding *Rice* notice violations or grievance matters were not cognizable under the School Ethics Act and would not be addressed in this forum. On review of the testimony of each of the witnesses, the Commission has determined that the parties agree upon the relevant material facts. The only issue remaining is whether the respondent violated the Code when she shared the recording of the taped a portion of the Executive Session at the regular meeting of the Board on March 26, 2013, with her attorney[1] for use against certain Board members in another ethics matter filed against her with the Commission.

Complainants' Exhibits[2]

C-1	March 26, 2013 Executive Session Minutes of the Regular Meeting of the Deptford Township School District.

FINDINGS OF FACT

As the Trier of Fact in this matter, the Commission had the greatest opportunity to observe the demeanor of the witnesses and was qualified to assess their credibility. Based on the credible testimony and documents on the record, the Commission makes the following factual findings:

1. The respondent was at all times relevant to this matter a member of the Deptford Township Board of Education (Board), having been newly sworn in on January 3, 2013.

2. The Board convened for its regular meeting on March 26, 2013.

3. Seven of the nine members, who comprise the Board testified at the hearing and had personal knowledge of the events, which took place during Executive Session.

4. For discussion that evening, the agenda included negotiations and several other personnel matters: Walter Berglund's grievance, an apology from the Board to Mr. Berglund, the

[1] The respondent shared the recorded portion of the meeting with her original counsel and with trial counsel.

[2] The respondent introduced a CD of the recorded portion of the Executive Session of March 26, 2013. The Commission found the CD inadmissible as the chain of custody could not be verified and because the recording contained Board deliberations, which are confidential.

contracts of four (4) employees who received *Rice* notices, and a proposal to settle an Unfair Labor Practice charge against the Board of Education for paraprofessional personal days.

5. The employees who received *Rice* notices and the respondent are members of the same union, the DEA/NJEA.

6. When Board deliberations turned to the topic of the apology letter, the respondent, fearing that she would be treated in an unprofessional manner by incumbent Board members angry with her for comments on her blog that occurred prior to the election, decided to tape the session because her original attorney was not there to protect her and another Board member supported her decision to do so.

7. The respondent's blog is no longer public. It is maintained to preserve its content for evidence and for private purposes.

8. The respondent placed her cell phone at the corner of her desk and began recording without advising the rest of the Board or the Board Solicitor that she was doing so.

9. Some time later, Board member Robert Gentile noticed the "record app" running and passed a note to Complainant Condo to advise him.

10. Complainant Condo, after confirming for himself with a visual observation, asked the respondent aloud if she were taping the Session.

11. The respondent immediately said, "Yes," explained that she had the right to do so and intended to play the recording for her attorney for use in another ethics proceeding against her.

12. The Board Solicitor told her that she should not tape the Session, but the respondent insisted that she had the right to do so.

13. The respondent testified that she had taped 19 minutes of the one-hour meeting.

14. The respondent offered to play the recording for the Board and the Solicitor, but all declined. The remaining Board members and the Solicitor walked out effectively ending the meeting.

15. All of the witnesses for the complainants testified that Executive Session is never taped, and the Board members and the Administrators go to great lengths to protect the confidentiality of the deliberations.

16. The respondent admitted that if no one had noticed that she had been recording the Session, she would not have told those in attendance that evening.

ANALYSIS

New Jersey's Open Public Meetings Act, N.J.S.A. 10:4-6, et seq. requires that the public have notice and access to all meetings, including Executive Session, of public bodies, which are legally empowered to vote on public matters or to spend public funds. Central to this Act is the public's right to know how the members of these public bodies vote and make decisions on behalf of the public. Yet, that right is not absolute. There are times when the public may be excluded from an open public meeting's Executive Session. N.J.S.A. 10:4-12(b) provides that "a public body may exclude the public only from that portion of a meeting at which the public body discusses:

> (4)Any collective bargaining agreement, or the terms and conditions, which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body.
>
> (8)Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.[3]

The purpose of executive session is to allow the Board to openly deliberate on select issues without the public being privy to those discussions. It is clear that the topics discussed during that portion of the meeting were confidential and it fell upon those individuals present in executive session to ensure those discussions remain confidential. Demonstrative of the level of care necessary to protect the confidentiality of Executive Session is the care everyone took during the hearing to preserve the confidentiality of the Board meeting. The Commission steered the witnesses away from testimony that would reveal any of the deliberations during Executive Session; the respondent's attorney described "the sanctity" of the recording and his decision not to send it even in discovery to the complainants because "anyone could have heard it" (STE-007 at 1:00:00 – 1:01:33); and the Commission, when it denied admission of the CD into the record, reasoned that recording would divulge confidential Board deliberations.

In excluding the tape, the Commission recognized that each public body enjoys its own protection of confidentiality, individually and separately from any other public body. The protection of confidentiality attaches to each public body as a whole: It is not severable and no one Board member or official can waive that protection for the Board without breaching his duty. Further, the Commission finds that sharing the deliberations of a closed meeting with any third party, who would not have been permitted to attend the meeting, is tantamount to a breach of trust and to the promise and expectation of confidentiality.

In his closing, respondent's counsel cited Pitts v. Gidwani, Winslow Township Board of Education, Camden County, C27-11, 09/27/2011 in which the Commission determined that the

[3] Whether the Board was properly in executive session is not at issue in this case.

respondent did not violate the Code when she, without seeking prior permission, taped Executive Session. In its decision, the Commission found:

> ...the Commission does not find that the respondent's action in taping a Board session implicates his duties and functions as a Board member sufficiently to characterize his conduct as "board action" within the intendment of N.J.S.A. 18A:12-24.1(c). Further, if such action constituted private action, or action beyond the scope of the respondent's duties, the Commission finds that there are no facts set forth in the complaint that would support a conclusion that this action was of such a nature that it had the potential to compromise the Board so as to violate N.J.S.A. 18A:12-24.1(e). Indeed, inasmuch as the complainant fails to allege that the respondent took *any* action beyond taping, it appears that this matter predominantly implicates the Open Public Meetings Act, rather than the School Ethics Act. Thus, the Commission finds that the complaint, on its face, fails to allege facts sufficient to maintain a claim that the respondent violated N.J.S.A. 18A:12-24.1(c) or (e).

The credible testimony in these cases now before the Commission revealed that the respondent did take some action beyond taping and that she did do something more. She shared the confidential deliberations with two outsiders, who themselves are not parties to these deliberations and would not have been permitted to attend the meeting or be privy to the Board's discussions. Once shared with these individuals, confidentiality was breached. Consistent with this foregoing reasoning, the Commission reviewed these actions to determine whether they violated the Code.

The Commission initially notes that the complainants bear the burden of factually proving any violations of the Code of Ethics for School Board Members in accordance with the standards set forth at N.J.A.C. 6A:28-6.4(a). See also, N.J.S.A. 18A:12-29(b). The complainants assert that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), (g), and (i) of the Code of Ethics for School Board Members.

The Commission first considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(a), which states:

> I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(a) shall include a copy of a final decision from any court of law or administrative agency of this State demonstrating that the respondent(s) failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or

that the respondent brought about changes through illegal or unethical procedures. N.J.A.C. 6A:28-6.4(a)1.

The complainants did not produce a copy of a final decision from a court of law or administrative agency of this State that demonstrates this respondent failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondents brought about changes through illegal or unethical means. See, David Hollander v. Judith Millman, et al., Springfield Twp. Board of Education, Union County, C33-07 (January 22, 2008); Denise Bouyer v. Rita Owens and Oscar McCoy, Willingboro Board of Education, Burlington County, C37-09 (December 15, 2009); Martha Oramas-Shirey v. Peter Gallo et. al., Bethlehem Twp. Bd. of Ed., Hunterdon County, C43-10 (March 22, 2011). Accordingly, the complainants failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(a).

The Commission next considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(c), which states:

> I will confine my board action to policymaking, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(c) shall include evidence that the respondent(s) took board action to effectuate policies and plans without consulting 2
>
> i. Develop the general rules and principles that guide the management of the school district or charter school;
>
> ii. Formulate the programs and methods to effectuate the goals of the school district or charter school; or
>
> iii. Ascertain the value or liability of a policy. N.J.A.C. 6A:28-6.4(a)3.

The complainants presented no evidence that the respondent took any particular "board action" so as to implicate this provision of the statute. Rather, respondent's conduct implicates N.J.S.A. 18A:12-24.1(e), as set forth below. Accordingly, the complainant failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(c).

The Commission next considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(d), which states:

> I will carry out my responsibility, not to administer the schools, but together with my fellow board members, to see that they are well run.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(d) shall include, but not be limited to, evidence that the respondent(s) gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district or charter school. N.J.A.C. 6A:28-6.4(a)4.

Based on the testimony and in accordance with the Commission's findings of fact, the Commission finds insufficient evidence to conclude that the respondent gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district. Accordingly, the complainants failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(d).

The Commission next considers the complainant's allegation that the respondent violated N.J.S.A. 18A:12-24.1(e), which provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The Commission's regulations require that:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(e) shall include evidence that the respondent made personal promises or took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board. N.J.A.C. 6A:28-6.4(a)5.

When the respondent, in consultation with another Board member, turned on her phone's recording app, she was still within her rights to do so, as the Commission found in Pitts v. Gidwani, *supra* However, the Commission concludes that, here, the respondent took private action, or action that was outside the scope of her duties as a Board member when she intended to and did disclose the deliberations to two other third parties who would not otherwise have been privy to the Board's deliberations.

In finding a violation of N.J.S.A. 18A:12-24.1(e), it is not necessary for the Commission find that the respondent's action, in fact, compromised the Board. Rather, it is sufficient that the action was of such a nature that it might have compromised the Board. See, Tony John et al. v. Ken Gordon, Willingboro Bd. of Ed., Burlington County, C34-08 (October 27, 2009), *aff'd* Commissioner of Education Decision No. 102-10ASEC, decided March 30, 2010. Here, however, the Commission does so find that the Board's protection of confidentiality was breached when the respondent played the recording for two other individuals who were not permitted in Executive Session. Accordingly, the Commission finds that the respondent took private action, which was of such a nature that it had the potential to compromise the Board in violation of N.J.S.A. 18A:12-24.1(e).

In this analysis, the Commission does not diminish the respondent's stated concern that she believed that she was protecting herself by taping the 19 minutes of the Executive Session. She testified that as a newly elected Board member, she was treated harshly by incumbent Board members for questioning the credentials of Mr. Berglund. If the respondent did not want to be confronted again, she could have asked the Board Solicitor to intervene or simply walked out.

The Commission next considers the allegation that the respondent violated N.J.S.A. 18A:12-24.1(g), which provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

The Commission's regulations require that:

> Factual evidence of a violation of the confidentiality provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that the respondent(s) took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. Factual evidence that the respondent violated the inaccurate information provision of N.J.S.A. 18A:12-24.1(g) shall include evidence that substantiates the inaccuracy of the information provided by the respondent(s) and evidence that establishes that the inaccuracy was other than reasonable mistake or personal opinion or was not attributable to developing circumstances. N.J.A.C. 6A:28-6.4(a)7.

It is clear from respondent's actions in taping a portion of Executive Session and playing it for two individuals who could not ever be privy to the Board's deliberations that she took action to make public, reveal or disclose information that was not public under any laws, regulations or court orders of this State, or information that was otherwise confidential in accordance with board policies, procedures or practices. However, the complainants do not provide any facts to support a claim that the respondent failed to provide accurate information or evidence that establishes that the inaccuracy was other than a reasonable mistake or personal opinion or was not attributable to developing circumstances. Accordingly, the Commission finds that the complainants met their burden to establish a violation of the first part of N.J.S.A. 18A:12-24.1(g), but not the second part of the provision.

Finally, the Commission considers the complainants' allegation that the respondent violated N.J.S.A. 18A:12-24.1(i), which states:

> I will support and protect school personnel in proper performance of their duties.

The Commission's regulations further provide:

> Factual evidence of a violation of N.J.S.A. 18A:12-24.1(i) shall include evidence that the respondent(s) took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties. N.J.A.C. 6A:28-6.4(a)9.

On this record, the Commission does not find this subsection applicable since Board members are not considered school personnel and are not protected under this provision of the Code. On the other hand, Mr. Berglund is an employee of the District and is therefore protected. However, as the respondent testified, her inquiries questioning the credentials and experience of Complainant Berglund occurred when she was a private citizen over whom the Commission did not have *in personam* jurisdiction. Even if the respondent had made these inquiries as a Board member, doing so would have been consistent with her duty to ensure that public funds were properly expended. Consequently, respondent's actions do not in any way evidence taking deliberate action, which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties. Accordingly, the Commission finds that the complainants have failed to establish that the respondent violated N.J.S.A. 18A:12-24.1(i).

DECISION

The Commission finds that respondent Stacy Gray violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members, and the Commission dismisses the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), and (i).

In addition, the Commission has taken this occasion to review its determination in Pitts v. Gidwani, Winslow Township Board of Education, Camden County, C27-11, 09/27/11, and it reassessment leads to a cautionary note. The Commission does not believe that it is within its authority to prohibit the taping of the Executive Session. However, it does recommend that each District determine for itself the rule it wishes to follow. The Commission supports such a prohibition since allowing the taping of Executive Session Board deliberations creates too great a probability that Board members may not freely discuss school business. Such an outcome must not be countenanced as it makes ineffective the very purpose of a closed session—to discuss the public's business unfettered and protected. Most importantly, allowing members to tape a closed session, even a portion, introduces a greater and unacceptable threat that the confidential deliberations may become available to public scrutiny through an individual who is not a beneficiary of the protection of confidentiality recognized in Executive Session.

PENALTY

The Commission recommends a penalty of reprimand for breaching the confidentiality of Board deliberations by sharing the recording with another who would not have been permitted to attend the meeting or be privy to the Board's discussions. In doing so, the Commission takes this

opportunity to encourage the Board as a whole and its members individually to put this rancor behind them so that it does not continue to taint the future and further recommends that they attempt to rebuild the trust that the people who elected them look to for leadership.

Pursuant to N.J.S.A. 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the School Ethics Commission's recommended sanction. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of violation may file, within **13 days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal, pursuant to the standards set forth at N.J.A.C. 6A:4, within **30 days** of the filing date of the decision from which the appeal is taken. The filing date shall be three days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (13 days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender
Chairperson

Mailing Date: December 20, 2013

Resolution Adopting Decision – C16-13 & C22-13 Consolidated

Whereas, the School Ethics Commission has considered the pleadings filed by the parties, the documents submitted in support thereof, and the testimony of the parties from its hearing on October 29, 2013; and

Whereas, at its meeting on November 26, 2013, and after further deliberation, the Commission closed the record and found that the complainants established that the respondent violated N.J.S.A. 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members, but dismissed the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (d), and (i); and

Whereas, at its meeting on December 19, 2013, the Commission voted to recommend to the Commissioner of Education a penalty of reprimand; and

Whereas, at its meeting on December 19, 2013, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs it staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its public meeting on December 19, 2013.

Joanne M. Restivo
Interim Executive Director
School Ethics Commission

244-14

OAL DKT. NO. EDU 17165-13
AGENCY DKT. NO. 275-11/13B

J.P. on behalf of minor child P.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF LONG HILL, MORRIS COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is a proposed settlement of a controversy involving petitioner's minor child, who respondent determined had committed an act of harassment, intimidation and/or bullying (HIB), in violation of the statutory mandate of *N.J.S.A.* 18A:37-13 *et seq.* Respondent's determination was made by way of an August 19, 2013 vote and resolution after a hearing, at which petitioner appeared and was permitted to participate. Petitioner appealed the respondent Board's action, respondent answered, and the matter was transmitted to the Office of Administrative Law (OAL) on November 2, 2013. Upon review of the Initial Decision and proposed settlement, the Commissioner is constrained to reject same.

More specifically, Section "2" of the "Settlement/Release and Stipulation of Dismissal" (Agreement) recites that all records pertaining to respondent's determination that P.P. had committed an act of HIB would be transferred from P.P.'s school file to a location in the Superintendent's office until they could be destroyed, and would not follow him to high school. That is a pledge that respondent does not have the authority to make.

First, records are classified by the State Records Committee into series and posted on a Records Retention and Disposition Schedule. Student disciplinary records have been assigned the Record Series Number 0053-0001. Records in that classification may not be destroyed until seven years after the student's graduation or termination from the school system. Thus, P.P.'s disciplinary records related to HIB incident must be retained by respondent until 2020. Second, the No Child Left Behind Act (NCLB) Act of 2001, 20 *U.S.C.A.* 7165(b), requires public schools to transfer students' records related to disciplinary actions when the student transfers to a different school. Third, respondent's district does not have a high school. Students who successfully complete eighth grade are sent to the Watchung Hills Regional High School district for their secondary education. *N.J.A.C.* 6A:16-7.10(a) requires that all information in a transferring student's record "related to disciplinary actions taken against the student by the school district . . . shall be provided to the receiving public school district . . . ." *N.J.A.C.* 6A:16-7.10(a)(2) further instructs that "written consent of the parent or adult student shall not be required as a condition of the transfer of this information."[1]

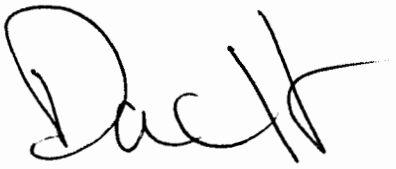
In summary, respondent took formal disciplinary action against P.P. after a hearing during which facts were presented and, presumably, after the Board deliberated and voted. The disciplinary action was memorialized and that memorialization constitutes a disciplinary record. If respondent believes that there are material facts which petitioner was not able to present at the Board hearing, and which might necessitate a reconsideration of the

[1] In *S.S. and E.S. on behalf of minor child E.S. v. Board of Education of the Township of Union, Union County,* Commissioner Decision No. 336-07 (August 24, 2007), the Commissioner addressed the State interests underlying the retention and transfer of disciplinary records. He pointed to the State Board of Education's observation that the possibility of student violence militates against destroying records about threatening behavior, *Id.* at 5. He further cited to various New Jersey statutes which reflect a widespread concern about student violence: *N.J.S.A.* 18A:35-27 (Findings and Declarations about the link between violence and vandalism and ethnic intolerance; *N.J.S.A.* 18A:35-4.26 (Elementary school instruction about gang violence); *N.J.S.A.* 18A:17-46 (Requirement that school employees report student violence; *N.J.A.C.* 6A:16-7.1 (code of student conduct); *N.J.A.C.* 6A:16-5.3 (Requirement that school employees report incidents of violence, vandalism and alcohol and other drug abuse).

controversy, the proper procedure is another hearing – at the Board level or in the OAL. The remedy is not secretion of the original investigation and proceedings. The Commissioner also notes that, pursuant to *N.J.A.C.* 6A:32-7.7(d), petitioner may place statements in P.P.'s record commenting on the information therein or setting forth reasons for her disagreement with same. Such a statement must always be disclosed along with the portion of P.P.'s record to which it pertains.

Accordingly, for the reasons articulated *supra*, the Initial Decision and incorporated settlement are rejected and the matter is remanded to the OAL for further proceedings.

IT IS SO ORDERED.*



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/09/14

Date of Mailing: 6/10/14

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 17165-13
AGENCY DKT. NO. 275-11/13B

J.P., ON BEHALF OF MINOR CHILD,
Petitioner,
v.
TOWNSHIP OF LONG HILL
BOARD OF EDUCATION, MORRIS COUNTY
Respondent.

Lisa M. Fittipaldi, Esq. for petitioner (DeFancesco, Bateman, Coley, Yospin, Kunzman, Davis, Lehrer & Flaum, attorneys)

Nicholas Celso, III, Esq., for respondent (Schwartz, Simon, Edelsein & Celso, attorneys)

Record Closed: April 21, 2014 Decided: April 21, 2014

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 2, 2013 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Township of Long Hill Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated April 7, 2014.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

April 21, 2014
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 4-23-14

Mailed to Parties: APR 23 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

DATE

/rr

AFFIDAVIT OF SECRETARY

I, John Esposito, Board Secretary for the Board of Education in the Township of Long Hill, in the County of Morris, State of New Jersey, hereby certify that the extract below, from the minutes of the meeting of the Board of Education is a true, complete copy.

JOHN ESPOSITO, Board Secretary

April 7, 2014

EXTRACT FROM THE MINUTES
OF A MEETING OF THE BOARD OF EDUCATION
OF THE TOWNSHIP OF LONG HILL, MORRIS COUNTY, N.J.
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Long Hill, in the County of Morris, New Jersey held a Public Meeting on Monday, **April 7, 2014** at **7:30** p.m. in the Township Municipal Building Gillette, New Jersey.

The following members of the Board of Education were present:

MS. RITA BARONE, President
MR. STEVEN BROWN
MR. MATTHEW DiGIORGIO
MS. MARTA MOAKLEY
MR. NICHOLAS STEVENS, Vice President
MR. DAVID CARN
MR. STEVEN LoCASCIO
MS. KAREN ANN NYQUIST

On a motion made by Mr. DiGiorgio and seconded by Ms. Nyquist, the Board of Education took action on the following resolution:

RESOLVED that the Board approves the Settlement Agreement in the matter of *J.P. o/b/o of Minor Child P.P. v. Long Hill Twp. Board of Education*, Agency Dkt. No. 275-11/13B in accordance with the terms and conditions set forth therein and authorizes the Board President and Secretary to execute same on behalf of the Board, and the Board Attorney to take all steps necessary to bring this matter to closure.

The resolution was unanimously APPROVED by a vote of 8-0-0.

RECEIVED

2014 APR 21 A 9:29

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

J.P. o/b/o P.P.,

Petitioners,

V.

LONG HILL TOWNSHIP BOARD OF EDUCATION

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO.: EDU
AGENCY REF. NO.:

SETTLEMENT/RELEASE AND STIPULATION OF DISMISSAL

WHEREAS, Judith Peacock is the parent of P.P (collectively referred to as "Petitioners"), a minor child and student residing within and attending school in the Long Hill Township School District ("District"); and

WHEREAS, a dispute exists arising from the events leading up to and following a decision of the Long Hill Township Board of Education ("Board") to affirm the District's finding that P.P. engaged in an act or acts of harassment, intimidation and bullying (HIB), prohibited by *N.J.S.A.* 18A:37-15, *et seq.;* and

WHEREAS, Petitioners appealed the Board's decision by filing the above referenced petition of appeal with the Commissioner of Education which presently is scheduled in for a plenary hearing in the Office of Administrative Law before the Hon. Ellen Bass, ALJ; and

WHEREAS, the parties, each having a desire to amicably settle any and all claims in all jurisdictions, asserted and unasserted, now hereby agree as follows:

1. Upon final execution and approval of this Agreement, the Petitioners shall withdraw their petition of appeal.

2. Upon final execution and approval of this Agreement, all records pertaining to the underlying HIB investigation, including all HIB investigations and charges, shall be removed from P.P.'s school file and secured in a separate file maintained in the Superintendent's office where they shall be held until such time as they may be destroyed, pursuant to *N.J.A.C.* 6A: 32-7.8. In the interim, said records shall not be disclosed to any third party nor forwarded to P.P.'s receiving school upon his completion of schooling in Long Hill Township Middle School, without the express written authorization of his parents or him, upon the attainment of eighteen years of age. J.P. shall be entitled to review an entire copy of P.P.'s student record one month prior to his completion of schooling in Long Hill to ensure compliance. No information concerning the subject matter shall be added to his file following completion of said review. However, nothing in this Agreement shall prevent the District from relying upon and considering the subject information in the event that P.P. is engaged in another HIB incident in which he is

found to be the aggressor while enrolled in the Long Hill Township School District.

3. Petitioners, in consideration of the above terms and conditions, hereby release the Board and its agents and successors in interest from all claims they have or may have had emanating from the circumstances underlying the subject Petition of Appeal that could have, or have been, filed in any forum whatsoever, now and forever.

4. This Agreement contains the entire agreement between the parties hereto and is intended to resolve any and all disputes and issues, known or unknown, between them as of the date of execution of this Agreement.

5. The terms of this Agreement represent the compromise of disputed claims between the parties. This Agreement shall not be treated as an admission that either party has failed to act in accordance with any laws, statutes, regulations and/or regulation.

6. Each party shall be responsible for its own attorney's fees and costs related to the underlying matter.

7. The parties represent that they sign this Agreement as their own voluntary act and deed, and that they have read and fully understand the terms, duties, requirements, obligations and limitations enumerated herein and have consulted with their respective legal representatives. The drafting and negotiation of this Agreement have been participated in by each of the parties and, for all purposes, this

Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship.

8. This Agreement shall be governed by the laws of the State of New Jersey.

9. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified. The parties shall not be bound by this Agreement until it has been ratified by the Board. Upon ratification of this Agreement, the Board shall cause a copy of the relevant resolution to be forwarded to Petitioners.

WITNESSETH:

In consideration of the foregoing covenants, the legal sufficiency of which is acknowledged by the parties, they have set forth their duly authorized signatures below:

WITNESS:

Judith Peacock, individually and o/b/o of P.P.

DATED: 4/4/14

DATED: 4/4/14

WITNESS:

Long Hill Township Board of Education

John Esposito, Business Administrator
Long Hill Township School District

DATED: April 7, 2014

By: Rita Barone, Board President
Long Hill Township School District

DATED: April 7, 2014

245-14

OAL DKT. NO. EDU 13230-13
(EDU 12411-12 ON REMAND)
AGENCY DKT. NO. 230-8/12

V.R.D. II AND M.D., on behalf of minor child, A.D.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH HANOVER, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is a proposed settlement of a controversy involving petitioner's minor child, who brought a knife to school in violation of school policy and *N.J.S.A.* 2C:39-5(e)(2). Petitioner filed an appeal of the discipline imposed by respondent, and the matter was transmitted to the Office of Administrative Law (OAL) on September 12, 2012. A settlement was proposed by the parties in July 2013, but was rejected by the Commissioner because it contained terms which could not be implemented. A new proposed accord is now before the Commissioner. Upon review of same and the Initial Decision of the OAL, the Commissioner approves the new settlement, conditioned upon stipulations which will be discussed *infra*.

A brief review review of the facts of this matter reveals that in May 2012, A.D. brought a knife to the C.B. Lamb Elementary School (C.B. Lamb) in North Hanover. She was given a "short-term" suspension of ten days, and respondent also required that she be evaluated by a mental health professional and cleared by a physician before she could return to school.

Because the evaluation did not take place until August 2013, A.D. did not return to C.B. Lamb until the beginning of the 2012-2013 school year. The record suggests that subsequent to A.D.'s return to C.B. Lamb, she transferred to a school in Evesham Township, Burlington County. Correspondence between the parties and the OAL in January 2013 indicates that respondent agreed to withhold the disclosure of A.D.'s disciplinary records from the Evesham school district (Evesham) pending the outcome of this case.

Section One of the settlement proposal now before the Commissioner provides for the transmittal to Evesham of a copy of the May 20, 2012 letter from North Hanover Superintendent Helen Payne to petitioners, advising them of the ten day suspension and the requirement that A.D. be evaluated and given a doctor's clearance to return to school. However, the section allows for the redaction of the paragraph in Payne's letter which references the district's concerns about A.D.'s mental health. The Commissioner finds that Section One of the proposed settlement does not conflict with the provision of *N.J.A.C.* 6A:16-7.10(a) which requires that all information in a transferring student's record "related to disciplinary actions taken against the student by the school district ... shall be provided to the receiving public school district ..." [Emphasis added][1]

The first provision of the second section of the proposed settlement articulates petitioners' right to supplement their child's records. But Section Two goes on to provide that:

> The Respondent will not object to any redactions made by the Petitioners to any correspondence from the Respondent, provided that Petitioners clearly initial their redactions.
>
> Respondent will not transfer any original versions of the document(s) submitted and/or redacted by Petitioners to supplement the record.

[1] Nor does it conflict with certain provisions of the "No Child Left Behind Act" (NCLB) which require disciplinary records to follow students when they change schools.

N.J.A.C. 6A:32-7.7 allows petitioners to challenge student records "on grounds of inaccuracy, irrelevancy, impermissive disclosure, inclusion of improper information or denial of access to organizations, agencies and persons." *N.J.A.C.* 6A:32-7.7(a) The remedies petitioners may seek are: 1) expungement of inaccurate, irrelevant or otherwise improper information from the student record; 2) insertion of additional data and comments about the meaning and accuracy of the records; and 3) staying of disclosure pending final disposition of the challenge process, *Ibid.*, which process is described in *N.J.A.C.* 6A:32-7.7(b).

Petitioners' desire to not have the records pertaining to the knife incident follow their child to the new school district led to their appeal to the Commissioner. But that appeal did not progress to an adjudication of the facts. There was no finding that A.D. did not bring a knife to school; neither was there a finding that the discipline which was imposed was improper. Thus, both the NCLB and *N.J.A.C.* 6A:16-7.10(a) require that records of A.D.'s discipline be forwarded to her new school district.

The Commissioner is concerned that allowing petitioners unfettered redactions to all of A.D.'s records opens the possibility that A.D.'s file might arrive at the Evesham school district absent the information about disciplinary actions that the above referenced statutory and regulatory provisions mandate that it receive. The fact that petitioners have agreed to initial all redactions does not ameliorate the problem, since – by definition – to redact is to remove text. Thus, the Commissioner construes Section Two of the settlement to mean that petitioners may make redactions only to documents which contain no references to the discipline of A.D., and the incident(s) or behavior which led to such discipline. Section Two may not be read to allow redactions to documents containing references to the disciplining of A.D. or the behavior which led to the discipline.

N.J.A.C. 6A:16-7.10(d) allows petitioners to supplement (not redact) A.D.'s records by placing statements therein which comment on the information set forth in the documents and explain any disagreements petitioners may have with respondent's actions or determinations. But petitioners may not frustrate the purpose of *N.J.A.C.* 6A:16-7.10(a), and the above referenced provisions of the NCLB.

In summary, the Commissioner approves the proposed settlement, subject to the provisos set forth above.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/09/14

Date of Mailing: 6/10/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 13230-13
AGENCY DKT. NO. 230-8/12
(REMAND OF EDU 12411-12)

V.R.D., II AND M.D., ON BEHALF OF MINOR CHILD, A.D.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH HANOVER, BURLINGTON COUNTY,
Respondent.

Tisha Adams, Esq., for petitioner

Robert M. Tosti, Esq. for respondent (Parker McCay, attorneys)

Record Closed: April 10, 2014 Decided: April 15, 2014

BEFORE **SUSAN M. SCAROLA**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 17, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13, on remand of EDU 12411-12, in order to modify the terms of a settlement agreement.

The parties have modified the original Settlement Agreement, and have executed same. It is attached and fully incorporated herein.

I have reviewed the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached document.

2. The settlement fully disposes of all issues in controversy between them and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 15, 2014
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: 4/17/14

Mailed to Parties: 4/17/14

/mel

SETTLEMENT AGREEMENT

V.D. AND M.D. o/b/o A.D.
Petitioner,

v.

North HanoverBoard of Education,
Respondent

13230-13
OAL DKT NO. EDU ~~12411-2012~~S
AGY REF NO. 230-8/12

Judge Susan M. Scarola, ALJ

The parties, in full and final satisfaction of the above-referenced matter, hereby agree to the following:

Redaction of Disciplinary Letter

1. The Disciplinary Letter dated May 20, 2012 from Helen Payne to the Petitioners will remain part of A.D.'s disciplinary records to be forwarded to the Evesham Public School District. However, Paragraph 3 of that letter has been redacted in its entirety.

Petitioner's Right to Supplement Records

2. The Petitioners reserve their right pursuant to the New Jersey Administrative Code to supplement the student disciplinary record prior to such record being transferred to the Evesham Public School District. The Respondent's staff will notify the Petitioners, in writing prior to record transferal, in order to give Petitioners full and fair opportunity to supplement the record.

   The Respondent will not object to any redactions made by the Petitioners to any correspondence from the Respondent, provided that Petitioners clearly initial their redactions.

   Respondent will not transfer any original versions of the document(s) submitted and/or redacted by Petitioners to supplement the record.

Petitioners and Respondent agree that this Settlement Agreement represents satisfaction of all claims related to the above-referenced matter, in any court of competent jurisdiction. Petitioners and Respondent further agree that this matter is now concluded and all issues raised in the Petition of Appeal are resolved.

Dated: January _____, 2014

Valdon Daniel
Petitioner

Helen Payne
For the Respondent

Petitioner is signing on behalf of
Petitioner M.D. and V.D.

Tisha Adams, Esq.
Attorney for Petitioner

Robert M. Tosti, Esq.
Attorney for Respondent

Hon. Susan M. Scarola, ALJ

246-14

IN THE MATTER OF THE TENURE	:	
HEARING OF SANFORD WILLIAMS,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF	:	
NEWARK, ESSEX COUNTY.	:	

SYNOPSIS

The petitioning school district certified tenure charges against respondent on or about September 1, 2006. Subsequently it became evident that respondent had filed an application for retirement with the Division of Pensions, effective September 1, 2006. The matter has remained active as there was initial confusion regarding respondent's status with the Division of Pensions – which status was resolved in 2009 – and Orders of Inactivity were entered by the ALJ, followed by the scheduling of hearing and status conference dates in 2009, 2012, and 2013.

The ALJ found that: respondent filed an application for retirement with the Division of Pensions, effective September 1, 2006, which was approved on or about November 2, 2006; respondent failed to appear, or offer any explanation for his non-appearance, for any of the scheduled hearing or conference dates; following respondent's 2013 non-appearance, the petitioner moved to dismiss this matter as moot. The ALJ concluded that the matter must be dismissed based on respondent's inaction.

The Commissioner determined to affirm the ALJ's dismissal of the instant matter, not because of respondent's inaction but because the matter was rendered moot upon respondent's retirement in 2006. Accordingly, the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

June 9, 2014

OAL DKT. NO. EDU 07035-06
AGENCY DKT NO. 125-3/06

IN THE MATTER OF THE TENURE	:	
HEARING OF SANFORD WILLIAMS,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF	:	
NEWARK, ESSEX COUNTY.	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law have been reviewed. The parties did not file exceptions.

Upon his independent review, the Commissioner determines to affirm the Administrative Law Judge's (ALJ) dismissal of the petition in this matter. However, he does so not for reasons expressed by the ALJ, but because the matter is moot, as set forth below.

An action is considered moot when it "no longer presents a justiciable controversy because the issues involved have become academic. A case is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Ronald Victoria v. Board of Education of the Township of Woodbridge, Middlesex County,* 1982 *S.L.D.* 1, 5. Here, the ALJ found that respondent filed an application for retirement with the Division of Pensions, effective September 1, 2006, and that the application was approved on or about November 2, 2006. Upon his retirement, the instant matter was rendered moot.

Accordingly, for the reasons expressed above, the petition is hereby dismissed as moot.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/09/14

Date of Mailing: 6/10/14

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING DISMISSAL FOR
FAILURE TO APPEAR
OAL DKT. NO. EDU 07035-06
AGENCY DKT. NO. 125-3/06

IN THE MATTER OF THE TENURE HEARING OF SANFORD WILLIAMS, STATE OPERATED SCHOOL DISTRICT OF NEWARK, ESSEX COUNTY

Arsen Zartarian, Esq., for petitioner (Office of the General Counsel, The Newark Public Schools, attorneys)

Sanford Williams, respondent, pro se

Record Closed: September 16, 2013 Decided: April 23, 2014

BEFORE **JEFFREY A. GERSON**, ALJ:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On June 9, 2006, the above captioned matter was transmitted to the Office of Administrative Law for a hearing as a contested case pursuant to N.J.A.C. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The District certified tenure charges to the Commissioner of Education on or about September 1, 2006. It later came to the attention of the District that respondent filed an application for retirement with the Division of Pensions effective September 1, 2006 and that application was approved on or about November 2, 2006.

On or about March 11, 2008, counsel for petitioner forwarded a letter to the undersigned advising that the charges were moot and requesting to withdraw the Petition. Respondent objected to the District's withdrawal because of correspondence received from the Division of Pensions years ago that indicated that his case was under review because of this matter. However, on or about December 4, 2009, the Division of Pensions reviewed respondent's case and determined to continue making payments to respondent.

Since that time, as a courtesy to respondent, the undersigned entered two Orders of Inactivity dated September 24, 2008 and December 4, 2009. The court has also scheduled subsequent hearing and status conference dates on December 10, 2009, April 29, 2012 and September 16, 2013. Respondent has not attended any of the scheduled dates.

As of this date, respondent has not contacted the OAL or counsel for petitioner since the scheduling of the September 16, 2013 status conference.

It is further noted that the September 16, 2013, hearing notice mailed to respondent at his current address was not returned to the OAL therefore it is assumed that petitioner received the notice and was aware of the conference date.

Since the respondent did not appear at the September 16, 2013 conference and did not contact the OAL to explain why he failed to appear, the petitioner moved to dismiss the matter as moot.

Based on the petitioner's inaction, this matter is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 23, 2014

DATE

JEFFREY A. GERSON, ALJ

Date mailed to the Agency

April 23, 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

Date mailed to the Parties APR 24 2014

sej

247-14L

247-14

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Acting Commissioner

June 11, 2014

Susan Lavelle, Esq.
1814 Kennedy Blvd.
Union City, New Jersey 07087

Sabino Valdes
[redacted]
Paramus, New Jersey 07652

Re: *In the Matter of the Tenure Hearing of Sabino Valdes, Board of Education of the City of Union, Hudson County, Agency Dkt. No.328-9/00.*

Dear Parties,

I have reviewed the materials filed in connection with Sabino Valdes' Motion to Reopen the tenure charges filed against him by the Union City Board of Education (Board). It is well established that administrative agencies have an inherent authority to reconsider, reopen or revise a prior decision made by the agency. A Motion to Reopen, however, will only be granted when good cause is shown and the motion is made with reasonable diligence. *See*, *Duvin v. State of New Jersey, Dep't of the Treasury, Public Employees' Retirement System*, 76 *N.J.* 203, 207 (1978).

Upon review and consideration of the parties' submissions, I find that Mr. Valdes has not satisfied the requirements necessary to reopen the tenure charges filed against him by the Board. First, Mr. Valdes' Motion to Reopen was not made with reasonable diligence. The Motion to Reopen was filed nearly 10 years after the State Board of Education's August 4, 2004 decision affirming the decision of the Commissioner removing Mr. Valdes from his tenured employment with the District for insubordination and unbecoming conduct. Moreover, the current motion submitted by Mr. Valdes is another filing in a long line of litigation in connection with the tenure charges filed by the Board. There has been absolutely no good cause shown necessitating the reopening of this case, which has been thoroughly and exhaustively litigated.

Accordingly, the Motion to Reopen the tenure charges filed against Mr. Valdes by the Union City Board of Education is hereby DENIED.[1]

Sincerely,

David C. Hespe
Acting Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

Via Regular Mail

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

OAL DKT. NO. EDU 01643-99
AGENCY DKT. NO. 2-1/99

MICHELLE LONGO-SARE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision. Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that this matter is appropriately dismissed for failure to appear and prosecute.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/10/14
Date of Mailing: 6/11/14

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

249-14

MICHELLE LONGO-SARE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed an appeal in 1999, challenging the Board's charging of her accumulated sick leave for absences related to a work-related injury. This matter was the subject of a pending Worker's Compensation case and was repeatedly placed on the inactive list between 1999 and 2013. A hearing in the matter was subsequently scheduled for December 4, 2013, but that date was adjourned at the request of petitioner's counsel. The hearing was then re-scheduled for April 14, 2014 and appropriate notification was sent to the parties. On that date, neither party appeared for the hearing.

Based on the foregoing, the ALJ ordered that the matter be dismissed for failure to appear and prosecute.

The Commissioner concurred with the ALJ that the matter is appropriately dismissed for failure to appear and prosecute. Accordingly, the Initial Decision of the OAL was adopted as the final decision, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 6/10/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
FAILURE TO APPEAR
OAL DKT. NO. EDU 01643-99
AGENCY DKT. NO. 2-1/99

MICHELLE LONGO-SARE,
Petitioner,
v.
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Alan S. Porwhich, Esq. for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Jennifer Shaw, Esq. for respondent, (Florio, Perrucci, Steinhardt & Fader, attorneys)

Record Closed: April 30, 2014 Decided: April 30, 2014

BEFORE **LELAND S. MCGEE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was originally transmitted to the Office of Administrative Law on February 8, 1999, and assigned to the Hon. Maria Mancini LaFiandra, ALJ, as a contested case. On May 14, 2010, the matter was reassigned to the undersigned.

This matter was the subject of a pending Worker's Compensation case and was placed on the inactive list by orders issued on the following dates:

June 4, 1999
December 22, 1999
July 26, 2000
March 6, 2001
November 13, 2001
June 10, 2002
June 22, 2007
December 19, 2007
July 11, 2008
February 3, 2009
September 18, 2009
May 13, 2010
December 15, 2010
November 30, 2011
August 1, 2012
January 8, 2013

The last four Orders were issued by the undersigned.

On August 8, 2013, Notice was sent to the parties that this matter was scheduled for a hearing on December 4, 2013. By letter dated December 2, 2013, counsel for Petitioner requested an adjournment of the matter in anticipation of reaching a resolution of this matter. He stated "there is a good chance that petitioner will agree to

withdraw her petition, after she has a chance to consult with her workers' compensation attorney."

On December 6, 2013, Notice was sent to the parties that this matter was scheduled for a hearing on April 30, 2014, at 9:00 a.m. There is no evidence that the notices were not received. The undersigned went on the record on April 30, 2014 at 10:30 a.m., and neither party appeared for the hearing. Neither party called, or submitted a request for an adjournment of this proceeding.

Based upon the forgoing, it is hereby **ORDERED** that this matter be **DISMISSED** for failure to appear and prosecute.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 30, 2014
DATE

LELAND S. McGEE, ALJ

Date mailed to the Agency April 30, 2014

Date mailed to the Parties MAY - 1 2014

lr

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

250-14

STATE BOARD OF EXAMINERS DKT. NO. 1213-148;
COMMISSIONER APPEAL NO. 5-5/13A

KAREN GABA :

V. :

NEW JERSEY STATE BOARD OF EXAMINERS :

COMMISSIONER OF EDUCATION

DECISION

Appellant challenges the determination of the New Jersey State Board of Examiners (Board of Examiners) that it was constrained from removing two decisions concerning her from the Department of Education's (Department) website. The subject decisions memorialized the Board of Examiners' refusal to reissue appellant's revoked substitute teaching credential and the State Board of Education's (State Board) denial of her appeal from the Board of Examiners' decision. The Commissioner will be guided by *N.J.A.C.* 6A:4-4.1(a), which instructs that "[i]n determining appeals from decisions of the State Board of Examiners . . . , the Commissioner shall ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated that the Board . . . acted in a manner that was arbitrary, capricious or contrary to law."

The facts underlying this controversy are established and undisputed. As a result of an incident which occurred in 1994, appellant agreed – in June 1996 – to a revocation of her substitute teaching credential. She had faced criminal charges as a result of the incident, but – in September 1996 – a consent order was issued in Sussex County Superior Court that expunged from local and State law enforcement agencies all records relating to the charges. In June 1998, appellant's application for a new substitute teaching credential was denied by the Board of

Examiners, and in November 1999 the State Board denied an appeal from the Board of Examiners' decision.

In January 2004 the Board of Examiners voted to allow appellant to apply for permanent teaching certification, and in February 2004 a standard teaching certificate with a Health and Physical Education endorsement was issued to appellant. Eight years later, in November 2012, appellant requested that the Board of Examiners remove from the Department's website copies of the 1998 Board of Examiner decision and the 1999 State Board decision regarding her substitute teaching credential.

In a letter-decision issued on April 30, 2013, the Board of Examiners denied the request, stating:

> The Board . . . cannot remove any decisions from the Department of Education's website regarding Gaba that were not issued by the Board itself. Moreover, the Board cannot remove the decisions pertaining to [Gaba], as they accurately reflect Board action taken at the time.
>
> *In the Matter of Gaba*, State Board of Examiners Docket No. 1213-148 (April 30, 2013).

However, the Board of Examiners did elect to "amend its decision and minutes to reflect the expungement of appellant's criminal record, and remove any references to the specifics of her case." The instant appeal followed.

Reviewing the Board of Examiners' decision in the context of the foregoing facts, the Commissioner cannot conclude that the Board of Examiners acted arbitrarily, capriciously or contrary to law. At the outset, the Board of Examiners – a component of the Department – is correct in advising that it has no authority to remove from the Department's website information, documents or files that were created by the State Board, Commissioner, or other constituents of the Department.

As to the Board of Examiners' June 1998 decision rejecting appellant's request for a new county substitute credential, *N.J.S.A.* 47:1A-1[1] and 47:1A-1.1[2] bar the Board of Examiners from obstructing public access to same. The text of those statutes advises that the public has a right of access to government records, including memorializations of formal decisions made by government instrumentalities. While certain records may be protected for reasons of privacy, applications for teaching certification are not included in that carve-out. *See, Muench v. New Jersey Board of Examiners,* Commissioner Decision No. 199-13A, decided May 28, 2013, at 4. [3]

In sum, the Board of Examiners' action denying appellant's request to delete the subject decisions from the Department's website was not arbitrary, capricious or contrary to law. Moreover, the Board of Examiners made a good faith effort to accommodate appellant by amending its own decision to reflect the above-referenced September 1996 expungement order,

---

[1] Legislative findings, declarations: The Legislature finds and declares it to be the public policy of this State that government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access accorded by *P.L.*1963, *c.*73 (*C.*47:1A-1 *et seq.)* as amended and supplemented, shall be construed in favor of the public's right of access;

[2] "Government record" or "record" means any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file in the course of his or its official business by any officer, commission, agency or authority of the State or of any political subdivision thereof, including subordinate boards thereof, or that has been received in the course of his or its official business by any such officer, commission, agency, or authority of the State or of any political subdivision thereof, including subordinate boards thereof. The terms shall not include inter-agency or intra-agency advisory, consultative, or deliberative material.

[3] Appellant's suggestion that the 1996 expungement order requires the removal of Department decisions from its website is contradicted by the express terms of that order. More specifically, the order limits the expungement of records to four entities: the Sussex County prosecutor, Superintendent of State Police, New Jersey Attorney General and Chief of Police of Sandyston Township. Similarly, the expungement statute, *N.J.S.A.* 2C:52-1 *et seq.* allows the removal of criminal records from the files of courts, detention and correctional facilities, law enforcement and criminal justice agencies, but not from other State administrative agencies. *See, E.A. v. N.J. Real Estate Comm'n.,* 208 *N.J. Super.* 65, 68 (App. Div.), *certif. denied,* 104 *N.J.* 415 (1986).

and by removing from the decision any references to the "specifics" of the 1994 incident which precipitated the revocation of her substitute teaching credential.

Accordingly, the Commissioner will not disturb the decision of the Board of Examiners. It is affirmed for the reasons set forth therein, and the appeal is dismissed.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/10/14

Date of Mailing: 6/11/14

[4] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.

251-14

OAL DKT. NO. EDU 2754-14
(EDU 3248-13 ON REMAND)
AGENCY DKT. NO. 27-2/13

A.R., on behalf of minor child, S.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF READINGTON, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement and Release, and the Initial Decision on Remand issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner finds that the deficiencies identified in the prior agreement have now been corrected and approves the parties' settlement.

Accordingly, the Initial Decision recommending approval of the parties' agreement is adopted as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/10/14

Date of Mailing: 6/12/14

252-14

OAL DKT. NO. EDU 8489-13
AGENCY DKT. NO. 119-6/13

Y.M., on behalf of minor children, A.O. AND S.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. According to the Agreement, the first settlement payment was due on May 1, 2014. This date has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/12/14
Date of Mailing: 6/12/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8489-13

AGENCY DKT. NO. 119-6/13

Y.M. ON BEHALF OF MINOR CHILDREN, A.O. AND S.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

Antonio Martinez, Esq., for petitioner

Joseph L. Roselle, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: April 30, 2014 Decided: May 1, 2014

BEFORE **JOHN F. RUSSO, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 19, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the enclosed Settlement Agreement (J-1). The Board Resolution is also hereby enclosed (R-1).

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, who by law is authorized to make a final decision in this matter. If the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

May 1, 2014
DATE

JOHN F. RUSSO, JR., ALJ

Date Received at Agency: _____

Date Mailed to Parties: 5/5/14

/bdt

254-14LM

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Acting Commissioner

June 13, 2014

Thomas O. Johnston, Esq.
Porzio Bromberg & Newman PC
100 Southgate Parkway
Morristown, New Jersey 07962-1997

Lauren A. Jensen, DAG
Department of Law and Public Safety
Division of Law
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112

Re: *D.U.E. Season Charter School, et al. v. New Jersey Department of Education and Evo Popoff. Agency Dkt. No. 88-4/14.*

Dear Counsel:

I have reviewed the materials filed in connection with petitioners' – D.U.E. Season Charter School, Doris Carpenter, and E.B. (D.U.E.) – motion for a stay of Assistant Commissioner Evo Popoff's March 5, 2014 decision denying the renewal of the school's charter, and a stay of the Commissioner's May 13, 2014 decision dismissing D.U.E.'s appeal for lack of jurisdiction.[1]

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that petitioner has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

[1] The May 13, 2014 decision denied D.U.E.'s request for emergent relief and dismissed D.U.E.'s petition of appeal challenging the March 5, 2014 decision for lack of jurisdiction.

Upon review of the parties' submissions, I find that D.U.E. has failed to meet the standard required for a stay of the March 5, 2014 and May 13, 2014 decisions. Most notably, D.U.E. has failed to establish a likelihood of success on the merits in connection with both decisions.

It is undisputed that the Commissioner is authorized to deny the renewal of a charter after a comprehensive review of the school. *N.J.A.C.* 6A:11-2.3(b). There is evidence in the record indicating that the Department thoroughly reviewed all of the information submitted by D.U.E. in its renewal application and took the steps necessary to properly evaluate whether the charter should be renewed. As outlined in the March 5, 2014 decision, D.U.E. was placed on probation on June 12, 2013. After a thorough review of the school's performance during the 2013-2014 school year, it was established that D.U.E. had failed to meet all of the nine standards within the Performance Framework. In the stay request, D.U.E. did not provide any information indicating that the Department's determinations were not accurate. As a result, D.U.E. has failed to show that the decision to revoke/non-renew its charter – for the reasons outlined in the March 5, 2014 decision – was unreasonable, and thus has failed to demonstrate a likelihood of success on the merits.

D.U.E. also failed to demonstrate a likelihood of success in connection with its request for a stay of the May 13, 2014 decision. In accordance with *N.J.S.A.* 18A:4-33, then-Commissioner Christopher Cerf designated Assistant Commissioner Evo Popoff to act on his behalf for all matters relating to the 2013-2014 charter renewal cycle. Pursuant to *N.J.S.A.* 18A:36A-4 and *N.J.A.C.* 6A:11-2.5, the exclusive forum for appeal of the Department's determination on a charter renewal application is the Appellate Division of the Superior Court. Consequently, the Commissioner lacks jurisdiction to rule on D.U.E.'s challenge to the March 5, 2014 decision.

In light of the fact that all of the *Crowe* prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors. Accordingly, D.U.E.'s request for a stay of both the March 5, 2014 and the May 13, 2014 decisions is hereby DENIED.[2]

Sincerely,

David C. Hespe
Acting Commissioner

c: County Superintendent
State Law Library

CC/MKD/JKH

VIA FAX AND REGULAR MAIL

[2] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

257-14

OAL DKT. NO. EDU 7467-14
AGENCY DKT. NO. 149-6/14

M.L., on behalf of minor child, J.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF TINTON FALLS, MONMOUTH COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6. In particular, the Commissioner notes that – while petitioner has met the threshold standard of irreparable harm because J.L.'s opportunity to participate in his 8th grade graduation cannot be regained once lost[1] – applicants seeking extraordinary remedy must also demonstrate a likelihood of success on the merits of the underlying

[1] The Commissioner is cognizant of the well-established principle that a prohibition from attending events of the type at issue herein does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant extraordinary remedy. However, harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In cases denying similar applications for emergent relief, the irreparable nature of the harm and the degree or severity of the harm have frequently been addressed together; they are, however, two separate factors, and it is on the basis of the *severity* of the harm – which pertains to the weighing of interests – and not its irreparable nature that applications of this type actually fail. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1996; *L.J. on behalf of minor child, S.J., and David Wickham v. Board of Education of the Township of Manchester, Ocean County*, decided by the Commissioner May 2, 2003.

appeal and show that the balance of interests and equities under the circumstances rests in their favor, neither of which petitioner herein has done.

Accordingly, the recommended Order of the OAL denying petitioner's application and dismissing the Petition of Appeal is adopted for the reasons expressed therein as modified above. Because the present proceeding has fully disposed of all issues in dispute between the parties, no further proceedings are necessary, and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/17/14
Date of Mailing: 6/18/14

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 7467-14

AGENCY DKT. NO. 149-6/14

M.L. ON BEHALF OF MINOR CHILD J.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF TINTON FALLS, MONMOUTH COUNTY,

Respondent.

M.L., petitioner, pro se

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Barger, Kenny & Steel, attorneys)

BEFORE **LINDA M. KASSEKERT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appealed respondent school district's (district) action denying him the privilege of walking with his class at the 2014 eighth grade graduation ceremony

scheduled for June 17, 2014. For the reasons discussed below, the relief sought by the petitioner is **DENIED.**

The New Jersey Department of Education Bureau of Controversies received a petition for emergency relief on or about June 13, 2014. The matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case on June 16, 2014, on petitioner's application for emergency relief. The Director of the OAL assigned the undersigned to hear this matter pursuant to N.J.S.A. 52:14F-5.

The matter was scheduled for oral argument on June 17, 2014.

FACTUAL DISCUSSION

For the purposes of deciding the application for emergent relief, the following facts are determined to be undisputed:

Respondent has a regulation that deals with promotion and retention of students within the Tinton Falls School District. Section C of this regulation (R-2) deals with Grade Eight Graduation and states:

> 1. Students who do not pass all five subject areas: reading, language arts, mathematics, science, social studies will not be permitted to participate in graduation activities including the graduation ceremony.

On August 8, 2013, respondent, through its Superintendent, John P. Russo, sent a letter to all parents and guardians with respect to documents that are distributed at the beginning of each school year, known as the "2013-2014 Parent Information Packet" (R-3). Various items are listed and parents or guardians are to initial indicating that they have reviewed each item. M.L., petitioner's mother, initialed that she had read #6 which is the Promotion/Retention Policy. She signed the form on September 11, 2013.

Petitioner's Social Studies teacher, Ms. McGahan, gives the following weights for the each of the below categories for her students in order to measure academic performance:

Tests/Quizzes	50%
Classwork	30%
Participation	10%
Preparation	10%

For the three marking periods of the 2013-2014 School Year, petitioner's grades in Social Studies were "60", "69", and "75", resulting in an average of "68"[1] (R-6). This was two points below what petitioner needed to pass.

Petitioner received varying grades on his tests: On September 25, 2013, he received a "30"; on October 9, 2013, he received a "60"; on October 24, 2013, he received a "45"; on November 5, 2013, he received a "30"; on an undated test he received a "93"; on January 7, 2014, he received a "38"; on February 26, 2014, he received a "30"; on March 24, 2014, he received a "70"; on April 11, 2014, he received a "27"; on May 16, 2014, he received "100"; and, on May 30, 2014, he received a "23". As a result, his category score was 31.1500 points.

With respect to his class work, petitioner received a 25.8900. He received an 8.0000 for participation and a 10.0000 for preparation.

As a result of the concerns about the petitioner's performance, the district scheduled an I&RS/504 meeting with M.L., petitioner's teachers and the I&RS/504 Committee members which included two classroom teachers, the building supervisor and school nurse (R-6). As a result of this meeting an I&RS Accommodation Plan was developed for the petitioner. The plan, dated January 16, 2014, indicated that the participants were concerned that petitioner was in danger of failing multiple classes. Ms. McGahan also emailed M.L. on a number of occasions, expressing concern about petitioner's performance. On May 27, 2014, the principal asked the school staff to send

[1] Petitioner's actual grade in the first marking period for Social Studies was 55.6; however, the district indicates that the lowest grade given is a 60.

the names of any student in danger of failing for the year. Ms. McGahan responded with three names, one of them was the petitioner.

On June 10, 2014, the principal, Linda Balogh notified M.L. and her husband in a letter (P-2) that:

> J. will be receiving one or more failing grades on the final report card for the school year. As a result, J. may not participate in the graduation ceremony or the 8th grade dance.
>
> J. will still receive a diploma and be promoted to the 9th grade. You may come to school to pick up the diploma between June 24-30th.
> ...

Initially, the district informed M.L. that the petitioner was not allowed to attend the eighth grade graduation dance. However, this was retracted. Only students who have disciplinary issues are prohibited from attending the dance and petitioner had no disciplinary issues.

TESTIMONY

M.L.

M.L. is the petitioner's mother. She asks for emergent relief and for J.L. to be allowed to walk at his eighth grade graduation ceremony. M.L. states that J.L. was very upset when he learned he was not allowed to walk. He has been "sick", has "thrown up" and is very depressed. He has a twin brother who will be able to walk at the ceremony. M.L. feels that this will take away J.L.'s ambitions and his sense of accomplishment since he has worked very hard to bring up his grades. She noted that over the school year, J.L. increased his average by 20 points. She feels that Ms. McGahan has been very "cold hearted" and not willing to consider extra credit. Her son has tried hard and she has paid for tutoring in an effort to bring up his grades. She is also feels that the superintendent should have the power to overrule the teacher.

LEGAL DISCUSSION AND CONCLUSION

N.J.A.C. 1:1-12.6(a) provides for the granting of emergency relief where authorized by law and where irreparable harm will result without expatiated decision granting or prohibiting some action or relief connected with a contested case. In such circumstances, emergency relief pending a final decision may be ordered upon the application of a party. N.J.A.C. 1:1-12.6(f) of this section provides that temporary relief may be granted if there is a finding that immediate and irreparable harm will probably result, if there is the likelihood that the moving party will prevail, and if the relief is as limited in scope and as temporary as possible.

The foregoing regulation embodies the principles of law announced by the court in Crowe v. DeGioia, 90 N.J. 126, 132 (1982). These legal principles may be summarized as follows:

1. Emergency relief should not issue except when necessary to prevent irreparable harm. Harm is generally considered irreparable if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Pecuniary damages may be inadequate because of the nature of the injury or of the right affected.

2. Emergency relief should be withheld when the legal right underlying the claim of the requesting party is unsettled.

3. Emergency relief should not issue where all material facts are controverted. Thus, to prevail on an application for emergency relief, the party requesting the relief must make a preliminary showing of a reasonable probability of ultimate success on the merits. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the status quo. The point of emergency relief is to maintain the parties in substantially the same condition when the final decision is issued, as they were when the litigation began.

4. The final test in considering the granting of emergency relief is the relative hardship to the parties in granting or denying relief. The relief granted should be no broader than necessary to preserve the status quo pending a full hearing on the merits.

In order to prevail, petitioner must meet all four prongs of this test.

As to the first requirement, there are a significant number of cases holding that a prohibition from attending a graduation ceremony or other similar events does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant the extraordinary remedy being requested. Nevertheless, the Commissioner has recently pointed out that there is no adequate after-the-fact remedy that can adequately redress the intangibles of a lost experience after the event is over.

The real issue in a case such as this is whether J.L. is entitled to participate in the graduation ceremony. It is only where he can show such entitlement and is being prevented from participation that he is being irreparably harmed. Therefore, the key issue is whether he can show a likelihood of success on the merits. In the absence of a showing of a likelihood of success on the merits, I **CONCLUDE** that petitioner has failed to establish irreparable harm in this case.

As to the requirement that the right underlying the claim of a requesting party must be settled, it is clear that each school district is obligated to provide a thorough and efficient system of education to all children residing in its school district. N.J. Const. (1947), art. VIII, ¶ 1; N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have been granted discretionary authority at N.J.S.A. 18A:11-1(c) and (d) to adopt rules for the management of the public schools of the district, and to perform all acts and do all things necessary for the lawful and proper conduct of the public schools of the district.

In this matter, the respondent school district adopted policies relating to academic performance and who can walk at graduation. The district's policy provides that in order to walk, a student must pass all five subject matters. This policy was clear and concise. M.L. received a copy of the policy and signed a receipt for it. The district also communicated with M.L. its concerns over J.L.'s academic performance and met with her on January 16, 2014, to develop a plan to address it.

Based on the evidence submitted, I cannot conclude that the actions of the school district in not allowing J.L. to walk at his graduation are arbitrary, without a

rational basis, or induced by improper motives. J.L. has a failing grade in Social Studies, which means that under the policy he is not allowed to walk at graduation. Notably, he is not the only student not allowed to walk in the graduation ceremony. There are three other students similarly situated.

There is no question that graduation is a privilege, and that under the clearly enunciated policies of the school district, failure to comply with the academic requirements of the school district will result in a student's exclusion from the graduation ceremony.

Finally, I **CONCLUDE** that the petitioner has failed to show that when the equities and interests of the parties are balanced, J.L. will suffer greater harm than the respondent will suffer if the requested relief is not granted. While J.L. and his family have a personal stake in seeing him participate in the graduation ceremony, the school district also has an important interest in seeing that its academic policy is enforced. If this policy is disregarded without clear justification, it will send a message to the students of the school district that they may disregard the policy and avoid the consequences. Such a message will clearly damage the efforts of the school district to ensure the orderly conduct of the academic process and would be unfair to the other students who are not allowed to participation in the graduation ceremony because of their academic performance.

In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Bd. of Educ. of Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Bd. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of N. Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)). The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions. This standard has been defined by the New Jersey courts as having no rational basis. Piccoli v. Bd. of Educ. of Ramapo Indian Hills Reg'l Sch. Dist., EDU 1839-98 (January 22, 1999) (citing Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd, 131 N.J.

Super. 37 (App. Div. 1974)), adopted, Comm'r (March 10, 1999) <http://lawlibrary.rutgers.edu/oal/search.shtml>.

In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of the board of education. Massaro v. Bd. of Educ. of Bergenfield, 1965 S.L.D. 84, 85. In Kopera, supra, 60 N.J. Super. at 294, the Appellate Division noted "the well established rule that action of the local board [of education] which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives."

Based upon the foregoing, I **CONCLUDE** there is a rational basis for the respondent's action and that the right underlying petitioner's claim is settled against the petitioner's position. Therefore, I **CONCLUDE** that petitioner has failed to establish the right to relief.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's request for emergency relief is hereby **DENIED**. This Order disposes of all issues in controversy regarding this matter.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **Commissioner of the Department of Education**, does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 17, 2014
DATE

LINDA M. KASSERKERT, ALJ

/lam

WITNESSES

For Petitioner

M.L.

For Respondent

None

EXHIBITS

For Petitioner:

P-1 Motion for Emergent Relief
P-2 Letter to NJ DOE with additional paperwork

For Respondent
R-1 Tinton Falls BOE Policy- Promotion and Retention
R-2 Tinton Falls School District Regulation – Promotion and Retention
R-3 August 8, 2013, letter from Superintendent to parents/guardians and sign off sheet
R-4 J.L.'s test
R-5 J.L.'s work assignments
R-6 January 16, 2014, Meeting sign in sheet
R-7 Tinton Falls I &RS Accommodation Plan for J.L.
R-8 Genesis Report Card for J.L.
R-9 Student Assignment Summary for J.L. - Social Studies
R-10 Calendar
R-11 Emails
R-12 Handwritten notes from May 28, 2014 and June 3, 2014

258-14

OAL DKT. NO. EDU 6212-14
AGENCY DKT. NO. 118-4/14

V.R., on behalf of minor child, J.R.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/18/14
Date of Mailing: 6/18/14

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

2014 JUN -2 A 11:05

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER- EMERGENCY RELIEF
OAL DKT. NO. EDU 06212-14
AGENCY DKT. NO. 118-4/14

V.R., ON BEHALF OF MINOR CHILD, J.R.,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

V.R., pro se

Rita Barone, Esq., for respondent (Purcell, Mulcahy, Hawkins, Flanagan & Lawless, attorneys)

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

Petitioner seeks an Order for Emergency Relief directing respondent, the Sate Operated School District of the City of Newark (District), to provide sixth grade student, J.R. with home instruction for the remainder of the 2013-2014 school year due to a medical condition and for tutoring or the continuation of home instruction during the summer break.

In his underlying petition, petitioner requests the following: home instruction; summer tutoring; a directive that the District help place J.R. in a public/charter school

that would help her continue to be successful in her academic studies; and the removal of J.R.'s first and second cycle grades from her permanent record.

PROCEDURAL HISTORY

On May 8, petitioner filed a petition of appeal with the Commissioner of the Department of Education. As it was not clear from the petition whether J.R. is currently attending school, the Director of Controversies and Disputes advised petitioner on May 8, 2014, "if your child is not attending school, this matter should proceed on an expedited basis. Accordingly, you must additionally file a motion for emergent relief . . . explaining why you believe the Commissioner should grant such relief." Petitioner subsequently filed the instant request for emergency relief on May 14, 2014, in addition to the original petition. The Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter on May 14, 2014, to the Office of Administrative Law (OAL), pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13, for determination as a contested case. I heard the application for emergency relief on May 29, 2014

DISCUSSION

For a request for interim relief or stay, N.J.A.C. 6A:3-1.6 requires as follows:

(b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

These four standards are in the conjunctive, and petitioner must satisfy all requirements in order to be entitled to the requested relief.

Petitioner's Position

J.R. is a sixth-grade student at the District's Alexander Street School.

Psychologist Daniel E. Williams issued a February 11, 2014, letter indicating that, "[J.R.] reported that her life has been threatened by a fellow student because she is very outspoken when she is either mistreated or sees things going on in school that are wrong. She is in fear for her life and, at times, becomes very anxious and depressed. She also complains of being bullied in School. I have recommended to [V.R.] that he not take [J.R] back to the school to which she was assigned that she be placed on home instructions. [J.R.] will be seen in individual psychotherapy."

On February 25, and March 17, 2014, the District denied in writing petitioner's request that J.R. receive home instruction because she needed a medical certificate from a medical doctor and treatment plan.

On March 13, 2014, Donald Fong, M.D. prescribed home instruction to the end of the school year for J.R. based on a diagnosis of Adjustment Disorder with disturbance in mood and Anxiety Disorder. He also prescribed a treatment plan of weekly individual counseling, no medication at that time, and a re-evaluation in four weeks.

Petitioner asserts that J.R.'s condition was the result of being harassed, bullied, threatened and assaulted by teachers, staff and students at her school; the District did nothing to protect J.R.; the Administration did not like the fact that J.R. testified at Advisory Board Meetings; and teachers graded her unfairly as part of their harassment.

Petitioner contends that J.R. will suffer irreparable harm if forced to return to her class without medical clearance as her return may cause more stress and anxiety and cause her to be further traumatized. He argues that the law is settled in his favor regarding the right to a free and thorough education. Petitioner also argues that he is likely to prevail on the merits because J.R. is does well with her home instructor, and her grades must be removed because they are not justified. Finally, he contends that the equities balance in his favor because J.R. faced hard times under the District's care, yet the District wants to return her to the same predicament and environment that caused her diagnosis.

Respondent's Position

The District contends that petitioner is not entitled to emergency relief on the application for home instruction as J.R. has been receiving home instruction continuously since March 20 to the present other than during the holiday recess. The District acknowledges that nine hours of home instruction were missed due to a delay in retaining home instructors and agrees to make up those missed home instruction hours. The District provided home instruction to April 21 and then granted an extension through May 19. It granted a second extension until the end of the school year and through June 30, 2014, in order to satisfy its commitment of nine extra hours.

Discussion

I **CONCLUDE** that, notwithstanding the various issues raised in petitioner's underlying petition, petitioner is not entitled to emergency relief because there is no emergency. The District is currently satisfying petitioner's desire that home instruction be provided to J.R. and is committed to providing such services until the end of the school year. The current services being provided to J.R. satisfies the concern expressed by the Director of the Bureau of Controversies and Disputes that J.R. was not attending school. There is no irreparable harm because J.R. is receiving the services in issue and the legal right underlying the claim for home instruction is moot

since she is receiving it. Petitioner protested that the District tried to condition a continuation of home instruction on being allowed to have J.R. submit to a District-initiated medical evaluation. However, petitioner acknowledged at the hearing that J.R. is currently receiving home instruction, and the District is no threatening to withdraw that service before the end of the school year. As to petitioner's prayer for summer tutoring or an extension of home instruction into the summer, petitioner claims entitlement because the District allegedly delayed the implementation of home instruction from January 23 to March 20. The District counters that it was waiting for petitioner to provide the prerequisite medical information as evidenced by its February 25 and March 17, 2014, communications to petitioner. It acted diligently after receiving the prescription from Dr. Fong which was dated March 13.. Additionally, the claim for tutoring because teachers allegedly unfairly graded J.R. involves significant disputed facts. In both regards petitioner falls short of satisfying the element of emergency relief that he has a likelihood of prevailing on the merits of the underlying claim

ORDER

It is hereby **ORDERED** that petitioner's application for emergency relief be **DENIED.**

It is further hereby **ORDERED** that the remaining issues in this matter proceed to a plenary hearing on September 18, 2014.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

5/29/14

DATE

JESSE H. STRAUSS, ALJ

id

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OAL DKT. NO. EDU 5640-14
AGENCY DKT. NO. 101-4/14

A.K., on behalf of minor child, K.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/18/14

Date of Mailing: 6/20/14

[1]This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5640-14

AGENCY DKT. NO. 101-4/14

A.K. ON BEHALF OF K.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, MONMOUTH COUNTY,

Respondent.

Paul R. Edinger, Esq., for petitioner

Jodi S. Howlett, Esq., for respondent

Record Closed: May 13, 2014 Decided: May 13, 2014

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 7, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

May 13, 2014
DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency:

Date Mailed to Parties: 5/15/14

/cad

260-14

AGENCY DKT. NO. 3-3/12A (48-2/12 ON REMAND)
SEC DKT. NO. C03-14 (C25-08 ON REMAND)
APP. DIV. DKT. NO. A-6038-11T4

MELINDO PERSI,	:	
COMPLAINANT,	:	
V.	:	COMMISSIONER OF EDUCATION
DANIEL WOSKA, TOWNSHIP OF BRICK BOARD OF EDUCATION, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

This matter is before the Commissioner pursuant to a remand by the Appellate Division. In its decision, the Court concluded that the Commissioner's decision lacked sufficient clarity, particularly with respect to the issue of who is authorized to issue a Rice notice to the chief school administrator. The Court further found the lack of clarity on that issue hampered its review on appeal. Accordingly, the Court remanded the matter[1] to the Commissioner to "delineate the respective authority of a board member, board president, and full board in determining how and when a school superintendent's employment is reviewed."

Pursuant to the ruling in *Rice v. Union County Reg'l High Sch. Bd. of Educ.*, 155 *N.J. Super.* 64, 74 (App.Div. 1977), *certif. denied*, 76 *N.J.* 238 (1978), a board of education must notify an employee of its intention to consider personnel matters related to them. The act of issuing a *Rice* notice serves several purposes. First, it gives the employee notice that some aspect of his/her employment will be discussed by the board of education. Second, it gives the employee an opportunity to request that the discussion be held in open forum, pursuant to

[1] The Court identified additional issues for determination on remand. Those issues are within the jurisdiction of the School Ethics Commission and, therefore, will not be addressed by the Commissioner here.

N.J.S.A. 10:4-2. And third, since the board of education is precluded from discussing employment-related issues in the absence of a *Rice* notice, it effectively represents a call for the discussion itself.

There is no law or regulation that specifically outlines the procedure for issuance of a *Rice* notice to the chief school administrator of a district board of education. The Commissioner recognizes, however, that employment matters related to the chief school administrator of a district are akin to the type of issues that precipitate a special meeting of the board of education. In that regard, such matters are often of a serious and time-sensitive nature. Thus, the Commissioner finds instructive the regulation delineating the procedure by which a special meeting may be called. That regulation provides, in pertinent part:

> (a) The secretary of the district board of education shall call a special meeting of the district board of education whenever:
>
> 1. Requested by the president of the district board of education to do so;
> 2. Requested by the chief school administrator when the district board of education fails to meet within two months during the period in which the schools in the district are in session; or
> 3. When presented with a petition signed by a majority of the full membership of the district board of education requesting the special meeting.
>
> (*N.J.A.C.* 6A:32-3.1).

The Commissioner concludes that, like calling a special meeting of the board of education, the issuance of a *Rice* notice to the chief school administrator of a district represents a significant procedural matter and, thus, a substantially similar[2] protocol is appropriate. Accordingly, the Commissioner finds that a single board member is without authority to direct issuance of a *Rice* notice to the chief school administrator of a district. Rather, that authority lies

[2] Subsection (2) is inapposite since the chief school administrator is not responsible for requesting the issuance of a *Rice* notice to him/herself.

with the president of a district board of education or a majority of the full membership of a district board of education.

This matter is hereby transmitted back to the School Ethics Commission for further action in accordance with the Appellate Division's decision.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/17/14

Date of Mailing: 6/18/14

[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

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OAL DKT. NO. EDU 07495-14
AGENCY DKT. NO. 150-6/14

AAA SCHOOL LLC / EL ELDESOUKY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
PASSIAC COUNTY EDUCATIONAL SERVICES COMMISSION,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons stated on the record – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. As the ALJ correctly noted, petitioner has preserved the bid specification challenge, which can be perfected after the bid opening. *Entech Corp. v. City of Newark*, 351 *N.J. Super.* 440, 460 (Law Div. 2002).

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed by the ALJ on the record. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.[1]

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ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/19/14
Date of Mailing: 6/19/14

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENCY RELIEF
OAL DKT. NO. EDU 07495-14
AGENCY DKT. NO. 150-6/14

AAA SCHOOL LLC / EL ELDESOUKY,
Petitioner,
v.
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION,
Respondent.

El Eldesouky, petitioner, pro se

Erin M. Callahan, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

THIS MATTER having been brought before this tribunal by petitioner upon application for emergency relief; and this tribunal having reviewed the papers submitted in support of and in opposition to the application; and this tribunal having heard oral argument in support of and in opposition to the application; and this tribunal having found that petitioner failed to demonstrate that it will suffer irreparable harm, that a likelihood of success on the merits exists, that the legal rights underlying its claim are

well-settled, and that the relative hardships weigh in its favor; and for good cause having been shown;

It is on this 18th day of June 2014;

ORDERED that petitioner's application for emergency relief is **DENIED** for the reasons stated on the record.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

BARRY E. MOSCOWITZ, ALJ

dr

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262-14LM

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Acting Commissioner

June 17, 2014

Thomas O. Johnston, Esq.
Porzio Bromberg & Newman PC
100 Southgate Parkway
Morristown, New Jersey 07962-1997

Geoffrey Stark, DAG
Department of Law and Public Safety
Division of Law
25 Market Street
8th Floor, West Wing
Trenton, New Jersey 08625

Re: *Renaissance Regional Leadership Charter School, et als. v. New Jersey State Department of Education and Evo Popoff*, Agency Dkt. No. 100-4/14

Dear Counsel:

I have reviewed the materials filed in connection with petitioners' – Renaissance Regional Leadership Charter School, Lorna Hassel, and C.M. (Renaissance) – motion for a stay of Assistant Commissioner Evo Popoff's March 5, 2014 decision denying the renewal of the school's charter, and a stay of the Commissioner's May 9, 2014 decision dismissing Renaissance's petition of appeal and motion for emergent relief for lack of jurisdiction.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that petitioner has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits, and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find that Renaissance has failed to meet the standard required for a stay of the March 5, 2014 and May 9, 2014 decisions. Most notably, Renaissance has failed to establish a likelihood of success on the merits in connection with both decisions.

It is undisputed that the Commissioner is authorized to deny the renewal of a charter after a comprehensive review of the school. *N.J.A.C.* 6A:11-2.3(b). There is evidence in the record indicating that the Department thoroughly reviewed all of the information submitted by Renaissance in its renewal application and took the steps necessary to properly evaluate whether the charter should be renewed. As outlined in the March 5, 2014 decision, Renaissance received a warning letter on June 12, 2013 based on a review of the school's academic performance in grades three through eight. After a thorough review of the school's performance based upon NJASK results in the 2012-2013 school year, it was established that Renaissance had failed to meet all of the nine standards within the Performance Framework. In the stay request, Renaissance did not provide sufficient information to conclude that the Department's determinations were erroneous. As a result, Renaissance has failed to show that the decision to revoke/non-renew its charter – for the reasons outlined in the March 5, 2014 decision – was unreasonable, and thus has failed to demonstrate a likelihood of success on the merits.

Renaissance also failed to demonstrate a likelihood of success in connection with its request for a stay of the May 9, 2014 decision. In accordance with *N.J.S.A.* 18A:4-33, then-Commissioner Christopher Cerf designated Assistant Commissioner Evo Popoff to act on his behalf for all matters relating to the 2013-2014 charter renewal cycle. Pursuant to *N.J.S.A.* 18A:36A-4 and *N.J.A.C.* 6A:11-2.5, the exclusive forum for appeal of the Department's determination on a charter renewal application is the Appellate Division of the Superior Court. Consequently, the Commissioner lacks jurisdiction to rule on Renaissance's challenge to the March 5, 2014 decision.

In light of the fact that all of the *Crowe* prongs must be met in order for a stay to be granted, it is not necessary to analyze the three remaining factors. Accordingly, Renaissance's request for a stay of both the March 5, 2014 and the May 9, 2014 decisions is hereby DENIED.[1]

Sincerely,

David C. Hespe
Acting Commissioner

c: County Superintendent
State Law Library

CC/MKD/JLC

VIA FAX AND REGULAR MAIL

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

264-14

CATHERINE RUTLEDGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BETHLEHEM, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

This matter involves a dispute between petitioner and the respondent Board regarding whether petitioner has achieved tenure as an elementary school teacher in Bethlehem Township schools. Petitioner – who holds both an instructional teaching certificate with an Elementary School Teacher endorsement and an Educational Services certificate with a Student Personnel Services endorsement – was hired by the Board as a full-time elementary school guidance counselor in September, 1999. In May of 2010, petitioner was notified that she was being reduced to part-time status as a guidance counselor. In the instant appeal, she contends that she had earned tenure as an elementary teacher because she spent significant time developing and implementing a character education curriculum which she taught in a classroom setting. Petitioner argues that on the basis of this tenure claim, she was entitled to be placed in a full-time teaching position over a less senior or non-tenured elementary teacher. The Board contends that petitioner had not achieved tenure or seniority rights as a teacher, as her employment in the district has been solely as an elementary guidance counselor. Subsequent to the filing of the instant appeal, petitioner's guidance counselor position was restored to full-time status, thereby narrowing petitioner's requested relief to back pay.

The ALJ found, *inter alia,* that: petitioner was hired by the Board in 1999 as a guidance counselor; as part of her duties in that capacity, she implemented grade-appropriate character development programs; petitioner often prepared and submitted lesson plans outlining her character development program, but was not required to do so; the lessons presented by the petitioner were solely guidance-related, and she never taught core curriculum subjects; educational personnel are tenured under New Jersey's Tenure Act, *N.J.S.A.* 18A:28-1 to -18; tenure is achieved in a specific position held under an appropriate certificate; petitioner in the instant matter was employed under her educational services certificate as a guidance counselor, and her tenure status in the respondent's district is limited to same. Accordingly, the ALJ concluded that the petitioner is not a tenured teacher but rather is tenured exclusively as a guidance counselor, and ordered the petition dismissed.

Upon comprehensive review, the Commissioner concurred with the ALJ 's determination that the petitioner did not earn tenure in respondent's district as a teacher, and was accordingly not entitled to teaching assignments during the period of the RIF, nor to any back pay. The Initial Decision was adopted as the final decision in this case, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 6/19/14

OAL DKT. NO. EDU 9329-10
AGENCY DKT. NO. 173-7/10

CATHERINE RUTLEDGE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BETHLEHEM, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is petitioner's contention that, when the hours of the guidance counselor position in which she served were reduced in 2010, she should have been given a teaching assignment to increase her working hours to full-time status. Subsequent to the institution of this controversy, the guidance counselor position in which petitioner served was restored to a full-time position, narrowing petitioner's requested relief to back pay. Upon review of the record, Initial Decision, petitioner's exceptions to same and respondent's reply to petitioner's exceptions, the Commissioner adopts the Initial Decision as the final decision in this case.

The record reveals that petitioner was hired by respondent in 1999 to fill the position of guidance counselor. At the time, she held (and still holds) an educational services certificate with a student personnel endorsement, and an instructional certificate with both elementary education and preschool education endorsements. It is undisputed that she earned tenure as a guidance counselor in respondent's district. The controversy arises from petitioner's contention that she also achieved tenure as a teacher. Petitioner has the burden of persuasion.

Tenure is achieved in a specific position and the scope of the tenured position is limited by the certificate(s) the individual must hold to satisfy the prerequisite qualifications for

employment. *See, e.g., Nelson v. Board of Education,* 148 *N.J.* 358, 366 (1997) (emphasis added). As support for her contention that she also achieved tenure as a teacher in respondent's district, petitioner makes two arguments. First, petitioner notes that her first five contracts – through 2004 – expressly referred to the fact that she held an instructional certificate as well as an educational services certificate. From this, petitioner appears to reason that her position was a dual position, *i.e.,* both guidance counselor and teacher. Second, petitioner quotes language from some of her contracts, evaluations and observation reports which refer to her as a "teacher." She urges that the cited language denotes that her position was a teaching position as well as a counseling position.

Petitioner's first argument fails because she has misconstrued the significance of the references, in her early contracts, to her instructional certificate/endorsements. Currently, employment as a guidance counselor requires a school counselor endorsement to an educational services certificate. However, prior to 2004, *i.e.,* during the first five years of petitioner's employment in respondent's district, a guidance counselor was required to hold both a "Student Personnel" endorsement to an educational services certificate and an instructional certificate. As the New Jersey Register (Volume 35, Number 19, October 6, 2003) explained:

> PROFESSIONAL LICENSURE AND STANDARDS
>
> Summary
>
> The Department of Education is proposing the repeal of N.J.A.C. 6:11, Professional Licensure and Standards, and the adoption of a new chapter, N.J.A.C. 6A:9, also entitled Professional Licensure and Standards. The proposed new rules represent the initial comprehensive examination of existing regulations that began several years ago. At that time, under the provisions of Executive Order No. 22(1994), the Department was directed to conduct such a review of all chapters of Title 6 to identify rules that were overly prescriptive, outdated or creating high cost and low benefit to those affected by these regulations.
>
> . . . .

[T]he proposal to repeal N.J.A.C. 6:11 and to adopt N.J.A.C. 6A:9 occurs at an opportune time. Under Executive Order No. 66(1978) the current chapter is scheduled to expire ("sunset") on January 11, 2004. Concurrently, the State's commitment to student achievement through better teaching and learning has fundamentally altered the view of how teachers, school leaders and other school personnel must be prepared to fulfill their educational responsibilities. Within this new context, therefore, the proposal is a natural transition resulting from the adoption of varied regulations and amendments to an educational standards-based system to prepare school personnel in the improvement of teaching and learning.

. . . .

With thoughtful consideration of the above mentioned expansive growth and development of licensure rules, the newly developed N.J.A.C. 6A:9 incorporates the critical improvements made in the last several years. More importantly, the proposed new chapter, driven by professional standards-based reform, is structured in a coherent, practical manner. Professional educators are thereby guided by rules and grounded in such standards from service preparation to induction year support and certification to professional development to insure improved teaching and learning and, ultimately, high student achievement.

. . . .

N.J.A.C. 6A:9-13.8 School counselor

This section incorporates provisions formerly appearing at *N.J.A.C.* 6:11-11.11. It establishes the certification for the school counselor. This section has been rewritten and reorganized for clarity and includes the following changes:

- The name of the certificate has changed from Student Personnel Services to School Counselor (*N.J.A.C.* 6A:9-13.8);

- The functions of a school counselor have been defined (*N.J.A.C.* 6A:9-13.8(a));

- A master's degree and a supervised counseling practicum are now required (*N.J.A.C.* 6A:9-13.8(b));

- Additional study in counseling and study in statistics and research methods have been added (*N.J.A.C.* 6A:9-13.8(b)2v);

- Candidates who complete a master's or higher degree from a regionally accredited college or university that meets the standards of the Council for Accreditation of Counseling and Related Education Programs may be issued standard certificates (*N.J.A.C.* 6A:9-13.8(c));

- The requirement for a teaching certificate and classroom teaching experience has been eliminated; and

- Provisions for emergency certification have been defined (*N.J.A.C.* 6A:9-13.8(d)).
[Emphasis added.]

35 *N.J.R.* 4352(a). These changes were adopted effective January 20, 2004. 36 *N.J.R.* 469

In light of the foregoing, the allusions to petitioner's instructional certificate in her first five contracts were simply pursuant to the requirement that she hold same in order to serve as a guidance counselor under her educational services certificate. This explanation is corroborated by the fact that after 2004, petitioner's contracts no longer referred to her instructional certificate. Accordingly, petitioner's instructional certificate was not the *sine qua non* for her position in respondent's district and cannot serve as the basis for (teacher) tenure.

Petitioner's second argument concerning documents which referred to her as a "teacher" is also unavailing. Close scrutiny of her contracts, for example, reveals the following. First, petitioner's contracts with respondent – for the school years 1999-2000, 2000-2001, 2002-2003, and 2003-2004 – all stated that respondent engaged petitioner as a guidance counselor. (Petitioner's Exhibits P-2A through P-2E) Second, although the text of petitioner's boilerplate contracts for the school years 2004-2005, 2005-2006, 2006-2007 and 2009-2010[1] represented that she was engaged to "teach in the public schools," and held "an appropriate

[1] No contracts were produced for the 2007-2008 and 2008-2009 school years.

Elementary School Teacher certificate," (Petitioner's Exhibits P-2F through P-2I), Dr. Nancy Lubarsky – who began employment as a principal in respondent's district in July 2004 and served as its superintendent from July 2009 through November 2011 – testified that contracts are issued by the district's business office, provided to the employees to sign, and then forwarded to the respondent Board to execute. The superintendent does not review them. The references to petitioner as a teacher were clerical errors made by the business office and did not correctly represent petitioner's position in the district. (2T17 through 2T20; 2T23 through 2T4-31) Third, petitioner's contract for the 2010-2011 school year, during which she was slated to work half-time, returned to describing her as a guidance counselor and referring to her student personnel services endorsement to her educational services certificate. (Petitioner's Exhibit P-2J) In sum, the Commissioner is not persuaded that the contractual language upon which petitioner relies supports her contention that she held a teaching position in respondent's district.

Similarly, examination of the evaluations and observation reports which petitioner offers as proof of her alleged status as a teacher in respondent's district reveals that acceptance of petitioner's thesis would require elevating form over substance. For example, five observation reports and two end-of-year evaluations (which will be referred to as Exhibits P-3A through 3G), covering school years 1999-2000 and 2000-2001 were performed by Dr. James Gamble, who hired petitioner as a guidance counselor in 1999. (2T62) At the beginning of each evaluation and observation report, petitioner's area of expertise was identified as "Guidance." The five observation reports memorialized petitioner's performance in activities typical of school counselors: reviewing information about kindness with a class of first-graders, participating in a parents conference, presenting lessons on human differences to second-graders, exploring with kindergarteners ways of speaking nicely to each other, and engaging third-graders in various activities related to responsibility. The two end-of-year evaluations identified petitioner as a guidance counselor and, *inter alia*, discussed: her establishment of an effective school guidance program, her cooperation

with another guidance counselor to create a crisis management plan, her ability to handle interventions and crises, her implementation of prevention strategies by giving presentations to classes of children, her individual and group counseling work, her coordination of standardized testing, and her excellent rapport with students, staff and parents.

The two observation reports and one year-end evaluation of petitioner, performed by Donald Burkhardt in 2002, were specifically and unambiguously guidance counselor assessments. (Petitioner's Exhibits P-3H, 3I and 3J) Petitioner's Exhibit P-3L is a "Professional Performance Report" by Carolyn Smith, dated June 10, 2004, which identifies petitioner as a guidance counselor, itemizes her many activities and offers several suggestions for petitioner's professional growth.[2]

Lubarsky also performed end-of-year evaluations for petitioner – beginning in 2005 and ending in 2009. She testified that in the forms for the end-of-year evaluations, she erroneously referred to petitioner as a teacher. More specifically: on June 14, 2005, May 30, 2006, June 15, 2007, June 11, 2008 and June 15, 2009, Lubarsky prepared evaluations which – on the first page – referred to petitioner as a school counselor, but also – on the second page – referred to her as a teacher. (Petitioner's Exhibits P-3M through P-3Q) Lubarsky's explanation was that in a short period of time, she was required to issue many evaluations, most of which were for teachers. She worked from a template and, in petitioner's case, forgot to change the term "teacher" to "school counselor." (2T20-21) Petitioner's end-of-year evaluation in 2010 was prepared by Dr. Edward Keegan. He used a template which appeared to be composed for the evaluation of teachers, but clearly identified petitioner as a "Guidance Counselor" in the heading of the document and in the narrative portions of the last page. (Petitioner's Exhibit P-3R)

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[2] Petitioner also refers, in her exceptions, to an undated letter from a former Bethlehem Superintendent, Mario Barbiere, in which he states that he believes that, on occasion, petitioner performed duties as a teacher. (Petitioner's Exhibit P-24) Barbiere did not testify at the hearing, admittedly never observed petitioner, and was not responsible for her supervision. The Commissioner gives no weight to P-24.

In sum, while it is true that some of petitioner's evaluators over the years used templates designed for teacher assessments, there is nothing in the content of the evaluations and observation reports that convinces the Commissioner that respondent transferred petitioner from the counseling position for which she was hired to an instructional position. The act of imparting information to students, pursuant to the character development component of her mission as a guidance counselor, did and does not transform petitioner from a guidance counselor into a classroom teacher. The fact that she was the only staff member in the room when she presented her program did not signify that the students in the room were her class. Moreover, acceptance of petitioner's thesis would logically require acceptance of the indefensible corollary that certified guidance counselors who do not also hold instructional certificates must be barred from presenting their character development or other programs to groups of students in a classroom.[3]

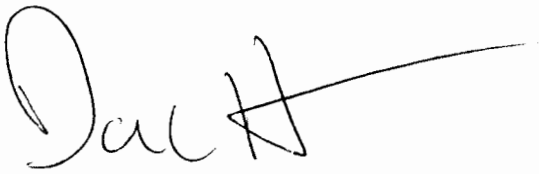
The record of this matter as a whole indicates that petitioner was hired for the position of guidance counselor, and that it was the student personnel endorsement to the educational services certificate that constituted the *sine qua non* for her position in respondent's school district. There is no indication in the record that petitioner's duties changed radically throughout the approximately twelve years of her employment prior to the RIF which reduced her hours. Thus, her visits to other teachers' classrooms to impart to groups of students the principles of good character were executed not as a duty ancillary to a new teaching position, but in the service of the various guidance programs which she instituted and/or implemented pursuant to her responsibilities as a guidance counselor – *i.e.*, her position of guidance counselor. The fact that, in the course of imparting character development guidance, she may have used some of the same techniques that

[3] Petitioner also points to the fact that she sometimes covered for absent teachers. That fact does not buttress her position, as individuals with only county substitute credentials may do the same. That she was alone in the room with the children is of little significance.

teachers use is unremarkable and does not change the nature of the position she held in respondent's district.

Accordingly, the Commissioner concurs with the determination of the ALJ that petitioner did not earn tenure in respondent's district as a teacher. She was not entitled to teaching assignments during the period of the RIF, and is not due any back pay. The Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is dismissed.

IT IS SO ORDERED.[4]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/19/14

Date of Mailing: 6/20/14

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9329-10
AGENCY DKT. NO. 173-7/10

CATHERINE RUTLEDGE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BETHLEHEM, HUNTERDON COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Marc H. Zitomer, Esq., for respondent (Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: August 1, 2012 Decided: March 21, 2014

BEFORE **JOHN SCHUSTER III**, ALJ:

STATEMENT OF THE CASE

This matter concerns a dispute between petitioner and respondent as to whether petitioner has achieved tenure status as an elementary school teacher in the respondent's district. The matter was transmitted to the Office of Administrative Law

(OAL) as a contested case on August 27, 2010, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Hearings were held on April 20 and April 23, 2012. After post hearing submissions were received the record closed on August 1, 2012. Subsequently a series of extensions were granted for good cause.

DISCUSSION

Petitioner was hired by respondent as a full-time elementary school guidance counselor and started her employment in September, 1999. Petitioner received a notice in May, 2010 advising her she was being reduced to part-time status in her role as guidance counselor. Petitioner does not dispute respondent's right to modify the guidance counselor position from full-time to part-time, but claims to be a tenured elementary school teacher she is entitled to be placed in a full-time teaching position over a less senior or non-tenured teacher. The basis for petitioner's claim is that she spent significant time developing and implementing a character development curriculum which usually occured in a classroom setting.

Respondent disagrees and takes the position petitioner has not achieved tenure or seniority rights as a teacher. Respondent says petitioner was hired in 1999 as a guidance counselor and for no other position. Her duties included conducting one-on-one and group counseling sessions; hearing discussions with parents regarding guidance related issues; applying for guidance related school grants and designing and implementing character education programs for the kindergarten through fourth grade school where petitioner worked. Respondent argues the subject matter of petitioner's character education curriculum was related to self-esteem, kindness, peer relationships, social skills, decision making and other similar issues concerning appropriate behaviors and foundations of good character. Respondent says petitioner was hired as a guidance counselor and not a teacher. The two District Superintendents petitioner worked under acknowledged the exceptional job she did as a guidance counselor, but testified she was hired as a guidance counselor/coordinator and had no classroom teaching responsibilities in any core subject area. Respondent acknowledges that on occasion petitioner would conduct character education lessons in a classroom setting.

However, respondent says this work was exclusively guidance related and had to be coordinated with the classroom teacher so as not to interfere with an academic teaching period.

Petitioner argues she worked for respondent in dual capacities. She says she was a guidance counselor when she was not in a classroom and a teacher when she was. Consequently, she worked under her educational services certificate when acting in her guidance capacity, and elementary school teacher certificate when performing her duties in the classroom setting.

Petitioner also says her contracts demonstrate her duties as a teacher. A review of the petitioner's employment contracts indicate the 1999-2000 and 2000-2001 contracts referred to petitioner as "Guidance Counselor/Coordinator" and states petitioner holds "Early Childhood, Elementary and Student Personnel certificates. The 2001-2002, 2002-2003 and 2003-2004 contracts refer to petitioner as "Guidance Counselor" and states petitioner holds an "Elementary School Teacher Student Personnel Services" certificate. The contracts for 2004-2005, 2005-2006 and 2006-2007 state petitioner was employed "to teach in the public schools" and indicated petitioner holds an "Elementary School Teacher" certificate. The contracts for the 2007-2008 and 2008-2009 school years were not produced. The contract for the 2009-2010 year states she is employed to "teaching the public schools" and petitioner holds a "Teacher" certificate. The 2010-2011 contract states petitioner is employed to be a "guidance counselor in the public schools" and indicates she holds a Student Personnel Services" certificate. See P-2A thru P-2J. Petitioner argues the contract references to her as a teacher or holding a teacher certificate validates her position that she held a teaching position while employed by the respondent. Petitioner also argues her Observation Reports show her signing an acknowledgment on a line that is labeled "signature of Teacher" as a proof of her position with the district. In addition, petitioner argues she regularly submitted lesson plans to the administration just like members of the recognized teaching staff.

Respondent counters that petitioner was hired as and always remained a guidance counselor and not a teacher. The reliance on any forms to the contrary amounts to putting form over substance. The fact she lectured in a classroom setting on character development issues doesn't make her a teacher as the location of her work is not a dispositive factor. Respondent points out petitioner's Observation Reports refer to petitioner only in terms of guidance and only concern her counseling and character development issues. With respect to lesson plans, respondent argues petitioner submitted same on her own volition and she was not required to do so unlike members of the teaching staff.

FINDINGS OF FACT

Based on the evidence submitted, I make the following Findings of Fact.

- Petitioner was hired by respondent as a guidance counselor and began her employ in September 1999.

- Petitioner holds both an instructional teaching certificate with an Elementary School Teacher endorsement (P-1a) and a Student Personnel Services certificate under which petitioner served as a guidance counselor.

- Petitioner's duties as a guidance counselor included conducting individual and group counseling sessions, meeting with parents regarding non-academic issues, designing and implementing grade appropriate character development programs, applying for guidance related grants and working with students to improve character development such as responsibility, self-esteem, social skills, etc.

- Petitioner frequently prepared and submitted lesson plans outlining her character development program but was not required to do so.

- Petitioner did not teach core curriculum subjects or otherwise measure students' achievement. The lessons petitioner presented were only guidance related and concerned issues such as responsibility, citizenship and personal development.

- The fact that some district forms referred to petitioner as "teacher" does not mean petitioner performed the duties of a teacher or worked for respondent under her instructional certificate.

- Petitioner's argument that she was a classroom teacher because she presented lessons in a classroom is unconvincing as the location of her activities is inconsequential. For example, I would not be said petitioner was a physical education teacher if she presented her lessons in a gymnasium.

- Petitioner's only title and the only function she performed was that of a guidance counselor/coordinator. The fact petitioner used methods and protocols sometimes used by academic instructors (teachers) was her choice in the manner she performed part of her duties.

- Petitioner's reliance on her alleged recognition as a "Highly Qualified Teacher" is also unconvincing. The Form G which petitioner signed as accurate lists her as an "Elementary Generalist (full-day, all subjects)" which petitioner admittedly was not. (P-5). In addition the form was only signed by petitioner and omits the signature of a School Official as that line is unsigned.

- Petitioner prepared a document as part of her 2004-2005 professional review entitled School Counselor Professional Responsibilities. The preamble to a list of her accomplishments petitioner wrote:

> The elementary school counselor's responsibilities help. . . all children by insuring that students begin to develop appropriate self-esteem, skills for conflict resolution, and resources for coping with an ever changing world. As an elementary school counselor, I provide assistance in

maintaining a positive school climate of mutual respect and cooperation.
See P-4 § 2004-2005.

- In that document she lists as part of her accomplishments as assisting with in-service training regarding child assault prevention, providing in-class assistance, individual counseling and social skills groups, assisting with children in need of services and providing school tours and assimilation assistance for new students.

- Petitioner developed and implemented the K-4 Character Education Curriculum. Sometimes this was done in a classroom setting. In that setting the general education teacher sometimes left the classroom leaving petitioner alone with the students. This is permitted because petitioner holds an Elementary School Teacher certificate. The same applies on some rare occasions when she had to replace an absent teacher. Because petitioner's activities when alone in the classroom were related to character development, whether she was accompanied by the regular education teacher or not, is of no consequence. Character development programs are presented under a guidance counselor certification and not a teacher certification.

- Petitioner's primary duty and the one performed by petitioner on a regular full-time basis was as the school's guidance counselor using her Student Personnel Services certificate. The vast majority of petitioner's classroom time was as a guidance counselor and not as a teacher when lecturing students on character development subjects such as kindness, personal responsibility and self-esteem.

LEGAL ANALYSIS

The New Jersey State Board of Education has established a certificate system requiring that "any person employed as a teaching staff member by a District Board of Education shall hold a valid and appropriate certificate." N.J.A.C. 6A:9-5.1(a).

Regulations provide for three different types of certificates i.e., instructional, educational services and administrative. N.J.A.C. 6A:9-2.1; N.J.A.C. 6A:9-5.2. An individual may hold multiple certificates. In addition to the three types of certificates there are also specific endorsements that are affixed to a specific certificate. These endorsements coincide with educational subjects or positions that share common attributes and are thus grouped under a particular certificate. Dennery v. Board of Education, 130 N.J. 626, 633 (1993). For example, instructional certificates are grouped by subject area or grade level specialization while educational services certificates include supportive positions such as school psychologist, social worker, guidance counselor, etc. Administrative certificate endorsements cover positions such as principal, vice principal, etc. A person is qualified to work in a particular area or in a particular specialty based upon the endorsements enumerated on the individual's certificate.

Educational personnel are tenured in New Jersey under the Tenure Act, N.J.S.A. 18A:28-1 to -18. An employee of a Board of Education is entitled to tenure if the person:

(1) Works in a position for which a certificate is required;

(2) Holds the appropriate certificate; and

(3) Has served the requisite period of time.

N.J.S.A. 18A:28-5

Tenure is achieved in a specific position and the scope of the tenured position is initially limited by the certificate the individual must hold to satisfy the pre-requisite qualifications for employment. Nelson v. Board of Education, 148 N.J. 358 366 (1997). Transfer of tenure is authorized between endorsements; however, tenure is not transferable between certificates. Dennery, supra. at 635.

In this matter petitioner's employment with the Bethlehem School District was under her Educational Services Certificate as a guidance counselor and her tenure status in respondent's district is limited to positions within the certification category of "educational services", thus she enjoys no tenure with regard to positions requiring

instructional certificates. See Ellicott v. Board of Educ., 251 N.J. Super. 342, 350 (App. Div. 1991). Because petitioner is not a tenured teacher, but rather is tenured exclusively as a school guidance counselor under an educational services certificate, any tenure rights that she possesses are restricted to positions in that certification.

CONCLUSION

I **CONCLUDE** that petitioner is not a tenured teacher but rather is tenured exclusively as a guidance counselor. Thus, petitioner has failed to carry her burden to prove that she has tenure rights entitling her to the elementary education teaching position that she seeks.

ORDER

I hereby **ORDER** Ms. Rutledge's appeal petition be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 21, 2014

DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/cad

WITNESSES

For Petitioner:

Catherine Rutledge

For Respondent:

Dr. Nancy Lubarsky
James Gamble

EXHIBITS

For Petitioner:

P-1a Elementary School Teacher Certificate
P-1b Teacher of Nursery School Certificate
P-1c Student Personnel Services Certificate
P-1d Diploma of Masters of Education Graduate Study in Computers and Education K through 12
P-2 Are employment contracts from September 1999 to September 2010
P-3 Observation/Evaluations, November 1999 to June 2010
P-4 Professional Improvement Plans, 1999 to 2010
P-5 Information regarding Highly Qualified Teacher status
P-6 School Guidance K-4 Curriculum
P-7 Goals for standard 9.1 Career and Technical Education
P-9 Lesson Plan Schedule
P-9 Petitioner's monthly work schedules
P-10 Kindergarten through Fourth Grade Guidance Instructional Schedule
P-11 Kindergarten through Fifth Grade Monthly Work Schedules
P-12 2009-2010 Work Schedules
P-13 Guidance Curriculum Program

P-14 Not Admitted

P-15 Not Admitted

P-16 Anti-Bullying Program Curriculum Program

P-17 Not admitted

P-18 Character Education Best Practice Model Schools Application

P-19 Anti-Bullying Program

P-20 Not admitted

P-21 Not admitted

P-22 Bus Duty Schedule 2006-2007

P-23 Letter from Beverly Ross, dated December 10, 2010

P-24 Letter from James Gamble, dated December 1, 2010

For Respondent:

R-1 Role of Elementary School Counselor

R-2 Job Description of Teacher in Charge

265-14

OAL DKT. NO. EDU 7605-14
AGENCY DKT. NO. 154-6/14

M.D.J., on behalf of minor child, D.A.J.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons expressed on the record and in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. Because the present proceeding has fully disposed of all issues in dispute between the parties, no further proceedings are necessary, and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/20/14E

Date of Mailing: 6/20/14E

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 7605-14

AGENCY DKT. NO. 154-6/14

M.D.J. ON BEHALF OF MINOR CHILD
D.A.J.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,

Respondent.

M.D.J., on behalf of D.A.J., petitioner, pro se

John E. Collins, Esq., for respondent (Parker McCay, attorneys)

BEFORE **JEFF S. MASIN**, ALJ:

This is an emergency appeal from a decision of the Pemberton Board of Education to bar D.A.J. from participating in high school graduation ceremonies scheduled to be held on Monday, June 23, 2014. M.D.J. filed this petition with the Commissioner of Education on June 17, 2014, and the Commissioner transferred the

case for hearing to the Office of Administrative Law, where the hearing occurred on June 20, 2014.[1]

D.J. has been on home instruction since late September, 2013, when he stopped attending Burlington County Alternative High School after being suspended. On April 30, 2014, School Superintendent Michael R. Gorman, Ed.D, issued a letter to Ms. J., advising that the Board's Committee of Student Appeals had denied her request on her son's behalf, for him to be permitted to participate in end of year activities. The letter cited as the reasons for this, "he was dismissed from the Alternative School, was placed on Home Instruction with the hope he would qualify for graduation and enlistment in the winter, and his ability to contain his behavior in confrontational situations." However, the letter further advised that he would be awarded his diploma "upon completion and validation of his coursework." In fact, he is to receive his diploma.

In addition to the reasons cited in the letter, at the hearing Superintendent Gorman provided a Certification, in which he asserted that when questioned at the meeting of the Board Committee, at which the Superintendent was present, as to whether he "continued to have difficulty controlling himself in unstructured situations," D.A.J. responded, "Yes." The Superintendent offered that "he remains a continued danger to himself and others and that this difficulty to control himself would be exacerbated in the unstructured commencement program."

Ms. J. passionately detailed the progress her son has made in counseling, in his participation and imminent graduation from the Juvenile Intensive Supervision Program in Burlington County, and in his attitude. He has changed his intentions regarding his future from his previous intention to join the Marines, in which his mother's family has substantial history, which was noted in Superintendent Gorman's letters of both September 30, 2013, and April 30, 2014. Instead, he intends to pursue his education, with the idea of becoming a doctor. She notes that while he and two other students

[1] On the morning of the emergent hearing, I received a Due Process Complaint Notice, faxed from the petitioner. At the hearing, I inquired whether D.A.J. was a classified student and was advised that he was not. Neither was it asserted that he had a 504 Plan. As such, the matter was processed as a regular education matter. It is noted that the Due Process Complaint was apparently never filed with the Office of Special Education (OSE). If the student was a special education student, or the issues otherwise involved relief sought under Section 504 or the Individuals with Disabilities Act (IDEA), I would have no jurisdiction to act until a Petition for Due Process was filed with OSE and transferred to the OAL.

were dismissed from Burlington County Alternative High School over an incident, the others were readmitted, while D.J. decided that he did not think that the atmosphere and contacts at that school were beneficial to him and chose to not seek to return to that school.

As was explained at the hearing, long-standing decisions of the Commissioner affirmed by the courts, have established the proposition that the Commissioner of Education will not interfere in the discretionary decisions of local boards of education unless the board is acting in an arbitrary, capricious or unreasonable manner. Kopera v. Bd. of Educ., Tp. of W. Orange, 60 N.J. Super. 288 (App. Div. 1960). Attendance at and participation in a graduation ceremony is a privilege and not a right, and as such, it is within the discretion of the board to decide who may participate, so long as their decision is not arbitrary. While the concept that being unable to attend a once-in-a-lifetime high school graduation ceremony does not present a situation of irreparable harm under the standards for emergent relief, Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982), is no longer so readily accepted, given the reality of the impact of this, for many,unique event in the lives of students and their families, see Nabel v. Board of Education of the Township of Hazlet, Monmouth County, EDU 8026-09 (Final Decision), http://njlaw.rutgers.edu/collections/oal/final/edu8026-09.pdf, nevertheless, in an appeal of this type the other Crowe standards must be satisfied. The party seeking relief must have a likelihood of prevailing on the merits. Crowe, supra. That determination must of necessity take into account the high standard that must be met to overturn the board's decision. In this case, much of what I heard argues for the likelihood that this student has matured, has learned to cope with things that troubled him in the past, and that he is on the path to a much brighter future. He is to be commended for this and especially for his upcoming graduation from the JIST Program. However, he candidly acknowledged to the Board Committee that he still has difficulty with unstructured situations, and he acknowledged this at the hearing as well. It is the case that his honesty, which it is essential to stress is a sign that he understands himself and that he did not seek to manipulate the truth as he understands it in order to seek to please the Board or myself with what he might think we would like to have heard, is to be applauded. But it is also true that while there is certainly some structure at a high school graduation and there is some school-staff and apparently also police

supervision, nevertheless at a graduation of approximately 300 students, with many other present, the situation is one that the student, on home instruction for most of this school year, has not been in for sometime. Given the history and the student's candid admission, it is simply not possible to conclude that Board had no rational basis for concluding that J.A.D.'s presence at the graduation ceremony was not in the best interest of the school, and perhaps himself.

The decision of both the judge and Commissioner here is constrained by the law, and whether in agreement with the Board's choice or not, I am bound to follow the accepted legal principles applicable to this type of case. In that light, with reluctance, I **CONCLUDE** that the petitioner has failed to establish that she has a reasonable likelihood of success on the merits, as I cannot find that the Board's discretion was abused. Since emergency relief cannot be ordered if the Crowe standards are not each met, this conclusion precludes any emergent relief. Therefore, it is **ORDERED** that the petition for emergent relief is **DISMISSED**.

The parties have advised me that no other issues remain once the emergent relief matter is resolved.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 20, 2014
DATE

JEFF S. MASIN, ALJ

/lam

LIST OF EXHIBITS

For petitioner:

P-1 Certified letter, dated April 30, 2014

P-2 Letter, dated September 30 2013

For respondent:

R-1 Certification of Thomas Sexton

266-14

OAL DKT. NO. EDU 5934-14
AGENCY DKT. NO. 116-5/14

DESTINY JACKSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE MORRIS SCHOOL DISTRICT, MORRIS COUNTY, AND THOMAS FICARRA,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The instant petition and application for emergent relief were filed by high school senior Destiny Jackson to challenge respondents' disciplinary actions, including her exclusion from participation in graduation exercises and "Project Graduation" on June 25, 2014.[1] Said discipline was imposed following an incident of physical aggression by petitioner, and subsequent to a meeting where it was determined that her behavior was not a manifestation of her disability[2], and a disciplinary hearing before the respondent Board of Education (Board). The petitioner and her mother were in attendance at the disciplinary hearing, were allowed to testify, and were given the opportunity to question respondent's witnesses.

The petition to the Commissioner, which petitioner filed on May 13, 2014, was transmitted to the Office of Administrative Law (OAL), where a hearing took place on May 27, 2014. After hearing from both parties, the Administrative Law Judge (ALJ) found that there was no basis for disturbing the respondent Board's disciplinary action. The Commissioner concurs.

The standards for evaluating a request for emergent relief are well settled. The applicable rule for this controversy is *N.J.A.C.* 6A:3-1.6(b):

[1] Petitioner was also barred from participating in the school prom. Since that event has already taken place, it is no longer at issue.

[2] There was no indication in petitioner's papers that she was classified or had a 504 plan; that first came to light in reviewing respondent's papers after the hearing. Accordingly, it may be that the ALJ's decision should be considered final pursuant to 20 *U.S.C.A.* § 1415 (i) (1) A and 34 *C.F.R.* § 300.514.

(b) A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

All four standards must be met.

Notwithstanding that missing graduation ceremonies may be regarded as "irreparable harm," the Commissioner's conclusion after review of the record – including the recording of the May 27, 2014 oral argument held in the OAL – is that petitioner has no likelihood of success on the merits, and that her application for emergent relief must therefore fail. To conclude otherwise would require that the Commissioner deem the Board's long-term suspension of petitioner – which occurred after an incident of physical aggression that had been preceded by multiple other violations of respondent's code of conduct – to be arbitrary, capricious, or unsupported by the record.[3] The record supports the opposite, *i.e.,* that after providing petitioner with due process, the respondent Board imposed reasonable and appropriate discipline.

Accordingly, petitioner's motion for emergent relief is denied. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/23/14

Date of Mailing: 6/24/14

[3] The Commissioner is also satisfied that petitioner's interest in attending graduation exercises is no greater than the respondent Board's interest in maintaining a safe, orderly, civil and respectful environment in its schools.

[4] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

ON EMERGENT APPLICATION

OAL DKT. NO. EDU 05934-14

AGENCY DKT. NO 116-5/14

D.J.,

Petitioner,

v.

MORRIS SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent.

D.J., petitioner, pro se

Marie Laurence Fabian, Esq., for respondent (Porzio, Bromberg & Newman, attorneys)

BEFORE **CARIDAD F. RIGO**, ALJ

STATEMENT OF THE CASE

Petitioner, D.J., petitioned the New Jersey Department of Education for an Order for Emergent Relief seeking that she be allowed to participate in the prom, graduation ceremony and project graduation of respondent Morristown High School.

PROCEDURAL HISTORY

Petitioner filed her petition on May 13, 2014. On May 15, 2014, the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to 13 for determination as a contested case. I heard oral argument as presented by the parties on May 27, 2014.

FACTUAL BACKGROUND

D.J., is the petitioner, she is an eighteen-year-old senior at Morristown High School. On March 11, 2014, the respondent Board of Education held a disciplinary hearing because petitioner had been involved in a fight on or about January 15, 2014. At the hearing, respondent Board was presented with petitioner's academic and disciplinary history which reflected a pattern of incidents of misconduct and disrespectful behavior. As a result of the hearing, petitioner was disciplined in that she was placed on a long-term suspension, she was prohibited from attending classes, being on school grounds, attend school events, the prom, graduation and project graduation. The prom is on May 29, 2014, and the graduation activities are June 25, 2014. The Board provided petitioner with the required education at her home.

N.J.A.C. 6A:3-1.6 sets forth the standard for emergent relief pursuant to Crowe v. DeGioa, 90 N.J. 126 (1982) are as follows:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

I have heard the arguments of the parties and read their submissions. The burden of proof and persuasion is on the petitioner. Unfortunately, petitioner did not provide me with a single fact or reason in accordance with Crowe v. DeGoia as to why her request should be granted. All four of the Crowe v. DeGioa standards as codified in N.J.A.C. 6A:3-1.6, must be met in order for emergent relief to be granted.

Therefore, I **CONCLUDE** that petitioner has not met her burden of proof and her petition for emergent relief must be **DENIED**.

ORDER

It is hereby **ORDERED** that petitioner's application for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 29, 2014
DATE

CARIDAD RIGO, ALJ

jb

267-14

JOSEPH ANNECCHINO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

The petitioner in this case was employed under tenure as Supervisor of Visual and Performing Arts by the respondent Board when his position was eliminated in a reduction in force (RIF) in 2012. Petitioner – who had been employed by the District since 1984 – was reassigned to a teaching position for the 2012-2013 school year, at a reduced salary. Petitioner contended that subsequent to the elimination of his position, non-tenured employees were permitted to remain in supervisory positions in the district, while he was demoted to a teaching position in violation of his tenure rights; he sought payment of $23,628 from the school district, representing the difference between his former supervisory salary and the amount he was paid as a teacher following his demotion. The respondent Board argued that its reason for retaining the non-tenured employees was that it had determined to keep as supervisors those people who possessed knowledge and experience in the subjects they were supervising; petitioner was not offered a supervisory position in another department because he did not have "content" expertise in anything besides visual and performing arts.

The ALJ found, *inter alia*, that: petitioner's position was eliminated as part of a valid RIF pursuant to *N.J.S.A.* 18A:28-9; the respondent Board merged petitioner's former position with that of the Director of Staff Development for the 2012-2013 school year; petitioner was certified as a teacher of visual arts and had supervisor endorsements; based on petitioner's tenure status, he should have been preferred for a supervisor position over a non-tenured school employee; irrespective of content expertise, a certified supervisor with tenure should be preferred over one who is non-tenured; and, although there is no statutory right to the salary held prior to a RIF, awards of differences in salary are appropriate remedies when a petitioner's tenure rights are violated as a result of a RIF. The ALJ concluded that petitioner is entitled to the salary difference of $23, 628 for the 2012-2013 school year, and ordered that he be awarded this amount by the school district.

The Commissioner concurred with the ALJ's conclusion that the criteria which the Board used to reorganize after the RIF was not harmonious with the rules concerning tenure; specifically, the respondent applied the regulations and precedent concerning seniority – instead of tenure – to the aftermath of the RIF. This would have been appropriate in a situation where all supervisory positions at the time of the RIF were held by tenured employees, but this was not the case here, and thus petitioner had a greater right to a supervisory position than any of the non-tenured supervisors. The Commissioner concluded that the petitioner should have been placed in one of the supervisory positions and paid a supervisor's salary following the RIF, instead of being reassigned as a teacher at a lower salary; accordingly, the petition was granted and respondent was ordered to pay the petitioner $23,628.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 6/24/14

OAL DKT. NO. EDU 13415-12
AGENCY DKT. NO. 261-9/12

JOSEPH ANNECCHINO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
RESPONDENT.	:	

The petitioner in this matter asks the Commissioner to order that he be compensated for the loss of salary which he suffered when his supervisory position was abolished and he was transferred to a teaching position during the 2012-2013 school year. Upon review of the record and Initial Decision of the Office of Administrative Law (OAL),[1] the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner is entitled to the compensation which he requests.

It is undisputed that at the time his position of Supervisor of Visual and Performing Arts was eliminated, petitioner had earned tenure as a supervisor in respondent's district. It is also undisputed that subsequent to the abolishment of petitioner's position, which occurred by virtue of a legitimate, economically driven reduction in force (RIF), non-tenured employees were permitted to remain in supervisory positions in the district, while petitioner was demoted to a teaching position. Respondent's stated reason for this result was that it determined to keep as supervisors the employees who possessed knowledge and experience in the subjects they were supervising. It is also clear, however, that the Board of Education did not approve the need for dual certification.

The ALJ correctly concluded that the criteria which respondent used to reorganize after the RIF was not harmonious with the rules concerning tenure. More specifically, respondent appears to have applied the regulations and precedent concerning seniority – instead of tenure – to the aftermath of

[1] Neither party filed exceptions to the Initial Decision.

the RIF. If it had been the case that all respondent's supervisory positions were held by tenured supervisors at the time of the RIF, determinations concerning the various supervisors' experiences in each category of supervisory position would have been relevant.

However, the field of candidates included non-tenured employees. As a tenured supervisor, petitioner had a greater right to a supervisory position than any of those non-tenured supervisors. *See, e.g., Nicholas Duva v. State-operated School District of the City of Jersey City, Hudson County*, State Board Decision No. 56-99, March 6, 2002:

> Given that . . . "supervisor" [is not] among those positions enumerated in *N.J.S.A.* 18A:28-5, the scope of petitioner's tenure protection under his Administrative Certificate extended to all assignments for which he was qualified by virtue of possessing a supervisor's endorsement. Hence, upon abolishment of his director's assignment, the petitioner was entitled to be employed in assignments requiring a supervisor endorsement in preference to any non-tenured individuals.
>
> *Duva, supra* at 17-18.

Thus, instead of being reassigned as a teacher, petitioner should have been placed in one of the supervisory positions in respondent's district and paid a supervisor's salary.

Accordingly, the petition is granted and respondent shall pay petitioner $23,628, the amount found by the ALJ to be due and owing.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/24/14

Date of Mailing: 6/24/14

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 13415-12
AGENCY DKT. NO. 261-9/12

JOSEPH ANNECCHINO,
Petitioner,
v.
TOWNSHIP OF IRVINGTON
BOARD OF EDUCATION,
Respondent.

Wayne J. Oppito, Esq., for petitioner (New Jersey Principals and Supervisors Association)

Albert C. Asphall, Esq., for respondent (Hunt, Hamlin & Ridley)

Record Closed: March 10, 2014 Decided: April 8, 2014

BEFORE **JOANN LASALA CANDIDO**, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Petitioner, Joseph Annecchino, contests the action of the respondent, Township of Irvington Board of Education, Essex County (respondent/District) that eliminated his position as a tenured supervisor with the District, due to reduction in force (RIF) that effected the 2012-2013 school year, but retained him as a teacher rather than a

supervisor with a decrease in pay. Annecchino was offered his supervisor position again for the 2013-2014 school year, which he declined for personal reasons and remained an instrumental music teacher for that year. Petitioner filed a petition of appeal with the Department of Education (DOE) on September 11, 2012, seeking his difference in salary during that one year for approximately $23,628. An Answer was filed on behalf of the respondent on October 3, 2012.

The matter was transmitted to the Office of Administrative Law on October 3, 2012, for hearing as a contested case. Many prehearing, adjournment requests, and telephone conferences were held in this matter wherein procedural schedules and discovery issues were established as well as settlement discussions. Thereafter, a hearing was held on January 23, 2014. The parties filed written submissions, the last being submitted on March 10, 2010, at which time the record closed.

FINDINGS OF FACT

At the hearing, Annecchino testified on his own behalf. Testifying on behalf of the Board were Neely Hackett, the District's superintendent of schools, and Musa Malik, human resources manager.

Many of the facts surrounding this matter are not significantly disputed. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Annecchino's relevant service with the Board can be summarized as follows. Petitioner commenced employment with the Board on January 9, 1984, as a teacher of instrumental music. From April 2003 to approximately June 2012, Annecchino served as a supervisor of visual and performing arts with thirty-seven teachers under his supervision. Annecchino held an administrative certificate with an endorsement of supervisor by the State of New Jersey Department of Education and State Board of Examiners. (J-1.) Annecchino, as a supervisor of thirteen schools in the District, observed teachers, checked the condition of musical equipment and inventory, and

evaluated teachers (not only of music and art) on lesson plans and teaching techniques. He did not have any teaching responsibilities.

In or around June 2012, Annecchino had most seniority in his department. Thereafter, and through the present date, Annecchino has served in the capacity of a teacher rather than a supervisor earning approximately $23,628 less per year. The Director of Professional and Staff Development took over his position as supervisor for the 2012-2013 school year. Annecchino did not think the reduction was done in bad faith, but rather for money reasons. Annecchino was offered his supervisory position to him again in the 2013-2014 school year to which he accepted but then changed his mind after he spoke with his doctor and felt it would be too much to handle.

The Board's witness Dr. Neely Hackett presented credible testimony, which the undersigned accepts as **FACT**, regarding Annecchino's position as supervisor changed to teacher in 2012 and the reason for the reduction in force. Hackett, who has served as the superintendent of schools since July 1, 2013, interim superintendent of schools in 2012, credibly testified that Annecchino's position was not the only position eliminated. The reduction was due to the budget shrinking and more children going to charter schools. The District combined many supervisory positions with existing directors, not just with Annecchino's department. Annecchino was not offered any other supervisory position in other departments because he did not have "content" expertise in anything other than visual and performing arts.

During 2013-2014 two charter schools had closed and the students were coming back. The District was in a better position to bring back positions such as Annecchino's supervisor position. There were non-tenured supervisors during the 2012-2013 school year that were not affected by the RIF, but had content expertise. Annecchino was on the Board's meeting agenda on July 22, 2013, to reinstate him as supervisor. Annecchino advised the District on that same date that he will not be returning to the supervisor position.

Musa Malik, manager of human resources testified on behalf of respondent. He explained that a RIF occurs when there is a loss of funding on State level based upon

student enrollment or a reduction of funding based upon what the District proposes in its budget.

LEGAL ANALYSIS AND DISCUSSION

Respondent, Board of Education approved a reduction in force in June 2012. Consequently, Annecchino's title was eliminated. The pertinent statute entitled "Reduction of force; power to reduce and reasons for reduction" N.J.S.A. 18A:28-9 provides:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

The New Jersey Supreme Court has recognized that a local board of education has the authority to reduce its teaching force as long as that reduction is genuinely for reasons of economy. Impey v. Bd. of Educ. of Shrewsbury, 142 N.J. 388, 399 (1995). Whether those services are eliminated, reduced or modified, however, may be a relevant factor in determining whether abolition of a position genuinely advances the goals of economy and efficiency and was undertaken in good faith. Id. at 399-40. Substance, rather than the form of a change in employment, is the controlling factor in making this determination, and if a position is replaced with an identical position but a different title, that action does not constitute a valid RIF. See Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

Based upon the foregoing, I **CONCLUDE** that Annecchino has not satisfied his burden that the reduction in force imposed by the District in June 2012 was done in bad faith or not for reasons of efficiency or economy. N.J.S.A. 18A:28-9. There is no disagreement that the board's actions in this case constituted a reduction in force. It is not contested that respondent Board of Education (Board) merged petitioner's former

position with the Director of Staff Development after a financial assessment and after consideration of the needs of the students. In fact, he credibly testified that he did not feel the RIF was done in bad faith. However, I am not persuaded by their argument regarding Annecchino's tenure rights.

Petitioner was certified as a teacher of visual arts and had supervisor endorsements. Based on petitioner's tenure status, he should have been preferred for a supervisor position over a non-tenured school employee.

Petitioner seeks the difference in salary for the 2012-2013 school year when he was offered a teaching position rather than a supervisory position in any other department. The petitioner argues that non-tenured personnel cannot be retained or hired over a tenured individual with reference to a position for which the individual has retained tenure. Respondent argues that the decision to not award petitioner the Director of Staff Development position that was available was because of petitioner's lack of substantive experience in staff development. They claimed that all supervisory positions were held by individuals with significant experience in the relevant subject area. Respondent highlights the fact that they offered the petitioner his old position as soon as it became available again for the subsequent school year, 2013-2014, which he declined for personal reasons.

If a teaching staff member is dismissed as a result of a RIF, they shall be preferred in order of seniority for reemployment, should reemployment become a possibility. The relevant statute, N.J.S.A. 18A:28-12, reads in relevant part:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service[.]

As a result of the Board's decision to remove the supervisor of visual and performing arts position for the 2012-2013 school year, petitioner was reassigned to the position of instrumental music teacher. This reassignment qualifies as a transfer rather than a dismissal:

> "Transfer" refers to the right of a school board to assign a teacher to a position within the scope of his or her certification. A tenured teacher may be involuntarily transferred to another position within his or her certification where no loss of salary or other reduction in employment is suffered and the teacher is not singled out for the transfer on a prohibited basis.
>
> [Carpenito v. Bd. of Educ. of Borough of Rumson, Monmouth Cnty., 322 N.J. Super. 522, 529 (1999).]

Though petitioner was not singled out on a prohibited basis, he did suffer a loss of salary as a result of the transfer. Respondent advances the rationale that because petitioner lacked substantive experience in content areas of other positions, he was not fit to maintain a supervisory position during the 2012-2013 school year.

Carpenito held that a tenured teacher has no seniority right to a former teaching position when a board of education hired a non-tenured teacher to fill the position, before the position was abolished, and when the tenured teacher was transferred to a teaching position of a different subject within that teacher's certification, without any loss of salary or benefits. Id. at 525. The court in Carpenito held that "absent allegations of bad faith or unlawful purpose, a tenured teacher's seniority rights are not triggered when a school board abolishes the teacher's position and assigns the teacher to teach different subjects within his or her certification without reducing the teacher's salary or other employment benefit." Id. at 528. The Carpenito court specified "the triggering event for preference based on seniority is either a dismissal or transfer coupled with a loss of a tangible employment benefit." Id. at 533. In this case, petitioner's transfer involving a loss in salary triggered his seniority rights.

In Capodilupo v. Board of Education, 218 N.J. Super. 510, 515 (1987) the court found that a "State Board was within its delegated authority when it ruled that a tenured

teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a RIF as against a non-tenured applicant with the same certification." Capodilupo stands for the conclusion that where a tenured teacher's position is terminated as a result of a RIF and where that tenured teacher is subsequently dismissed, that tenured teacher is entitled to preference over a non-tenured teacher for a position within the endorsements of their (i.e. the tenured teacher's) certificate. This case is distinguishable from Capodilupo insofar as the petitioner here was transferred, rather than dismissed; however, pursuant to the Carpenito analysis, both a transfer with loss of salary and dismissal trigger seniority rights.

Under the Capodilupo analysis, petitioner's entitlement to the positions subsequently held by non-tenured employees depends upon whether those positions were within the endorsements of petitioner's teaching certificate. According to the court in Capodilupo, regardless of experience, "[a] tenured teacher . . . is entitled to retention as against a non-tenured teacher" for a position for which that teacher is certified. Capodilupo, supra, 218 N.J. Super. at 514-15. In this case, petitioner is certified as a teacher of music and holds an administrative certificate with an endorsement of supervisor. Respondent contends that petitioner was not given the position of Director of Professional and Staff Development, which took over the responsibilities of his former position, or any other supervisory position, because he did not have content expertise in anything other than visual and performing arts. Implicit in the respondent's argument is the assumption that non-tenured supervisors were preferred because they did have relevant content expertise in professional and staff development. Pursuant to the law articulated Capodilupo and Carpenito, petitioner's right to a seniority preference in the Director of Staff Development position depends upon what endorsements were within his teaching certificate and not simply his content expertise.

A petitioner who "is also a tenured supervisor . . . in a reduction in force is entitled to a supervisor's position for which he is certified as against a non-tenured supervisor." Rogers v. Highland Park Bd. of Educ., 1990 S.L.D. 686 (internal citations omitted). Irrespective of content expertise, a certified supervisor with tenure should be preferred to one who is non-tenured. Furthermore, petitioner's role as a supervisor of

visual and performing arts involved evaluation of teachers, not only in music and art, on lesson plans and teaching techniques. In Nelson v. Board of Education of Township of Old Bridge, 148 N.J. 358 (1997), the NJ Supreme Court held that a tenured teacher's certificate with supervisor endorsements could not be transferred to a principal endorsement absent actually having accrued tenure through employment in that area. The Nelson Court interpreted N.J.S.A. 18A:28-5 (on guidelines on tenure) as requiring that supervisors and principals be tenured separately. See Ibid. However, Nelson did not preclude tenure from transferring across supervisor positions. Thus, despite not having subject experience in professional and staff development, the fact that petitioner's former position and the latter position fell under the same kind of certificate, petitioner should have been preferred based on his tenure status.

I **CONCLUDE** that petitioner is entitled to the salary difference for the 2012-2013 academic year. Though there is no statutory right to salaries held prior to a RIF, awards of differences in salary can be appropriate remedies when a petitioner's tenure rights are violated as a result of a RIF. In Driscoll v. West Essex Regional Board of Education, 93 N.J.A.R.2d (EDU) 761, a teacher was granted the salary she would have received prior to a RIF which violated her tenure rights. In Driscoll, a teacher was dismissed as result of a RIF and placed on a preferred eligibility list but the court determined that she should have been retained in a position within the scope of her certificate and preferred over other non-tenured teachers. See Ibid. In this case petitioner was transferred to a teaching position, earning a lower salary, but should have been retained over another teacher without tenure in a position within the endorsements of petitioner's certificate.

ORDER

Therefore, based upon the facts adduced and the legal principles cited above I **ORDER** that the action filed by Annecchino be **REVERSED** and he be awarded the difference in salary for the 2012-2013 school year in the amount of $23,628, to be confirmed by the District.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 8, 2014
DATE

JOANN LASALA CANDIDO, ALJ

Date Received at Agency:

Date Mailed to Parties: APR - 9 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

ljb

APPENDIX

LIST OF WITNESSES

For Petitioner:

Joseph Annecchino

For Respondent:

Neely Hackett

Musa Malik

LIST OF JOINT EXHIBITS

J-1 Supervisor Certificate

J-2 Teacher of Music Certificate

J-3 Reassignment transfers dated June 20, 2012

OAL DKT. NO. EDU 5267-14
(EDU 13448-13 ON REMAND)
AGENCY DKT. NO. 189-8/13

D.C., on behalf of minor children, D.C., D.C., and N.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the Settlement Agreement (Agreement), and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On April 30, 2014, the Commissioner remanded this matter to OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge did not include the requisite Board of Education approval.

Upon review of the revised record on remand, the Commissioner finds that the Agreement now contains the requisite Board approval. According to the Agreement, the first installment of the settlement payment is due on February 20, 2014 – a date that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms,

or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/25/14

Date of Mailing: 6/25/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5267-14 (On Remand EDU 13448-13)
AGENCY DKT. NO. 189-8/13

D.C., ON BEHALF OF MINOR CHILDREN,
D.C., D.C. AND N.C.,
Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

D.C., parent, pro se

Sanmathi Dev, Esq., for respondent (Capehart & Scatchard, P.A., attorney)

Record Closed: May 7, 2014 Decided: May 12, 2014

BEFORE **PATRICIA M. KERINS**, ALJ:

The matter was originally transmitted to the Office of Administrative Law for determination as a contested case September 20, 2013, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. An Initial Decision Settlement was issued on March 17, 2014.

Thereafter, on April 30, 2014, the Commissioner of the Department of Education remanded the matter.

On May 7, 2014, attorney for the Board filed with the undersigned the Board's minutes of the meeting, which was the reason the matter was remanded.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and their acceptance of the terms on the record on October 25, 2013, along with the Board minutes.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that these agreements meet the requirements of N.J.A.C. 1:1-19.1 and that the settlements should be approved. I approve the settlements and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

5/12/14
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency:

Date Mailed to Parties: 5/15/14

/lam

CAPEHART SCATCHARD
ATTORNEYS AT LAW

Sanmathi Dev
856-380-6709
sdev@capehart.com

May 7, 2014

VIA REGULAR MAIL AND FACSIMILE (609) 689-4100

Honorable Patricia M. Kerins, ALJ
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

Re: D.C. o/b/o D.C., D.C., and N.C. v. Hamilton Township Board of Education
Docket No. EDU 13488-2013 S
Agency Ref. No. 189-8/13
Our File No. 1555-11136

Dear Judge Kerins:

As you may know, this firm represents the Hamilton Township Board of Education ("Board") in the above-referenced matter. On May 2, 2014, I received the Commissioner's decision remanding this matter because no minutes were attached to the fully executed Settlement & Mutual Release Agreement. As such, I have included the Board minutes and motion regarding the approval of this Agreement at the February 26, 2014 Board meeting. Another copy of the Agreement is enclosed for your convenience.

If you have any questions or need anything else, please contact me at 856-380-6709.

Respectfully,

CAPEHART & SCATCHARD, P.A.

S. Dev

Sanmathi Dev

Encl.
3135395
cc: Mr. Dulhomme Clenor (w/ encl.)

[redacted]

Agenda Item Details

Meeting: Feb 28, 2018 - Regular Meeting - 7:00 PM - Agenda Model (Legal Authorities)

Category: F. Curriculum & Instruction

Subject: F.8. MOTION ADDED 2/21/18: Residency Settlement Agreement - pg 62-65

Access: Public

Type: Action

Recommended Action: Upon the recommendation of the Superintendent that the Board of Education accepts the findings of the Residency Settlement Agreement for attending as set C & I Enclosure #8

Public Content

Administrative Content

Regular Session
February 26, 2014

A. Opening of the Meeting

Call to Order

1. Call to Order

The Hamilton Township Board of Education met in Regular Session on Wednesday, February 26, 2014 at 7:00 P.M. in the Auditorium of Reynolds Middle School, 2145 Yardville Hamilton Square Road, Hamilton, New Jersey, 08690. This meeting was not recorded.

Meeting Notice

2. Meeting Notice

Notice of this meeting dated February 6, 2014 was read by Peter Frascella, Interim Board Secretary. Furthermore, on that date, a copy of such notice was sent to The Times, The Trentonian and the Clerk of the Township of Hamilton. It was also posted on the bulletin board at the entrance to the Board Room in the Hamilton Square Administration Building.

Flag Salute

3. Flag Salute

Roll Call

4. Roll Call

Present: Albert Gayzik, Richard Kanka, Dina Thornton, Pamela Kelly and Anthony Celentano.

Absent: Patricia DelGuidice, Joseph Malagrino, Stephanie Pratico and Jennifer Riddell.

Also present were: Dr. James Parla, Superintendent; Dr. Michael Gilbert, Director of Curriculum and Instruction; Joseph Slavin, Director of Administration; Kurt Stumbaugh, Interim Business Administrator; Peter Frascella, Assistant Business Administrator/Interim Board Secretary; Katherine Shilenok-Wright, Human Resources Manager, Jane Bilik, Interim Supervisor Student Services, Joseph Betley, Board Attorney; Christopher Scales and Nicholas DeMarie, student representatives, and interested members of the community. Student representative George Koutsouradis was absent.

Awards

B. Awards

1. Grace Dwyer (Nottingham H.S.) Cross County
2. Raychel Waltz (Nottingham H.S.) wins NJSIAA Tournament of Champions/Individual Overall Bowling State Champion

Announcements

C. Announcements

1. Superintendent

a) At the Annual Woodworking Show, Mike and Lee Friedman, teachers at Grice and Steinert, exhibited the guitars built by our students.

b) Responded to a question from the last board meeting on the amount of money in the budget for Physical Therapy services.

c) The GALRE trip was previously approved; however there is a modification to the motion since there is a cost to the Board. Dr. Parla would like the Board to approve this motion since the trip is next week.

d) HR motion has the incorrect date (year). The motion currently reads 2015, it should read 2014. One HR item is being deferred until March's Board.

2. Board Members

a) Mr. Celentano stated that the bleachers located at Steinert's baseball fields do not have backs.

b) Summer programming for Special Education students, do they need to apply?

c) Ad hoc Technology Committee will be meeting soon and will bring items to the Board.

3. Student Representatives

The student representatives updated the Board on current activities at their schools.

4. Dr. Parla introduced Hamilton West's new principal, Jeffrey Hudanish.

Presentations
IBC

D. Presentation

Affordable Healthcare Act (See attachment)
Steve Fallon, IBC

Inst Services/
Curriculum Budget

Instructional Services/Curriculum Budget Presentation
(See attachment)

Dr. Michael Gilbert

Dr. Gilbert displayed a Powerpoint presentation on the Curriculum, Instructional Services, Technology and Adult school budget for the 2014-15 school year and responded to questions from the Board.

Committee Rpts

E. Committee Reports

1. Board Committees

a) Audit – Ms. Kelly
- The committee is scheduled to meet on March 4th.

b) Transportation – Ms. Thornton
- The committee is finalizing a date for their first meeting.

c) Steinert Pool Naming -Gayzik
- Interested board members should contact Ms. DelGuidice.

d) Space and Enrollment - Kanka
- The Monday meeting was postponed. Next meeting will be held on March 10th.

f) Human Relations – Kanka
- Next meeting is scheduled for March 3rd.

d) Technology - Celentano
- Will discuss the contents of the meeting with professionals and will set up a meeting time.

2. Monthly Suspension Report
   - Questions were raised regarding the Alternative H.S. suspension numbers.

3. Monthly HIB Report
   - Questions were raised about the reporting process.

4. Monthly Health Report – January, 2013

5. Residency Report
   - Settlement agreement to be voted on tonight in the Curriculum and Instruction Motions.

F. Hearing of the Public — Public Comment

Robert Ortiz
- Thanked Dr. Parla for the interpreters.
- Discussed concerns about the PARCC assessments.
- Greenwood parents to submit data on creating an afterschool program at Greenwood.

George Fisher
- Participation in meetings by the Board members.
- Budget process

Daniel Caffarelle
- Steinert's Lacrosse Coach, presented a petition to Board.

Dina Ashure
- Believes that Principals are not following procedures on bullying/harassment issues.

Lori Phoenix
- Steinert's Lacrosse Coach

George Fisher
- Steinert's Lacrosse Coach
- 3 minute rule for public comment
- Wilson generator

G. Curriculum and Instruction Motions — C&I Motions

Kanka Celentano

(C&I 3-13)

Upon the recommendation of the Superintendent that revised Board Policy #1240 Evaluation of Superintendent, be adopted as per C & I Enclosure 3.

Upon the recommendation of the Superintendent that revised Board Regulation #1240 Evaluation of Superintendent, be adopted as per C & I Enclosure 4.

Upon the recommendation of the Superintendent that revised Board Policy #3142, Nonrenewal of Nontenured Teaching, be revised as per C & I Enclosure 5.

Upon the recommendation of the Superintendent that revised Board Policy #3144, Certification of Tenure Charges, be revised as per C & I Enclosure 6.

Upon the recommendation of the Superintendent that revised Board Policy #4146, Nonrenewal of Nontenured Support Staff, be revised as per C & I Enclosure 7.

Upon the recommendation of the Superintendent that the Board of Education approves the following revised courses of study as per C & I Enclosure 8.

Upon the recommendation of the Superintendent that the Board of Education approves the following new course proposal as per C & I Enclosure 9.

Upon the recommendation of the Superintendent that the Board of Education approves the following new course proposal as per C & I Enclosure 10.

Upon the recommendation of the Superintendent that the Board of Education approves the following new course proposal as per C & I Enclosure 11.

Upon the recommendation of the Superintendent that the Board of Education approves the following new course proposal as per C & I Enclosure 12.

Upon the recommendation of the Superintendent that the Board of Education approves the following new course proposal as per C & I Enclosure 13.

Roll Call

Motions Carried: 5 In favor 0 opposed

Kanka Celentano

C&I Motions

(C&I 2, C&I 14-15, C&I 17-24)

Upon the recommendation of the Superintendent that the payment of pupils sent to out-of-district schools be approved, as per C & I Enclosure 2.

Upon the recommendation of the Superintendent that the following textbooks be approved as per C & I Enclosure 14.

Upon the recommendation of the Superintendent that the Board offers a half day AM & PM preschool program at each Title 1 designated school for the 2014-2015 school year funded through the Title I grant, as per C & I Enclosure 15.

Upon the recommendation of the Superintendent that the agreement between Amy Goeri, Early Childhood/Special Education Consultant and the School District to assist teachers in implementing positive behavioral interventions for the following elementary schools, be approved as per C & I Enclosure 17.

Klockner Elementary School at the cost of $2,250.00 from account #20-231-200-300-104-628

Kuser Elementary School at the cost of $2,250.00 from account #20-231-200-300-105-628.

Upon the recommendation of the Superintendent that the Board of Education approves Christie Alston, a science teacher at Hamilton High North, as the Club Invention Instructor to implement two additional sessions of the previously BOE approved Club Invention Program at University Heights Elementary School, as per C & I Enclosure 18.

Upon the recommendation of the Superintendent that the Board of Education approves the operation of a High School Equivalency Testing Center, as per C & I Enclosure 19.

Upon the recommendation of the Superintendent that the Board of Education approves the Community Education Potential New Courses, as per C & I Enclosure 20.

Upon the recommendation of the Superintendent that the Overnight Student Field Trips, be approved as per C & I Enclosure 21.

Upon the recommendation of the Superintendent that the Board of Education accepts the following donation, as per C & I Enclosure 22.

Upon the recommendation of the Superintendent that the Board of Education accepts the findings of the Residency Settlement Agreement for effective as per C & I Enclosure 23.

Upon the recommendation of the Superintendent that the revised overnight student trip be approved as per the attached.
Motions Carried: 5 in favor 0 opposed

Dr. Parla pulled Business Motion #11, Proposal for the Wilson Generator project.

H. Business Motions — Business Motions
Celentano Kanka
(BA 1-9, BA 12-13)
Upon the recommendation of the Superintendent that the Minutes of the meetings of the Hamilton Township Board of Education be approved and released (as appropriate) at this time. (BA 1)

January 7, 2014	Reorganization Meeting
January 7, 2014	Executive Session
January 15, 2014	Agenda Session
January 15, 2014	Executive Session
January 29, 2014	Regular Session
January 29, 2014	Executive Session

Upon the recommendation of the Superintendent that the Building Use Applications be approved as per the attached. (BA 2)

Upon the recommendation of the Superintendent that the Board of Education approves the Food Services Financial Reports as per the attached. (BA3)

Celentano Kanka
Rescind Business Motion #3 from tonight's agenda
Motion Carried: 5 In favor 0 opposed

Upon the recommendation of the Superintendent that the Board approves the December 31, 2013 Secretary's Report. (BA 4)

Upon the recommendation of the Superintendent that the Board approves the Financial Certification, as per the attached. (BA 5)

Upon the recommendation of the Superintendent that the Board approves the December 31, 2013 Treasurer's Report as per the attached. (BA 6)

Upon the recommendation of the Superintendent that the Board approves the Line Item Transfers, as per the attached. (BA 7)

Upon the recommendation of the Superintendent that the Board approves the bid awards and/or bid rejections for supplies, equipment and contracted services for the 2013-2014 school year in the amount of $157,744.61. (BA 8)

Upon the recommendation of the Superintendent that the Board of Education approves the January bill list in the amount of $27,157,795.98 as per the attached. (BA 9)

Upon the recommendation of the Superintendent that the Hamilton Township Board of Education approves the Proposal for Concrete Spandrel Beam and Wall Repair at Nottingham High School, as per the attached. (BA 12)

Upon the recommendation of the Superintendent that the Transportation Items be approved as per the attached. (BA 13)
Motions Carried: 5 In favor 0 opposed
(Ms. Thornton abstained on BA2 #8)

Celentano Kanka
(BA 10)
Upon the recommendation of the Superintendent that the Hamilton Board of Education accepts the FEC letters as presented by the New Jersey Department of Education, as per the attached. (BA 10)
Roll Call
Motion Carried: 5 In favor 0 opposed

Dr. Parla reminded the Board that a HR motion has the incorrect date (year). The motion currently reads 2015, it should read 2014 and item B7 is being withdrawn until March's Board.

I. Human Resource Motions HR Motions
Thornton Kanka
(HR4-HR17)

Upon the recommendation of the Superintendent of Schools that the Appointment(s) be approved as attached. (HR 4)

Upon the recommendation of the Superintendent of Schools that the Transfer(s) be approved as attached. (HR 5)

Upon the recommendation of the Superintendent of Schools that the Extension of Contract(s) be approved as attached. (HR 6)

Upon the recommendation of the Superintendent of Schools that the Termination of Short-Term Contract(s) be approved as attached. (HR 7)

Upon the recommendation of the Superintendent of Schools that the Resignation(s) be approved as attached. (HR 8)

Upon the recommendation of the Superintendent of Schools that the Removal from Active Employment be approved as attached. (HR 9)

Upon the recommendation of the Superintendent of Schools that the Retirement(s) be approved as attached. (HR 10)

Upon the recommendation of the Superintendent of Schools that the Leaves of Absence(s) /Extension(s) and Return(s) be approved as attached. (HR 11)

Upon the recommendation of the Superintendent of Schools that the Reimbursement for Unused Day(s) be approved as attached. (HR 12)

Upon the recommendation of the Superintendent of Schools that the Salary Adjustment(s) be approved as attached. (HR 13)

Upon the recommendation of the Superintendent of Schools that the Promotion(s) be approved as attached. (HR 14)

Upon the recommendation of the Superintendent of Schools that the Adult School and Continuing Education be approved as attached. (HR 15)

Upon the recommendation of the Superintendent of Schools that the appointment(s) be approved as attached. (HR 16)

Upon the recommendation of the Superintendent of Schools that the Leaves of Absence(s) be approved as attached. (HR 17)

Mr. Gayzik called for a 5 minute recess.

The Board returned to the auditorium and Mr. Gayzik asked Mr. Frascella to call for a vote of the HR motions.

Roll Call:
Motions Carried: 5 in favor 0 opposed
Motion HR 11 A2 failed (4 in favor 1 abstained, Celentano)
Motion HR 11 B8 failed (4 in favor 1 abstained, Kanka)
Motion HR 6A2 conditionally approved upon clarification
Motion HR 7B5 conditionally approved upon clarification

Public Comment

J. Hearing of the Public

George Fisher

- Governance concerns

Other Business

K. Other Business

- Mr. Celentano spoke about the snow removal process at the Township.
- Ms. Thornton informed the Board that the Hamilton Parents of All Learners are scheduled to meet on March 6, 2014 and will be kicking off Special Education month.
- Mr. Kanka discussed the CJ Pride Job Fair on March 7, 2014.
- Ms. Thornton suggested that the Board would benefit from holding special session to discuss the 2014-15 budget.

Motion to add Budget session

Thornton Celentano
Motion to add a Special Session Board meeting on March 12, 2014 at 7:00 P.M. to discuss the 2014-15 Tentative Budget.
Motion Carried: 5 in favor 0 opposed

- Ms. Thornton feels that additional HR information should be placed on the public portion of Board Docs.

Motion to add HR Items to public Area of Board Docs

Thornton Celentano
Motion to include all of the HR data (as the Board members see it) on Board Docs where the public will have access to the information.
Roll Call
Motion Carried: 5 in favor 0 opposed

- Mr. Celentano made a comment on the 3 minute rule for public comment.

Motion to authorize RFP for substitute Teaching services

Kelly Gayzik
Motion to authorize the District to advertise for a Request for Proposal for contracting out substitute teachers.

Discussion occurred among the Board members regarding contracting out substitute teachers.

Roll Call
Motion Failed: 2 In favor 3 opposed
(Thornton, Celentano, Kanka)

L. Executive Session — Executive Session

Gayzik

WHEREAS, N.J.S.A. 10:4-13 requires adoption of a resolution of the Board to go into Executive Session;

BE IT RESOLVED, that the Board, pursuant to the Open Public Meetings Act, New Jersey Title 18A and the Hamilton Township Board of Education Bylaw No. 0166 hereby enters Executive Session to discuss a matter involving:

Resource Matters
1. P.H.
2. A.E.

Board Attorney Updates
1. J.M. –Attorney client privileges

BE IT FURTHER RESOLVED that the minutes of this Executive Session shall be made public following formal action by the Board and/or at the conclusion of any investigation(s), due process proceeding, or litigation, so long as not prohibited by law and so long as the need for maintaining confidentiality no longer exists.

Kanka Celentano
To Recess to Executive Session
Motion Carried: 5 in favor 0 opposed

M. Adjournment — Adjournment

Thornton Kelly
To adjourn the meeting.
Motion Carried: 5 in favor 0 opposed

The meeting adjourned at 11:35 P.M.

Respectfully submitted,

Peter Frascella
Interim Board Secretary

SETTLEMENT & MUTUAL RELEASE AGREEMENT

DUNO CLENOR (DOB: 2/21/2002)
D'OR CLENOR (DOB: 6/4/2003)
NICE CLENOR (DOB: 11/24/2005)

OAL Docket No. EDU 13448-2013 S
Agency Ref. No. 189-8/13

This Settlement and Mutual Release Agreement ("Agreement") is made on this _____ day of _____, 2013, by and between **DULHOMME CLENOR** and the **HAMILTON TOWNSHIP BOARD OF EDUCATION** (hereinafter "Board").

WHEREFORE, DULHOMME CLENOR is the natural father of Duno Clenor, D'Or Clenor, and Nice Clenor (the "Students").

WHEREFORE, DULHOMME CLENOR has a current address of 621 East Howell Street, Hamilton, New Jersey 08610.

WHEREFORE, the Board is organized by the laws of the State of New Jersey with a principal place of business at 90 Park Avenue, Hamilton, New Jersey 08690 in Mercer County.

WHEREFORE, the Board sought payment of tuition for the Students' attendance between January 1, 2013 and June 17, 2013 in a total amount of $18,306.00.

WHEREFORE, on October 25, 2013, DULHOMME CLENOR and the Board participated in a conference and proceeding before the Honorable Patricia M. Kerins and advised Judge Kerins that a settlement has been reached. The parties then placed the terms of the settlement on the record before Judge Kerins.

WHEREFORE, the parties seek to memorialize the terms of the agreement reached on October 25, 2013 in a written settlement agreement and release.

NOW THEREFORE, the undersigned parties hereby agree as follows:

1. DULHOMME CLENOR shall pay the Board a total maximum amount of $4,500.00. On or before February 20, 2014, DULHOMME CLENOR shall pay the Board $4,000.00. On or before June 30, 2014, DULHOMME CLENOR shall pay the Board $500.00.

2. DULHOMME CLENOR shall contact the Director of Administration to coordinate the payments described in Paragraph 1. All checks shall be issued to the Hamilton Township Board of Education. Upon receiving payment, the Board shall provide a receipt of such payment to DULHOMME CLENOR.

3. If DULHOMME CLENOR fails to comply with the terms of payment described in Paragraph 1, the Board shall have the right to seek payment of tuition in the full amount of $18,306.00. The Board shall have the right to enforce this Agreement in the Superior Court of New Jersey, Mercer County.

4. DULHOMME CLENOR agrees that Students were not eligible to attend school in the District between January 1, 2013 and June 17, 2013 and waives any and all rights to challenge the District's decision that the Students were not eligible to attend school in the District with the Commissioner of Education, state or federal court, or in any other forum.

5. The parties mutually agree to **RELEASE, WAIVE AND FOREVER DISCHARGE,** through the date of full execution of this Agreement, each other from any and all claims and causes of action, in law or in equity, whether known or unknown, whether asserted or unasserted, contingent or otherwise, arising from or relating directly or indirectly to the Students' education, special education program, placement, IEP, related services, discipline, counseling, and/or attendance within the District from the beginning of the Students' enrollment in District, including but not limited to: (a) compensatory education; (b) reimbursement of any medical, behavioral, or education evaluations; (c) transportation; (d) any claim of improper placement, supervision, monitoring and/or implementation of the Students' educational programming; and/or (e) attorney fees and expert witness fees. By way of further illustration, this Mutual Release and Waiver also includes, but is not limited to, any claim concerning and/or alleging a denial of FAPE, discrimination, state or federal constitutional rights violations, state or federal civil rights violations, monetary damages, pain and suffering, personal injury, property damage, reimbursement, prevailing party status, attorneys fees and costs, and expert fees, claims or causes of action arising under state or federal statutes, regulations, or common law, including but not limited to the New Jersey statutes and regulations pertaining to special education (inclusive of N.J.A.C. 18A:46-1 et seq. and N.J.A.C. 6A:14 et seq.), the New Jersey Law Against Discrimination, N.J.A.C. 10:5-1 et seq., the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., Section 504 of the Rehabilitation Act, 29 U.S.C. §701 et seq., the American with Disabilities Act, 42 U.S.C. §12101 et seq., the New Jersey Constitution, the United States Constitution, and the Civil Rights Act, 42 U.S.C. §1983, §1985, and §1988.

6. This Agreement constitutes the full and complete agreement of the parties and may not be changed or modified absent mutual agreement of the parties. This Agreement is binding upon the parties and their respective heirs, assigns or successors in interest.

7. This Agreement shall be governed by and construed in accordance with New Jersey law.

8. The terms and conditions of this Agreement shall be kept strictly confidential and will not be disclosed to any individual that is not acting directly on behalf of any party. In the event the Agreement is required to be disclosed in any litigation, including an action to enforce the Agreement, the party or parties involved shall make every effort to have it disclosed to the court *in camera* and subject to an appropriate protective order maintaining the confidentiality of the Agreement to the fullest extent possible.

9. The parties hereby verify, affirm and represent that they have each had the opportunity to discuss the terms of this Agreement with counsel, that they understand its contents and are entering into this Agreement voluntarily and with a full understanding of its meaning.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

Date: 1/17/14

DULHOMME CLENOR, Father
of Duno Clenor, D'Or Clenor, and Nice Clenor

Date: 2/28/14

AL Gayzik

JEFF HEWITSON, President
HAMILTON TOWNSHIP BOARD OF EDUCATION

CAPEHART SCATCHARD
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FAX TRANSMITTAL COVER SHEET

NAME	COMPANY	FAX #
Hon. Patricia M. Kerins, ALJ	Office of Administrative Law	(609) 689-4100

FROM: Sanmathi Dev

RE: D.C. o/b/o D.C., D.C. & N.C. v. Hamilton Township Board of Education
Our File No. 1555-11136

DATE: May 7, 2014

Total number of pages (including cover sheet): 15

If you do not receive all the pages, please call back as soon as possible.

Original mailed: ☒ Yes ☐ No

Operator, Date & Time Sent: _____ Confirmation #:_____

MESSAGE:

3135755

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270-14

D.B., on behalf of minor child, E.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal on behalf of his son in January 2014. The Board filed a counterclaim for tuition reimbursement. Petitioner could not be reached for a pre-hearing telephone conference on April 7, 2014, and failed to appear for an in-person conference scheduled for April 30, 2014. The ALJ then scheduled a hearing date in the Office of Administrative Law for June 27, 2014 to consider the Board's counterclaim. Subsequently, however, the Board waived its request for tuition reimbursement.

The ALJ found that the petitioner failed to appear at the in-person conference and the respondent Board waived its claim for tuition. Accordingly, the ALJ determined that the matter should be dismissed for failure to prosecute.

The Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

June 25, 2014

OAL DKT. NO. EDU 03046-14
AGENCY DKT. NO. 316-12/13

D.B., on behalf of minor child, E.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision. Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge that this matter is appropriately dismissed for failure to prosecute.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/25/14

Date of Mailing: 6/25/14

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 03046-14
AGENCY DKT. NO. 316-12/13

D.B. on behalf of E.B.,
Petitioner,
v.
BOARD OF EDUCATION OF WEST ORANGE
ESSEX COUNTY,
Respondent.

D.B., pro se, failed to appear

Stephen Christiano, Esq., for respondent, Board of Education of West Orange

Record Closed: May 5, 2014 Decided: May 13, 2014

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, D.B. on behalf of E.B. (D.B. or petitioner) filed an appeal of the residency determination by the Board of Education of West Orange. (Board) The Board

filed a counter claim for tuition reimbursement. On March 14, 2014, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A telephone pre-hearing was scheduled for April 7, 2014. I was unable to reach petitioner by phone for the conference. An in-person conference was scheduled for April 30, 2014. Notices to the parties were mailed on April 7, 2014.

FINDINGS OF FACT

Based on the procedural record in the file, I **FIND** the following **FACTS**:

Petitioner was sent a notice dated March 31, 2014 for a telephone pre-hearing conference on April 7, 2014. Petitioner could not be reached at the time of the conference. Petitioner was sent a notice dated April 7, 2014, of the in-person conference on April 30, 2014. Petitioner failed to appear for the conference. At that time I scheduled a hearing date of June 27, 2014 for the Board's tuition reimbursement claim. On May 5, 2014, I received a letter from The Board stating that it will waive its counterclaim for tuition reimbursement. To date, petitioner has not attempted to contact me to explain his failure to appear.

CONCLUSIONS OF LAW

N.J.A.C. 1:1-14.4(a) provides that, if after appropriate notice, a party does not appear in a proceeding scheduled by the Clerk of OAL, the judge may direct the Clerk to return the matter to the transmitting agency if the judge does not receive an explanation for the nonappearance within one day. Petitioner was informed by notice dated March 31, 2014 of a telephone pre-hearing conference for April 7, 2014. He could not be reached for the pre-hearing conference. Petitioner was informed by notice dated April 7, 2014 that an in person conference was scheduled for April 30, 2014, yet

he failed to appear for the conference. In addition the Board waived its counter claim for tuition reimbursement.

For the above reasons, I **CONCLUDE** that petitioner failed to appear at the in-person conference and respondent waived its claim for tuition reimbursement therefore this matter should be dismissed for lack of prosecution.

ORDER

It is **ORDERED** that D.B.'s application for relief be **DISMISSED** pursuant to N.J.A.C. 1:1-14.4, and The Board's claim for tuition reimbursement is waived. I **DIRECT** the Clerk to return the matter to the Commissioner of the Department of Education for appropriate disposition.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

5-13-14

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: MAY 13, 2014

Date Mailed to Parties: MAY 14, 2014

ljb

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

1. Notice of Pre-Hearing Conference of April 7, 2014, dated March 31, 2014
2. Notice of In-Person Status Conference of April 30, 2014, dated April 7, 2014
3. Letter from Respondent Waiving Tuition Reimbursement

273-14

AGENCY DKT. NOS. 60-3/14 and 155-6/14

LEARNING CENTER FOR EXCEPTIONAL CHILDREN,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

Before the Commissioner is petitioner Learning Center for Exceptional Children's (LCEC) motion for reconsideration of the Commissioner's May 12, 2014 denial of a stay of the Department of Education's (Department) February 14, 2014 decision denying petitioner's "Request to Establish a Special Education Program or Service" in a facility on Scoles Avenue in Clifton. LCEC has simultaneously moved for emergent relief – in the form of the removal of its Scoles Avenue, Clifton, operations from conditional approval status.

A review of petitioner's motion for reconsideration reveals that LCEC has failed to meet the standards of the applicable regulation – *N.J.A.C.* 6A:3-1.15(b)(2). Petitioner has not, in accordance with *N.J.A.C.* 6A:3-1.15(b)(2)(ii), presented any material "newly-discovered evidence" that was not previously discoverable by due diligence. No newly ascertained misrepresentations or misconduct by respondent's representatives – which could not have been previously known – are now presented by petitioner, pursuant to *N.J.A.C.* 6A:3-1.15(b)(2)(iii). Finally, no new developments in legal precedent are offered by petitioner in support of its motion, pursuant to *N.J.A.C.* 6A:3-1.15(b)(2)(iv), and no cognizable "mistakes" – as referenced in *N.J.A.C.* 6A:3-1.15(b)(2)(i), have been shown to have been made by respondent or the

Commissioner. Indeed, petitioner's current arguments are similar to those it submitted in March 2014.

Perhaps the most salient reason for denying the motion for reconsideration is that the May 12, 2014 stay denial pertained to a now-superseded action by the Department. More specifically, on May 12 the Commissioner declined to interfere with the Department's decision not to approve petitioner's operations at its Scoles Avenue (Clifton) facility. However, after petitioner moved for the stay, the Department gave conditional approval to LCEC's Scoles Avenue operations. Reconsidering the May 12, 2014 stay denial would therefore be an exercise in futility, since the action which had been the subject of the stay request is now a nullity. Accordingly, the Commissioner denies petitioner's motion for reconsideration.

Petitioner's remaining application will be forwarded to the Office of Administrative Law (OAL) for an emergent hearing. A review of the papers submitted by the parties reveals insufficient facts and joinder of issues for a determination by the Commissioner at this time.

In sum, Petitioner's motion for reconsideration is denied and its application for emergent relief is forwarded to the OAL for a hearing on an emergent basis.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/25/14

Date of Mailing: 6/26/14

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36.

274-14

ELIZABETH MARCINEK,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the denial of her application for certification as a Learning Disabilities Teacher-Consultant. Petitioner holds Certificates of Eligibility with Advanced Standing (CEAS) as both a Teacher of Students with Disabilities and Teacher of Elementary School, but holds neither provisional nor standard certification. Petitioner contended that the New Jersey State Board of Examiners' (Examiners) refusal to substitute her experience as a teacher for the requisite standard instructional certification was arbitrary, capricious and unreasonable. The Examiners argued that petitioner has never participated in the Provisional Teacher Program, successful completion of which is required pursuant to *N.J.A.C.* 6A:9-8.3 *et seq* in order to obtain standard certification in New Jersey. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner bears the burden of proving that she is entitled to the certification she seeks; to be eligible for standard certification in any instructional area, a candidate must possess a provisional certificate and successfully complete a State-approved district training program while employed provisionally in a position requiring the appropriate instructional certificate; *N.J.A.C.* 6A:9-17.13 allows an applicant to provide the Examiners with evidence of alternative education and/or experience that the applicant believes is equivalent to areas of deficiency in an application for certification; the Examiners were more than reasonable in their determination that petitioner's private school teaching experience is not a substitute for the training program required to achieve standard certification; formal certification is not necessarily required in a private school; and petitioner's argument that her failure to receive provisional certification was the private school's fault is without merit. The ALJ concluded that the Examiner's determination that petitioner was ineligible for certification should be affirmed.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 14828-13
AGENCY DKT. NO. 224-9/13

ELIZABETH MARCINEK,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	
RESPONDENT.	:	

This case was initiated by petitioner when the respondent State Board of Examiners denied her application for certification as a learning disabilities teacher-consultant. Upon review of the record and the Initial Decision of the Office of Administrative Law,[1] the Commissioner concurs with the determination of the Administrative Law Judge that the Board of Examiner's decision to deny petitioner's application was neither arbitrary, capricious nor unreasonable.

Accordingly, the Initial Decision is adopted as the final decision in this matter, summary decision is granted to respondent, and petitioner's cross-motion for summary decision is denied. The petition is herewith dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/25/14
Date of Mailing: 6/27/14

[1] Neither party filed exceptions to the Initial Decision.

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *N.J.S.A.* 18A:18A:6-9.1.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 14828-13
AGENCY DKT. NO. 224-9/13

ELIZABETH MARCINEK,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Joseph Roselle, Esq., for petitioner Elizabeth Marcinek (Schenck, Price, Smith and King, attorneys)

William Hanna, Deputy Attorney General, for respondent, State Board of Examiners (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: April 16, 2014 Decided: May 16, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Elizabeth Marcinek (Marcinek), challenges the denial by the respondent, State Board of Examiners (the Examiners), of her application for

certification as a Learning Disabilities Teacher-Consultant (LDT-C). Marcinek filed a petition of appeal with the Commissioner of Education (the Commissioner) on September 16, 2013. An answer was filed on behalf of the Examiners on October 15, 2013, and the contested case was transmitted to the Office of Administrative Law on October 16, 2013.

The Board of Examiners filed a Motion for Summary Decision on February 7, 2014. Marcinek replied via cross-motion filed on March 5, 2014, which she supplemented via letter dated March 13, 2014. The Examiners replied on March 21, 2014. Oral argument was conducted on March 25, 2014. On April 16, 2014, at my request, the parties supplemented the record with certifications from Marcinek and Secretary to the Examiners Dr. Robert Higgins, at which time the record closed.

ISSUE PRESENTED

N.J.A.C. 6A:9-13.10 sets forth the requirements for LDT-C certification as follows[1]:

> (b) To be eligible for the standard educational services certificate with a learning disabilities teacher-consultant endorsement, a candidate shall:
>
> 1. Hold a master's or higher degree from a regionally accredited college or university;
>
> 2. Hold a standard New Jersey or out-of-State instructional certificate; and
>
> 3. Have three years of successful teaching experience.
>
> (c) A candidate who satisfies (b) above also shall complete one of the following:
>
> 1. A Department-approved graduate program for the preparation of learning disabilities teacher-consultants;
>
> 2. A consultant-level master's degree in educational disabilities from an NCATE accredited program; or

[1] LDT-C is an endorsement to the Educational Services Certificate.

> 3. A minimum of 24 semester-hour graduate credits chosen from the areas listed below.

It is uncontroverted that Marcinek meets all the requirements for certification, with the exception of the requirement that she hold a standard New Jersey or out-of-state instructional certificate. At issue is whether the Examiners arbitrarily, capriciously and unreasonably refused to substitute Marcinek's experience as a teacher for the requisite standard instructional certification, and thus grant her application for certification as an LDT-C.

FINDINGS OF FACT

The material facts are not in dispute, and I **FIND** as follows:

Marcinek is the holder of Certificates of Eligibility with Advanced Standing (CEAS) both as a Teacher of Students with Disabilities and Teacher of Elementary School. She holds neither provisional nor standard instructional certification. In answers to Requests for Admissions served by the Examiners, Marcinek admitted that she "has never personally filed or sent paperwork to any state authority, agency or board in connection with obtaining a Provisional or Standard Certificate." She has taken no affirmative steps to obtain provisional or standard teaching certification.

Marcinek taught science from September 2007 through September 1, 2010, at Youth Consultation Service (YCS), a State-approved private school. She confirmed via certification that she worked collaboratively with colleagues in her school building, often discussing the preparation of lesson plans and teaching methods with seasoned teachers. She mentions two colleagues in particular, Terry Ryan and Regina Lowery, who she feels offered extensive assistance to her. Marcinek notes, however, that she "[does] not recall whether Ms. Ryan or Ms. Lowery were ever officially assigned to be [her] mentor(s) under a State-approved mentoring program." Marcinek points out that neither Ryan nor Lowery supervised her work. At no time did the YCS principal or any other school representative issue a final recommendation for standard licensure to the Department on Marcinek's behalf.

Higgins explained via certification that while a private school like YCS can provide a State-approved district training program for a teaching candidate, the process through which to do so is prescribed by regulation. Pursuant to N.J.A.C. 6A:9-8.5(a)(1), the non-public school must enter into a written agreement with the Department on a candidate-by-candidate basis. The agreement would provide for registration of the candidate with the Provisional Teacher Program; confirm the assignment of a mentor; and include the school principal's commitment to abide by Department rules and regulations during the provisional period. Higgins writes that "to my knowledge, the infrastructure was in place at YCS to allow Petitioner to meet the State-approved district training requirement," and he points out that in the past, YCS has entered into individual written mentoring agreements with the Department. But it did not do so on behalf of Marcinek. Marcinek places the blame for her lack of appropriate certification squarely at YCS's feet, stating it was the school's responsibility, not hers, to file any necessary paperwork with the Department. During her employment at YCS, Marcinek received satisfactory evaluations.

In May 2010, Marcinek enrolled in a State-approved program at Montclair State University that leads to certification as an LDT-C. She graduated from this program in 2012. In or about October 2012, Marcinek applied for a credential review, through which she sought to demonstrate to the Examiners that her education and experience could substitute for the standard instructional certification she lacks. On July 25, 2013, via written decision, the Examiners voted to deny Marcinek's request for issuance of an LDT-C certificate. This appeal followed.

CONCLUSIONS OF LAW

Both the Examiners and Marcinek seek relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to

interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision. There are no material disputed facts which require a plenary hearing, and the Examiners are entitled to judgment as a matter of law.

Marcinek carries the burden of demonstrating by a preponderance of the credible evidence that she is entitled to the certification she seeks. Farrar v. State Bd. of Exam'rs, EDU 13763-08, Initial Decision (April 27, 2010), aff'd, Comm'r (July 26, 2010), <http://lawlibrary.rutgers.edu/oal/search.html>. The Commissioner will "not disturb the decision [of the Examiners] unless the appellant has demonstrated that the Board [of Examiners] or the Commissioner acted in a manner that was arbitrary, capricious or contrary to law." N.J.A.C. 6A:4-4.1; Farrar, supra, EDU 13763-08 (citing Fisher v. State Bd. of Exam'rs, 96 N.J.A.R.2d (EDU) 58). Where there is room for two opinions, action is not considered arbitrary or capricious when exercised honestly and upon due

consideration, even though court may believe that an erroneous conclusion has been reached. Bayshore Sewerage Co. v. Dep't of Envt'l Prot., 122 N.J. Super. 184, 199 (App. Div. 1973).

N.J.A.C. 6A:9-17.13 allows an applicant to provide the Board with evidence of alternative education and/or experience that the applicant believes is equivalent to areas of deficiency in an application for certification. The Examiners do not waive requirements; rather, they determine if the experience presented is equivalent to the requirements for issuance of the certificate at issue. The Examiners have the discretionary authority to consider alternative experience, and to accept it where they determine that the experience establishes a one-to-one correspondence with regulatory requirements. Hutchinson v. Bd. of Exam'rs, EDU 16373-12, Initial Decision (April 5, 2013), aff'd, Comm'r (May 15, 2013), <http://lawlibrary.rutgers.edu/oal/search.html>. I **CONCLUDE** that the Examiners' unwillingness to substitute Marcinek's teaching experience for the requirement that she hold standard instructional certification was reasonable and entitled to deference.

To be eligible for standard certification in any instructional area, a candidate must possess a provisional certificate and successfully complete a State-approved district training program while employed provisionally in a position requiring the appropriate instructional certificate. N.J.A.C. 6A:9-8.8. The CEAS's held by Marcinek are the starting point on the path to standard instructional certification. These are certificates with lifetime validity that the Examiners issue to candidates who meet degree, testing, and professional education requirements. N.J.A.C. 6A:9-6.4(b). The CEAS merely authorizes its holder to seek employment, and the candidate may not assume responsibility for a job assignment in a public school until having been issued a provisional certificate. N.J.A.C. 6A:9-6.4(c). The provisional certificate is a two-year certificate issued to candidates who "have met requirements for initial employment as part of a State-approved school district training program or residency leading to standard certification." N.J.A.C. 6A:9-6.2. To be eligible for provisional certification, candidates must be "registered in the provisional teacher program upon employment . . . ." N.J.A.C. 6A:9-8.2.

The road to standard certification then continues with participation in a mentoring program, the components of which are outlined with specificity in N.J.A.C. 6A:9-8.4. A candidate like Marcinek, who holds a CEAS, must meet at least once per week with her mentor for the first four weeks of the assignment; all contact time must be recorded in a log developed as part of the mentoring plan; and the mentor must have completed a comprehensive mentor-training program.

The regulatory scheme thus reflects a thoughtfully designed process that awards a standard teaching certificate only to candidates who have completed a rigorous teacher-training program, to include provisional teaching experience under the mentorship of an experienced colleague who has been trained to properly introduce the novice teacher to district curricula, student assessment policies, and training on the school district's evaluation rubric, including setting and assessing student learning through student growth objectives. N.J.A.C. 6A:9-8.4(c)(1). This process can be completed through employment as a teacher in a nonpublic school, but only if, "[p]rior to enrolling any candidate in a teacher training program, the individual with the authority to execute binding documents on behalf of the nonpublic school . . . [enters] into a written agreement with the Department agreeing to comply with all requirements pursuant to N.J.A.C. 6A:9-8.4(b) and (d)." See N.J.A.C. 6A:9-8.5(a)(1).

Thus, the regulations do not contemplate the informal give and take inherent in any collegial employment setting, but rather, a formal training process that includes assignment of an individual mentor; observation and feedback; opportunities to observe effective practice; guidance in self-assessment on the Commissioner-approved teaching practice instrument; and regular mentor/mentee meetings. N.J.A.C. 6A:9-8.4(d). Marcinek nowhere asserts that she participated in anything that approximated the extensive training contemplated by the regulations, and accordingly, her argument that she was unfairly denied certification must fail. She describes YCS as a helpful and collegial work environment where she experienced professional successes, but she does not describe the one-to-one mentorship relationship the regulations require. I **CONCLUDE** that the Examiners were more than reasonable in their determination that

Marcinek's teaching experience is not a substitute for the training program required to achieve standard certification.[2]

Moreover, Marcinek unsuccessfully argues that her failure to receive provisional certification was YCS's fault and YCS's fault alone. Her reliance on Ruiz v. Fort Lee Board of Education, EDU 8187-10, Final Decision (August 17, 2011), <http://lawlibrary.rutgers.edu/oal/search.html>, is misplaced. Ruiz concerned an employee in a public school setting, where formal provisional certification is an absolute legal prerequisite to employment. Thus, the district there was remiss in not ensuring that Ruiz was properly credentialed to provide instruction to its students. Conversely, formal certification is not necessarily required at a private school, and the applicable regulation does not suggest otherwise. N.J.A.C. 6A:9-8.5 provides only that a candidate for certification, such as Marcinek, be "employed as a classroom teacher in a position that would require an appropriate instructional certification in a public school."

Indeed, many private school teachers have no interest or desire to achieve certification; it was thus incumbent on Marcinek to assist in moving forward the provisional certification and mentoring process that would have lead to her standard certification. If she attempted to do so, but was stymied by YCS's refusal to cooperate, this is nowhere alleged in her pleadings or certification. Ruiz cautions that "[t]he teaching staff member has some responsibility for ensuring that he is properly certificated . . . ." This caution is particularly apropos in the private school setting, where certification is not necessarily required, and where employees do not necessarily need to complete the certification process to legally deliver instruction and hold continued employment.

In summary, Marcinek has not met her burden of demonstrating a one-to-one correspondence between her teaching experience and the formal process required to earn standard certification. I **CONCLUDE** that the Examiners' determination that Marcinek was ineligible for certification as a LDT-C should be affirmed.

[2] It is noteworthy that the three years of teaching experience completed by Marcinek is a requirement additional to the required standard instructional certification. N.J.A.C. 6A:9-13.10.

ORDER

It is hereby **ORDERED** that the Board of Examiners' motion for summary decision be **GRANTED** and the petition of appeal is hereby **DISMISSED**. Marcinek's cross-motion for summary decision is **DENIED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 16, 2014
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: May 16, 2014

Date Mailed to Parties: MAY 19 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

275-14

OAL DKT. NO. EDU 06516-14
AGENCY DKT. NO. 140-5/14

A.R.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON APPLICATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law, and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia, supra,* and *N.J.A.C.* 6A:3-1.6. In particular, the Commissioner notes that – while petitioner has met the threshold standard of irreparable harm because the opportunity to participate in prom with the date of one's choosing cannot be regained once lost[1] – applicants seeking extraordinary remedy must also demonstrate a likelihood of success on the merits of the underlying appeal and show that the balance of interests and equities under the circumstances rests in their favor, neither of which petitioner herein has done.

Accordingly, the recommended Order of the OAL denying petitioner's application is adopted for the reasons expressed therein as modified above. Because the present proceeding has fully

[1] The Commissioner is cognizant of the well-established principle that a prohibition from attending events of the type at issue herein does not, in and of itself, rise to the necessary level of irreparable harm so as to warrant extraordinary remedy. However, harm is "irreparable" when there can be no adequate after-the-fact remedy in law or in equity, and monetary damages cannot adequately redress the intangibles of a lost experience after the event is over. In cases denying similar applications for emergent relief, the irreparable nature of the harm and the degree or severity of the harm have frequently been addressed together; they are, however, two separate factors, and it is on the basis of the *severity* of the harm – which pertains to the weighing of interests – and not its irreparable nature that applications of this type actually fail. *Martin A. Domacasse v. Board of Education of the North Warren Regional School District, Warren County*, decided by the State Board April 17, 1996; *L.J. on behalf of minor child, S.J., and David Wickham v. Board of Education of the Township of Manchester, Ocean County*, decided by the Commissioner May 2, 2003.

disposed of all issues in dispute between the parties, no further proceedings are necessary, and this matter is, therefore, dismissed with the request that the Clerk of the OAL return the file to the agency pursuant to *N.J.A.C.* 1:1-3.3.

IT IS SO ORDERED.[2]

COMMISSIONER OF EDUCATION

Date of Decision: 6/25/14

Date of Mailing: 6/27/14

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 06516-14
AGENCY DKT. NO. 140-5/14

A.R.,

Petitioner,

v.

BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT,

Respondent.

Charles E. Ray, Esq., for petitioner (Kuchinsky and Rotunno, P.C., attorneys)

John B. Comegno, II, Esq., for respondent (Comegno Law Group, P.C., attorneys)

BEFORE **JOSEPH A. ASCIONE,** ALJ:

Petitioner A.R. brings this emergent-relief application to the Commissioner of Education seeking an order from this tribunal and/or the Commissioner compelling respondent Board of Education of the Hunterdon Central Regional School District to allow her chosen guest, C.R., to accompany her to the June 6, 2014, Hunterdon Central Regional High School (HCRHS) Senior Ball (prom). On May 6, 2014, Michael Carr, vice principal of HCRHS, informed petitioner verbally that her chosen guest would not be permitted to attend. In response to petitioner's inquiry of the reason for the denial, Mr. Carr advised petitioner, "It is confidential." On May 9, counsel for petitioner requested in writing the grounds for the denial, and included waivers of confidentiality executed by

C.R. and petitioner. On May 22, counsel to respondent provided by letter the grounds for the denial as C.R.'s history of assault and illegal-substance use. Specifically, counsel referenced the following Board policies:

a) 5600, Pupil Discipline/Code of Conduct Policy;
b) 9160, Public Attendance at School Events; and
c) 5850, Social Events/Meetings.

Respondent's counsel's letter also related the factual incident of February 27, 2012, an assault on school property resulting in a charge, plea and sentence of one year's probation; a September 11, 2012, substance-abuse evaluation, subsequent to a possession-of-marijuana charge; and C.R.'s truancy for more than thirty days resulting in an April 2012 drop of C.R. from the student rolls. On May 29, 2014, petitioner's counsel made this application for emergent relief to the Commissioner of Education. On May 30, 2014, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-8.2. A hearing was conducted on June 5, 2014, and the record closed on that date.

STATEMENT OF FACTS

The following facts are not disputed, and I **FIND**:

Petitioner is a high school senior at HCRHS. HCRHS accepted her ticket order form for the prom for two persons. Her intended guest is C.R. C.R. is a former student of HCRHS.

HCRHS suspended C.R. for ten days in 2012 after an assault against another student on HCRHS property. He did not return to attend classes after that date. HCRHS dropped C.R. from its student rolls in April 2012 based upon C.R. having thirty days' unexcused absences. C.R.'s family inquired of the procedures to reenroll C.R. in the school. C.R.'s family thereafter abandoned pursuit of reenrollment.

The Guest Contract (P-E; R-7) requires that a potential prom guest provide an acknowledgement of the applicability of the HCHRS Code of Conduct during the prom and abstinence from alcohol or drugs during and prior to the event. C.R. signed this acknowledgement. Below the signature area is a section to be completed by the school a prospective guest is attending. C.R. did not complete the bottom portion of the form. Petitioner explained in paragraph 7 of her May 29, 2014, certified petition the guest's reasons for not completing the bottom portion of the form, but there is no corroborating direct evidence of the facts represented past the first sentence of paragraph 7.

TESTIMONY

Suzanne Cooley

Suzanne Cooley (Cooley) testified that for the last two years she has served as the principal of HCRHS, and worked for the Board as a vice principal for ten years prior to that. She testified that the Board anticipates 720 attendees at the HCRHS prom, and that the guest applications are reviewed by a committee comprised of the principal and five vice principals. Upon reviewing the guest contract, the inquiry focuses on the lower portion of the form to determine if a guest may not be suitable. If any guest would not be allowed to participate in his or her own school's activities, or had been involved in a violent event on his or her school's property, the guest would not be allowed to attend the prom at HCRHS.

In C.R.'s case, the committee became aware that C.R. attended HCRHS previously. His school records were considered in the evaluation of his status as a potential guest. The evaluation resulted in a determination not to allow C.R. to attend the prom. Michael Carr, the senior-class vice principal, verbally informed petitioner that her guest request had been denied. Cooley testified that the analysis is consistent with the prior processes of the committee as to similarly situated problematic guests. She testified that there are appeals to her after the committee decision, then to the superintendent, the Board, and, finally, to the State. Petitioner did not take advantage of any other appeal process. She testified that she is satisfied with the group of 720 attendees; however, she did acknowledge that there might be some attendees with a

previous violence or drug issue who had been allowed to attend. She characterized them as less of a safety concern than C.R. She testified that petitioner is not prohibited from attending the prom, and approximately 40 percent of the attendees attend without a guest.

CERTIFICATIONS AND REPRESENTATIONS OF COUNSEL

Petitioner and Cooley submitted certifications in support of and in opposition to the appeal. Counsel for respondent identified sections of the Board's policies that were identified in Cooley's certification as evidence of concern regarding C.R. as a guest. Policy 5850, Social Events, states, "Participation in school events is not a right and may be denied to any pupil who has demonstrated disregard for rules of the school." (R-2.) Policy 9160, Public Attendance at School Events, states, "The Board may bar the attendance of any person at a school event whose conduct constitutes a disruption." (R-3.) Policy 5600, Pupil Discipline, within Section B, Rules of Conduct, of the Board's regulations, proscribes insubordination, creating disorder, use of or threatening physical force, or endangering the safety of others. (R-5.) Specifically, concern was expressed regarding an observation contained in the March 9, 2012, Manifest Determination (R-1). There, Sharon Rider noted that in regard to the February 27, 2012, altercation, C.R. commented that he would "punch the kid harder when I come back to school." A report of a Hunterdon Healthcare substance-abuse evaluation of C.R., dated September 11, 2012, states that C.R. initially denied drug use, and then acknowledged an arrest for drug use, stating that he had no additional drug use after that event. Hunterdon Healthcare recommended an intensive outpatient program. No proof of completion of such a program was submitted.

Petitioner's counsel represented that C.R. has been back to HCRHS, installing carpeting in connection with his job at Flemington Department Store. However, petitioner provided no evidence of such occurrence during school hours, or that interaction with students occurred at that time. The Board's counsel did not have any knowledge of this claim. Petitioner claims irreparable harm if she is not allowed to bring the guest of her choice, her "high school sweetheart" of approximately four years, to the prom. Petitioner also claims that the Board's analysis of C.R.'s prior school record is

arbitrary, capricious, and/or unreasonable. Other guests from outside the school that are not attending HCRHS are not subject to the scrutiny applied to petitioner's intended guest.

ADDITIONAL FACTUAL FINDINGS

As a result of the testimony of Cooley, the certifications of Cooley and petitioner, representations of counsel, and the evaluation of the credibility of Cooley, I further **FIND**:

1. Participation in school events is not a right, and may be denied to any pupil who has demonstrated disregard for rules of the school.

2. The Board, through its personnel, may bar the attendance of any person at a school event whose conduct constitutes a disruption.

3. The Board, through its personnel, properly considered the previous student records of C.R. in connection with the determination of whether he is a suitable guest.

4. The Board had an obligation to consider all available information as to a potential guest in connection with its obligation to safeguard the students.

5. Petitioner has not shown any conduct on the part of the Board that indicates motivation of the Board that is arbitrary, capricious, or unreasonable.

6. Petitioner is not prohibited from attending the prom.

7. Petitioner may bring any guest to the prom, subject to the vetting procedure exercised by the Board through its personnel.

8. The Board has many policies regarding its review process of proposed attendees at the prom. These policies were appropriately applied to C.R., the proposed guest of petitioner.

9. Irreparable harm has not been shown by petitioner as a result of the inability to bring the guest of her choice to the prom.

DISCUSSION

Petitioner must meet the requirements for emergent relief set forth in N.J.A.C. 6A:3-1.6(b), and must show that the Board acted arbitrarily, capriciously or unreasonably in denying petitioner's intended guest's attendance at the prom.

N.J.A.C. 6A:3-1.6 sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in her favor.

The Board argues that the application for emergent relief should be dismissed because the petitioner cannot point to any irreparable harm that would arise to petitioner from C.R. not being able to attend the prom with petitioner. Historically, schools have exercised their discretion to deny a student's guest for a multitude of reasons. Sometimes the guest has been another student at the school, and at other times it has been a guest from another school or an individual who has already completed schooling. The aggrieved student is left in the position of finding another guest, attending alone, or not attending. Many an attendee at a prom attends alone. The Board represented that 40 percent would be attending alone at this year's prom. Agency case law exists that supports both that there is and that there is not irreparable harm. It is clear that the deprivation of the privilege of attendance at the prom does involve significant financial and emotional harm to petitioner, even if the latter may be of limited duration or extent. See D.B. ex rel. E.B. v. Bd. of Educ. of Pinelands Reg'l Sch. Dist., EDU 04102-08, Initial Decision (May 9, 2008), adopted, Comm'r (May 9, 2008), <http://njlaw.rutgers.edu/collections/oal/>. On the other side, the administrative law judge in M.L. and M.L. ex rel. S.L. v. Ewing Township Board of Education, EDS 4950-09, Final Decision (June 15, 2009), <http://njlaw.rutgers.edu/collections/oal/>, found that prevented attendance at Senior Fest would not cause the petitioner to suffer irreparable harm. However, here, it is not the petitioner's own attendance at the event, but the inconvenience of not being allowed to bring her initially intended guest to the event that petitioner seeks this tribunal to rule will cause irreparable harm. This tribunal cannot accept petitioner's unreasonable expectation that her guest would not be vetted, or that as a former student his school record would not be considered in the vetting process. These events should have been anticipated. Allowing the guest's attendance in and of itself would be a disruptive event. If this is "irreparable harm," it is occasioned by petitioner's own judgment in seeking to bring her intended guest to the prom.

Petitioner has shown that she will be disappointed or aggrieved if her nonstudent guest cannot accompany her to the prom. However, that expectation does not rise to the level of irreparable harm.

This tribunal is cognizant of the difficulties in proving that a school board's prom decision causes irreparable-harm, which serves to effectuate the dismissal of most

contentions that a school board has acted in an arbitrary, capricious or unreasonable manner. Thus, it would appear that there is no practicable means to challenge these decisions. However, while the Commissioner's standard in reviewing a school board's discretionary determinations is quite strict, and a board is often not second-guessed, it is appropriate that board actions are subject to review on the merits and not perfunctorily upheld without consideration of the merits solely because, "the prom is a privilege and no irreparable harm can exist."

Other prongs of the Crowe v. DeGioia test require an analysis of whether the legal rights are settled. It can hardly be said to be clear in the present circumstances. As stated above, agency case law exists that supports both that there is and that there is not irreparable harm. Board decisions within the area of their discretionary powers may not be upset unless patently arbitrary, without rational basis, or induced by improper motives. K.L. v. Bd. of Educ. of Matawan/Aberdeen High Sch. Dist., 91 N.J.A.R.2d (EDU) 74 (citing Kopera v. W. Orange Bd. of Educ., 50 N.J. Super. 288, 294 (App. Div. 1060)). The best that can be said is that each case is very fact-sensitive. This reasoning similarly applies to the prong dealing with the likelihood of success on the merits.

The final prong is a balancing of the equities and the interests of the parties. Petitioner is allowed to attend the prom, her initially intended guest is not. The potential injury to be sustained by petitioner pales in comparison to the potential injuries that could be suffered by the Board. In the event the guest is allowed to attend the prom and follows through with his threat to further injure the student he previously assaulted, that injury could be more severe than the potential injury of petitioner. In the presence of the knowledge of the guest's previous threat, the school could be subject to punitive damages, by an injured student, if the Board/Commissioner reverses the presently proposed action.

Turning to the standard to reverse a Board's action, petitioner must show that the actions to preclude her guest from attending the prom are arbitrary, capricious or unreasonable. Petitioner's arguments are that the extent of the scrutiny (review of the student records while he attended the school) this proposed guest received is

substantially disparate from that of other potential guests who are not in school, but working. There is no support either factually or legally to this argument. It may be that C.R.'s school records were available, and the records of another proposed guest who is out of school and in the workforce were not available. That is the nature of a vetting process, sometimes more or less information is available. Nowhere has the standard required that the vetting process be substantially equivalent treatment. Here, the proposed guest was a former HCRHS student. It is reasonable to anticipate that those records would be reviewed in connection with the vetting process. Petitioner argues that the policies identified regarding discipline and attendance at school events are designed to apply only to students at HCRHS. However, it is reasonable that the same standards be applied in the vetting process of guests. To anticipate otherwise would be unreasonable. Petitioner argues that the Guest Contract is an enforceable contract, and the policies are understood to be applicable regarding actions while attending the prom and/or during a short period of time leading up to the prom in regard to alcohol or drug use. Again, no legal or factual support is offered for this position. This is not to say that there is no support for this position anywhere. Neither petitioner's counsel nor I have found any. I would suggest that no binding contract exists. The proposed guest must accept the policies applicable to the prom. That acceptance is both a condition precedent and condition subsequent to the acceptance of the Guest Contract by the HCRHS. The acceptance of the contract is conditioned on the favorable conclusion of the vetting process by the HCRHS. The proposed guest has a reasonable expectation that some review will occur, especially where the bottom half of the Guest Contract provides for more information from a school district that the guest is anticipated to be attending. If inquiry of another school district is not applicable, as is the case here, it would be unreasonable for petitioner or the proposed guest to think that no vetting would occur. Petitioner has not shown any arbitrary, capricious or unreasonable action in the process of vetting petitioner's proposed guest.

CONCLUSION

After hearing the arguments of petitioner and respondent and considering the documents submitted, I **CONCLUDE** that petitioner is not entitled to emergent relief because the proofs submitted fail to establish the necessary elements to grant

emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there has been no showing that petitioner will suffer irreparable harm if the requested relief is not granted, or that she has a likelihood of prevailing on the merits. There has been no showing that the law is well settled in this area, and petitioner has not shown that the balancing of harm to the parties weighs in favor of petitioner.

For the foregoing reasons, petitioner's request for emergent relief is **DENIED**. Respondent's determination to deny petitioner's guest attendance at the prom is within its discretion, which has been exercised reasonably considering the HCRHS's concern for the welfare and safety of the other students, staff, teachers and administrators attending, and the likelihood that C.R.'s attendance could potentially create a disruption of the prom.

ORDER

It is hereby **ORDERED** that petitioner's request for emergent relief is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 6, 2014
DATE

JOSEPH A. ASCIONE, ALJ

cmo

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

Susan Cooley

LIST OF EXHIBITS

For Petitioner:

P-A Senior Ball Ticket Order Form with attachments

P-B Letter to Hunterdon Central Regional High School from Charles E. Ray, Esq., dated May 9, 2014, with fax transmittal sheets

P-C Authorization for the Release of Personal Information

P-D Letter to Charles E. Ray, Esq., from Rebecca D. Boudwin, Esq., dated May 21, 2014

P-E Guest Contract

For Respondent:

R-1 Student Attendance Profile regarding C.R.

R-2 District Policy 5850 – Social Events/Meetings

R-3 District Policy 9160 – Public Attendance at School Events

R-4 District Policy 5600 – Pupil Discipline

R-5 Regulation – 5600 – Pupil Discipline

R-6 Hunterdon Healthcare Substance Abuse Evaluation

R-7 Guest Contract

276-14E

OAL DKT. NO. EDU 6407-14
AGENCY DKT. NO. 109-5/14

W.M., on behalf of minor child, J.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
BOARD OF EDUCATION OF THE BOROUGH OF JAMESBURG, MIDDLESEX COUNTY,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioner has failed to demonstrate entitlement to emergent relief pursuant to *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons expressed therein. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/25/14
Date of Mailing: 6/27/14

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

DENYING EMERGENT RELIEF

OAL DKT. NO. EDU 06407-14

AGENCY DKT. NO. 109-5/14

W.M. ON BEHALF OF J.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

BOROUGH OF JAMESBURG, MIDDLESEX COUNTY,

Respondent.

W.M., appearing pro se

Stephen Bacigalupo, Esq. for respondents (Schwartz, Simon, Edelstein and Celso, attorneys)

Record Closed: June 4, 2014 Decided: June 4, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, W.M., the parent of an eighth grade student, has filed a petition for emergent relief, challenging the decision of the Jamesburg Board of Education (the Board) prohibiting her son, J.M., from attending an eighth grade graduation ceremony.

The matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case on May 19, 2014.[1] Oral argument took place on June 4, 2014, at which time the record closed.

FINDINGS OF FACT

The underlying facts are as set forth in the verified complaint and certification filed in opposition to the application, and I **FIND**:

In or about February 2014, petitioner was informed via letter from her son's school that he had failed Spanish, a course that he was enrolled in during the first two marking periods, and that this might affect his ability to attend eighth grade graduation. She became understandably concerned and followed up with the teacher and guidance counselor. The counselor called back a few days later and advised in a voicemail message that based on School District Policy # 5411, J.M. would not be able to attend the graduation ceremony. That policy is explained in the student handbook, which provides that "[o]nly students in good academic standing will be permitted to participate in eighth grade graduation ceremonies and receive a diploma." Petitioner contends that this language left her unclear whether failing an academic subject would make her son ineligible for graduation; in any event via letter dated "April 2014" the Superintendent of Schools advised her that J.M. had failed Spanish for the year, and that "[f]ailure of any subject area will affect your child's graduation and participating in the graduation ceremony."

Petitioner urges that despite the above information, she remained unclear throughout the year that her son might fail Spanish, and that if he did, this would adversely affect his ability to attend graduation. She notes that the website used to keep parents informed of school progress was not up-to-date, and that grades were missing for her son only because he was pulled-out of class for academic support in language arts. She urges that his failure and the resultant exclusion from graduation are unfair.

[1] It is noted for the record that petitioner has been attempting since April 16, 2014, to perfect the filing of an emergent relief petition with the Commissioner of Education. Several letters from the Department of Education explain the process to her.

Certifications submitted by school personnel, however, make it plain that the District was quite communicative regarding her son's poor academic performance. As early as October 2013, report cards sent home to the parents expressed concerns about J.M.'s poor attitude in class, his noncompliant behaviors, his lack of preparation for class, and how these factors were negatively impacting his academic success. This report card provoked no response from his parents. At the end of the course, the parents were advised that their son had received a grade of 64; again they did not contact school personnel. It was not until the Superintendent of Schools advised that J.M.'s participation in graduation may be affected per her February 2014 letter, that petitioner reacted to her son's academic crisis. The classroom teacher certified that he never heard from J.M.'s parents after they received the October report card noting his lack of cooperation and poor preparation for class. They did not attend a parent-teacher conference; petitioner noted that she did not do so because she finds that such conferences are often unhelpful. The parents contacted the Spanish teacher only after J.M. had completed the course, in or about April 2014.

Moreover, the classroom teacher certified that any missing grades would not have salvaged the course for J.M., as his mother asserts. Rather, those grades were omitted in an effort to bolster J.M.'s grades and not penalize him for being pulled-out for language arts assistance two days per week. Since half the class grade was based on class participation, the teacher notes that J.M. would have easily passed the course if he had shown focus in class and had been an active and cooperative participant in class activities.

Board policy makes it clear that passing all courses is a prerequisite to participation in the graduation ceremony. Policy 5411 provides that successful completion of the program of studies entails "achievement of the instructional objectives set for each course of study..." (Verona certification, exhibit C)

CONCLUSIONS OF LAW

In accordance with N.J.A.C. 1:1-12.6, emergency relief may be granted "where authorized by law and where irreparable harm will result without an expedited decision

granting or prohibiting some action or relief connected with a contested case..." My determination in this matter is further governed by the standard for emergent relief set forth by our Supreme Court in Crowe v. DeGioia, 102 N.J. 50 (1986), as follows:

> The judge may order emergency relief ....if the judge determines from the proofs that:
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted.
>
> 2. The legal right underlying the petitioner's claim is settled.
>
> 3. The petitioner has a likelihood of success on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the relief is not granted.

The moving party must satisfy all four prongs of the Crowe v. DeGioia standard to establish an entitlement to emergent relief. Id. at 132-35. I **CONCLUDE** that petitioner cannot meet their burden under the Crowe v. DeGioia standard.

Harm is irreparable when there can be no adequate after-the–fact remedy in law or in equity; or where monetary damages cannot adequately restore a lost experience. Nabel v. Board of Education of the Township of Hazlet, EDU 8026-09 (June 24, 2009); Tomlin v Lower Cape May Regional Board of Education, EDU 4952-09. Petitioner views this graduation ceremony as a once in a lifetime opportunity, and no amount of money will be able to restore the ceremony to her son after the fact. I **CONCLUDE** that petitioner has met her burden of demonstrating irreparable harm.

But petitioner cannot demonstrate that the law is settled in her favor, or that she has a likelihood of succeeding on the merits of her claims. In fact, the law is well settled in favor of the Board, which has broad discretion to take the actions needed to effectively operate its public schools. The Commissioner will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) <http://lawlibrary.rutgers.edu/oal/search.html>, citing Thomas v.

Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966). The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960).

Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, at plenary hearing petitioner will have to demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M. v. Moorestown, supra, EDU 2780-07, Initial Decision (February 6, 2008) <http://lawlibrary.rutgers.edu/oal/search.html>. I **CONCLUDE,** based on the record developed for this emergent application, that petitioner is not likely to be able to demonstrate that the actions of this Board were induced by improper motives, or were taken in utter disregard of the circumstances before it.

Indeed, a policy requiring that a student be in good academic standing to attend graduation is a reasonable one; and in my view, it is clear that a student who has failed an academic subject is not in "good academic standing." The Board's policy is entitled to deference. I moreover disagree that the Board, through its administration, was less than communicative with petitioner; the record reveals multiple efforts to communicate in regard to her son's academic difficulties.

Finally, a balancing of the equities militates against granting the relief sought by the petitioner. The rights of this petitioner are less weighty than those of the Board because participating a graduation ceremony is a privilege. See: M.A.A. v Edison Bd. of Educ., EDU 4134-98, Initial Decision (May 29, 1998), aff'd, Comm'r (June 12, 1998), <http://njlaw.rutgers.edu/collections/oal/>; N.B. v Gloucester Bd. of Educ., EDU 6740-11 Initial Decision (June 14, 2011)<http://njlaw.rutgers.edu/collections/oal/>. Although I entirely appreciate why he so strongly wishes to attend, J.M. has no right to attend this ceremony, and for this reason petitioner cannot demonstrate a harm weighty enough to

tip the balance in favor of a grant of extraordinary relief. Conversely, the Board has a strong and valid interest in the effective and orderly operation of its schools. As the Superintendent of Schools noted in her certification, this is a policy uniformly applied to all eighth grade students, and an exception here would be unfair to J.M.'s classmates and would undermine district policy.

Accordingly, I **CONCLUDE** that the request for emergent relief must be denied.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that petitioner's request for emergency relief is hereby **DENIED**.

This decision on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days, this recommended decision shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 4, 2014

DATE

ELLEN S. BASS, ALJ

#288-14

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND
COMMISSIONER OF EDUCATION

In the Matter of

TRENTON ADMINISTRATORS AND
SUPERVISORS ASSOCIATION,

Petitioner,

-and- PERC DOCKET NO. TO-2014-001

CITY OF TRENTON BOARD OF EDUCATION,

Respondent.

-and-

MONIQUE HARVEY,

Petitioner, AGENCY DOCKET NO. 190-8/13
OAL DOCKET NO. 14855-13

-and-

CITY OF TRENTON BOARD OF EDUCATION,

Respondent.

Appearances:

For the Petitioners Trenton Administrators & Supervisors Association and Monique Harvey, Robert M. Schwartz, attorney

For the Respondent/Respondent, Parker McCay, attorneys (Carl Tanksley, of counsel)

DECISION

On August 27, 2013, Petitioner Trenton Administrators and Supervisors Association ("Association") filed a Petition for a Contested Transfer Determination with the Public Employment Relations Commission ("PERC"). The petition alleges that Monique

Harvey was transferred from supervisor to coordinator for disciplinary reasons in violation of N.J.S.A. 34:13A-25.[1/]

On August 22, 2013, Petitioner Monique Harvey filed a verified Petition of Appeal with the Commissioner of Education seeking a determination that the Trenton Board of Education (Board) violated her tenure rights by transferring her from the tenured position of supervisor to the non-certified position of coordinator. The petition further asserts that the Board did not obtain prior approval from the Executive County Superintendent for use of the unrecognized title of coordinator.

The Board denies the allegations in both cases and has asserted affirmative defenses. On October 16, 2013, petitioner's Commissioner of Education petition was transferred to the Office of Administrative Law ("OAL") for hearing as contested cases. On April 21, 2014, petitioner filed a motion to consolidate the Commissioner of Education and PERC cases and for a determination of predominant interest.

On May 30, 2014, Administrative Law Judge Susan M . Scarola issued an Order for Consolidation and Determination of Predominant Interest finding the matters should be consolidated

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1/ This provision of the New Jersey Employer-Employee Relations Act provides: "Transfers of employees by employers between work sites shall not be mandatorily negotiable except that no employer shall transfer an employee for disciplinary reasons."

and that the Commissioner of Education has the predominant interest.[2/]

Having independently evaluated the record and considered the Administrative Law Judge's Order, the Chair of the Public Employment Relations Commission on July 2, 2014, acting pursuant to authority delegated to her by the full Commission, and the Acting Commissioner of Education on July 10, 2014, made the following determination in this matter.

JOINT ORDER

The matters should be consolidated for hearing before the Administrative Law Judge for the reasons set forth in her initial decision. That decision is modified to note that the Association has filed a Contested Transfer Petition only and not an unfair practice charge with PERC. The Commissioner of Education has the predominant interest. The Administrative Law Judge will first perform an analysis of all education law issues and then make a determination as to whether the reason for Harvey's transfer was disciplinary in violation of N.J.S.A. 34:13A-25. The Administrative Law Judge will first offer recommended findings of fact and conclusions of law to both the Public Employment Relations Commission and the Commissioner of Education, disposing

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2/ The ALJ's decision states that the Trenton Administrators and Supervisors Association is not the Petitioner in the PERC matter. PERC has not received an amended Contested Transfer Petition substituting Harvey for the Association.

of all issues in controversy through a single initial decision under N.J.A.C. 1:1-18.3 and consistent with N.J.A.C. 1:1-17.8(a). Upon transmittal of the initial decision to both agencies, the underlying record will be forwarded to the Commissioner of Education to determine whether the education laws were violated. The Commissioner's decision and the complete record will then be sent to the Public Employment Relations Commission to render a decision on whether petitioner was transferred for predominately disciplinary reasons.

DECISION RENDERED BY THE COMMISSIONER OF EDUCATION ON JULY 10, 2014

David C. Hespe
Acting Commissioner
Trenton, New Jersey

DECISION RENDERED BY THE CHAIR OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION ON JULY 2, 2014

P. Kelly Hatfield
Chair
Trenton, New Jersey



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER OF CONSOLIDATION AND DETERMINATION OF PREDOMINANT INTEREST

MONIQUE HARVEY,
Petitioner
v.
CITY OF TRENTON BOARD OF EDUCATION, MERCER COUNTY,
Respondent.

OAL DKT. NO. EDU 14855-13
AGENCY DKT. NO. 190-8/13

And

MONIQUE HARVEY,
Petitioner,
v.
CITY OF TRENTON BOARD OF EDUCATION, MERCER COUNTY,
Respondent.

PERC DKT. NO. TO-2014-0001

Robert M. Schwartz, Esq., for petitioner (Freedman and Lorry, P.C., attorneys)

Carl Tanksley, Jr., Esq., for respondent (Parker McKay, L.L.C., attorneys)

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioner Monique Harvey appeals to the Commissioner of the Department of Education (Commissioner or DOE) the determination of respondent City of Trenton Board of Education (Board) to transfer her from her alleged tenured position of supervisor to the non-certified position of coordinator, thereby violating her rights to tenure. She also contends that the Board did not obtain prior approval from the executive County superintendent for use of the unrecognized title of coordinator.

The petitioner also appeals this matter to the Public Employment Relations Commission (PERC), contending that the basis for her transfer from supervisor to coordinator was disciplinary and in violation of the New Jersey Employer-Employee Relations Act. The Board denies all the allegations and contends that the transfer was in response to staffing needs, that the withholding of petitioner's increment for 2013–2014 was due to petitioner's conduct at a meeting with the superintendent of schools and a human resources representative, and that PERC has no jurisdiction.[1]

PROCEDURAL HISTORY

On August 6, 2013, the petitioner filed a petition seeking a contested transfer determination with PERC under docket number TO-2014-0001. An answer to the complaint was filed by respondent on September 25, 2013. The matter remains pending in PERC and has not been transmitted to the Office of Administrative Law (OAL).

On August 22, 2013, the petitioner filed a verified petition of appeal with the Commissioner. On October 11, 2013, an answer was filed by the respondent.[2] On October 16, 2013, the Commissioner transmitted the matter to the OAL for hearing as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. On April 21, 2014,

[1] The petitioner advised that the petitioner's union, the Trenton Administrators and Supervisors Association, is neither a party to nor involved in the PERC or the DOE matter.
[2] An extension of time to file the answer had been granted by the Commissioner.

the Board filed a motion to consolidate and for a determination of predominant interest. The petitioner has indicated that she has no objection to the motion.[3]

LEGAL ANALYSIS AND CONCLUSION

Two issues are presented here for resolution: (1) whether these matters should be consolidated for hearing, and (2) if the matters are consolidated, which agency has the predominant interest.

Consolidation

Pursuant to N.J.A.C. 1:1-17.1, a party may move to consolidate a case that has been transmitted to the OAL with any other contested case involving common questions of fact or law between identical parties or between any party to the filed case and any other person, entity or agency. The following factors shall be considered in making the determination:

> 1. The identity of parties in each of the matters;
>
> 2. The nature of all the questions of fact and law respectively involved;
>
> 3. To the extent that common questions of fact and law are involved, the saving in time, expense, duplication and inconsistency which will be realized from hearing the matters together and whether such issues can be thoroughly, competently, and fully tried and adjudicated together with and as a constituent part of all other issues in the two cases;
>
> 4. To the extent that dissimilar questions of fact or law are present, the danger of confusion, delay or undue prejudice to any party;
>
> 5. The advisability generally of disposing of all aspects of the controversy in a single proceeding; and
>
> 6. Other matters appropriate to a prompt and fair resolution of the issues, including whether a case still

[3] The parties urge that the Department of Education has the predominant interest.

> pending in an agency is contested or is ripe to be declared contested.
>
> [N.J.A.C. 1:1-17.3.]

In this matter, the petitioner and respondent in the PERC matter and in the Department of Education matter are identical parties. Common questions of fact and law are involved in both matters, and to the extent that dissimilar questions of fact or law are present, they are easily determined without danger of confusion, delay or undue prejudice. To that extent, consolidation saves time and expense, and avoids duplication and inconsistency. Moreover, it would be advisable to dispose of all aspects of this controversy in a single proceeding. Each party has consented to consolidation for these very reasons.

Based on the above, I **CONCLUDE** that the within appeals should be consolidated for hearing.

Predominant Interest

The issue then remains as to whether PERC or the Commissioner has the predominant interest in the consolidated matters pursuant to N.J.A.C. 1:1-17.5. A brief review of the facts is necessary to make this determination.

The petitioner alleges that the following occurred:

On or about May 9, 2013, she was called into a meeting with the superintendent of schools and Kathy Smallwood Johnson (then in charge of human resources), to discuss her placement for the 2013–2014 school term. The petitioner was not advised that she had the right to bring a representative to the meeting. After an alleged verbal altercation, the superintendent advised the petitioner that she had acted disrespectfully. Subsequent to the meeting, the petitioner and the union were advised that petitioner's increment for the 2013–2014 school year would be withheld. The Board acted on the increment withholding at its meeting on or about May 28, 2013. The petitioner was also notified that she was being transferred to a coordinator title from her supervisor title in

which she had allegedly accrued tenure. She contends that the transfer to the lesser coordinator position was disciplinary and retaliatory in nature.[4]

The petitioner contends that such action by the Board, if proven, would constitute an unfair labor practice and require intervention by PERC.

The Board alleges that its decision to transfer the petitioner was the result of staffing-change decisions that had been made prior to the meeting, and that the petitioner became disrespectful when she was advised that her current position was being abolished. The petitioner then refused to accept the Board's decision as to her placement and her conduct at the meeting became unacceptable. As a result, the Board determined to withhold her increment for the 2013–2014 school year. The Board also contends that the position formerly held by the petitioner was not one that permitted her to accrue tenure.

The Board contends that PERC has no jurisdiction because the contested transfer was not between worksites; it was not disciplinary; administrative remedies had not been exhausted; and managerial prerogative permitted the Board to transfer employees within their certification and within their same worksite for non-disciplinary reasons.

While the parties have indicated their consent that the education and unfair labor-practice matters should be consolidated for hearing, it needs to be determined whether the Commissioner or PERC has the predominant interest in the consolidated matters.

According to the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -43, (Act) and the regulations promulgated thereunder, N.J.A.C. 19:19-1.1 to -5.2, "the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes." N.J.S.A. 34:13A-2. Under the Act, public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act" and "[r]efusing to negotiate in

[4] The petitioner's allegations are accepted as the underlying facts to determine this motion.

good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative." N.J.S.A. 34:13A-5.4(a)(1), (5). Any public employee or his or her representatives may file with PERC a charge that a public employer has engaged in an unfair practice. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-1.1 to -1.2. If PERC finds that an employer engaged in an unfair practice, PERC shall order the employer to cease and desist from such practice. N.J.S.A. 34:13A-5.4(c).

The Commissioner of Education has jurisdiction to hear all controversies and disputes arising under the school laws, including tenure and placement disputes. N.J.S.A. 18A:6-9.

The principles of administrative comity and deference inform predominant-interest determinations in order to "circumvent collisions between administrative agencies occupying similar areas and to avoid conflicts in agency decisions over the same subject matter" and to identify the agency that "is in the best position by virtue of its statutory status, administrative competence and regulatory expertise to adjudicate the matter." Hinfey v. Matawan Reg'l Bd. of Educ., 77 N.J. 514, 532 (1978).

The agency with predominant interest over a common issue is to render the final decision on all issues within the scope of its predominant interest. N.J.A.C. 1:1-17.6(b). In a consolidation order, the issues relating to the predominant issue are specified and the agency having the authority to issue a final decision on those issues is identified. Ibid. Upon conclusion of the case, after consideration of all of the issues, a single initial decision is rendered that disposes of all issues in controversy. N.J.A.C. 1:1-17.8(a). The initial decision is first filed with the agency with the predominant interest. Then, upon rendering a final decision, the predominant-interest agency transmits the matter to the other agency to decide any remaining issues and to consider any remedies within its jurisdiction. N.J.A.C. 1:1-17.8(b).

When a matter involves multiple State agencies that are asserting jurisdiction, the five factors enumerated at N.J.A.C. 1:1-17.5(a) must be applied to determine which agency, if any, has the predominant interest in the conduct and outcome of the matter:

> 1. Whether more than one agency asserting jurisdiction over a common issue has jurisdiction over the issue, and if more than one agency has jurisdiction, whether the jurisdiction is mandatory for one of the agencies.
>
> [N.J.A.C. 1:1-17.5(a).]

"Mandatory" jurisdiction means that jurisdiction attaches upon the filing of a complaint, and once affixed, the agency has no discretion to abstain from the exercise of its jurisdictional powers or to refrain from processing the complaint to completion. Hinfey, supra, 77 N.J. at 528. The common issue in the instant consolidated matters is whether the Board retaliated against the petitioner by denying her increment and by transferring her to the position of coordinator from the position of supervisor.

The Commissioner has jurisdiction over all disputes arising from the school laws. N.J.S.A. 18A:6-9. Thus, the Commissioner has jurisdiction over the common issue of the propriety of employee transfer or discipline. N.J.S.A. 18A:28-9 (local board of education has power to reduce number of staff); Dore v. Bd. of Educ. of Bedminster, 185 N.J. Super. 447 (App. Div. 1982) (Commissioner has power to review decisions of board for arbitrariness and capriciousness); see also Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 23–24 (1973) (local board has the power to "employ, promote, transfer and dismiss" and Commissioner has the power to review those decisions).

In the action before PERC, the petitioner claims that the Board improperly disciplined her by transferring her from her previous position, an unfair labor practice. Thus, PERC also has jurisdiction over the common issue.

PERC has exclusive jurisdiction over the unfair-practice charge. N.J.S.A. 34:13A-5.4(c). Nonetheless, the Supreme Court has recognized that such "exclusive jurisdiction" is not without exceptions. In Hackensack v. Winner, 82 N.J. 1 (1980),

petitioner firefighters appealed the city's denial of promotions on grounds: (1) that they were arbitrarily denied promotions under the civil service laws; and (2) that they were discriminated against because of their union activities. The petitioners appealed to the Civil Service Commission (CSC), which dismissed both allegations. The petitioners also filed a claim with PERC, and PERC subsequently made the opposite finding. On appeal, the Court held that PERC did not have mandatory jurisdiction over the unfair-practice charge because the matter involved factual allegations that were integral aspects of a valid civil-service complaint. However, PERC has mandatory, exclusive jurisdiction over unfair employer practices that do not involve an individual's civil service or other agency-protected rights, "such as a refusal to negotiate in good faith." Winner, supra, 82 N.J. at 26 (citing N.J.S.A. 34:13A-5.4(a)(5)).

> 2. Whether the common issue before the two agencies is, for either agency, the sole, major or dominant issue in dispute and whether its determination would either serve to moot the remaining questions or to affect substantially their resolution.
>
> [N.J.A.C. 1:1-17.5(a).]

Wrongful conduct equated with unfair practice may "so dominate or color the entire case" that its determination might substantially influence or render moot the resolution of other issues. Winner, supra, 82 N.J. at 25. However, in this case the sole issue is the Board's action in transferring the petitioner and withholding her increment, and the reasons for doing same.

The common issue before PERC and the Commissioner is the sole issue before the Commissioner. In this matter, the Commissioner's resolution of the common issue—whether the petitioner was improperly transferred and her increment withheld—could moot the remaining issue of unfair practice or affect substantially its resolution. The Commissioner could find that the Board did not violate the law and made a simple employment transfer due to staffing needs, and that the increment was withheld for inappropriate and unprofessional conduct. This finding could resolve the unfair-practice dispute because if the transfer and withholding were lawful and appropriate, there would be no unfair-labor-practice issue or jurisdiction for PERC to consider it.

Based on the foregoing, it is more likely that the Commissioner's decision on the common issue could substantially resolve the issue before PERC than it is likely that PERC's decision on the common issue could resolve or moot the disciplinary charge before the Commissioner.

> 3. Whether the allegations involve issues and interests which extend beyond the immediate parties and are of particular concern to one or the other agency.
>
> [N.J.A.C. 1:1-17.5(a).]

"[A]n unfair practice charge may raise issues of wide public significance affecting important interests extending beyond those of the immediate parties; in such a case, it may be appropriate to invoke PERC's jurisdiction even though the matter is otherwise cognizable before another administrative agency." Winner, supra, 82 N.J. at 26. It is not reasonable to conclude that the allegations presented here involve issues and interests that extend beyond the immediate parties and are of particular concern to PERC. This matter appears to be limited to the parties involved, and there appear to be no widespread public policy concerns.

> 4. Whether the claims, if ultimately vindicated, would require specialized or particularized remedial relief available in one agency but not the other.
>
> [N.J.A.C. 1:1-17.5(a).]

If there are requests for relief which may not be granted by the agency with the predominant interest, the decision shall specify clearly which determination by the agency with the predominant interest shall bind the agency subsequently considering any application for relief. Balsley v. N. Hunterdon Reg'l Sch. Dist. Bd. of Educ., 117 N.J. 434, 446 (1990).

The Commissioner has broad remedial powers in the administration of public education law. Id. at 442–43. PERC also has broad remedial powers, including the

authority to "provide broad remedial relief to compensate victimized employees for economic injury; to eliminate, correct, and prevent unfair practices; and to improve the overall working climate for public employees." Winner, supra, 82 N.J. at 24. PERC specifically offers the remedy of a cease-and-desist order that is not available in matters before the Commissioner if it finds that a party has engaged in or is engaging in unfair practice. Before any such action could occur, though, a determination must be made by the Commissioner of Education as to whether the Board exceeded its authority when it determined to transfer the petitioner from her position of supervisor to coordinator and then withheld her increment as a result of her conduct at the meeting. There may be no need for PERC to be involved in this matter at all if the transfer and withholding of the increment were lawful.

> 5. Whether the common issue is clearly severable from the balance of the controversy and thus will permit non-duplicative factual and legal determinations by each agency.
>
> [N.J.A.C. 1:1-17.5(a).]

As to whether the common issue is clearly severable from the balance of the controversy, the Court in Hinfey, for example, severed charges relating to sex discrimination embedded in the educational curricula from charges of employment discrimination. Winner, supra, 82 N.J. at 26 (discussing Hinfey, supra, 77 N.J. 514). The Hinfey Court addressed whether the Division on Civil Rights or the Commissioner of Education had jurisdiction over complaints charging sex discrimination in the curricula of public schools. Hinfey, supra, 77 N.J. at 517. One count alleged that females were excluded from certain types of sports. Another count alleged that the Board of Education was engaged in discriminatory "employment practices," e.g., male domination in the administration, and the failure to recognize maternity leave as a disability. Thus, in Hinfey, the two issues involved different facts. However, here, the common issue is clearly not severable. While each agency could make non-duplicative legal determinations—PERC on the unfair-labor-practice issue, the Commissioner on the school-law issues—severance would result in duplicative fact-finding because the same facts inform each matter.

Weighing the above five factors, **I CONCLUDE** that the Commissioner of the Department of Education has the predominant interest in the consolidated matters.

ORDER

I ORDER that the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** has the predominant interest as to the issues within his jurisdiction, and that the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** will determine remaining issues, if any, within its jurisdiction. Accordingly, the initial decision will offer recommended findings of fact and conclusions of law to both the Commissioner and PERC, disposing of all issues in controversy through a single decision under N.J.A.C. 1:1-18.3 and consistent with N.J.A.C. 1:1-17.8(a). Upon transmittal of the initial decision to both agencies, the underlying record will first be forwarded to the Commissioner of the Department of Education to resolve the education-law issues which are within his jurisdiction. The Commissioner's decision and the complete record will then be sent to PERC, which will decide any unfair-labor-practice issues, if such remain.

This order may be adopted, modified or rejected by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** and the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** which/who by law are authorized to make a final decision in this matter. The **PUBLIC EMPLOYMENT RELATIONS COMMISSION** and the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** are encouraged to consult and coordinate with each other before issuing a final order. If the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** and the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** do not adopt, modify or reject this order within forty-five (45) days and unless such time limit is otherwise extended, this recommended order shall be deemed adopted by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** and the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION.**

May 30, 2014
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

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M.R., on behalf of minor child, B.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY; MELVIN H. KREPS MIDDLE SCHOOL; RONALD E. BOLANDI, SUPERINTENDENT; ALICE WEISMAN, PRESIDENT; A. LEVERITT, PRINCIPAL,	:	DECISION
RESPONDENTS.	:	

SYNOPSIS

Petitioner – the mother of B.R. – alleged that the respondent Board placed her child in an inclusion math and social studies class against her objection to such placement. Petitioner sought modification of the school district's procedures for class placement and reimbursement for private school tuition which she incurred. Respondent Board denied the allegations, and filed a motion for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue of material fact in dispute, and the matter is ripe for summary decision; petitioner claimed that the Board engaged in systematic racial discrimination by placing Hispanic and minority children in inclusion classes that were conducted with less academic rigor than non-inclusion classes; her assertions were based solely on her own observations and the affidavits of her two sons, who claim they were placed in classes that were not sufficiently challenging and that included disruptive students; despite her claims, no evidence was presented to show that disruption occurred in the classroom due to disabled or inclusion students; likewise, petitioner provided no probative evidence regarding her contention that respondents engaged in systematic racial discrimination by placement of students in inclusion classes. The ALJ concluded that petitioner failed to present sufficient evidence to permit this matter to go to a hearing, and accordingly granted the Board's motion for summary decision and dismissed the petition.

Upon a full and independent review, the Commissioner concurred with the findings and conclusion of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 7/11/14

289-14

OAL DKT. NO. EDU 2275-09
AGENCY DKT. NO. 337-11/08

M.R., on behalf of minor child, B.R.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EAST WINDSOR REGIONAL SCHOOL DISTRICT, MERCER COUNTY; MELVIN H. KREPS MIDDLE SCHOOL; RONALD E. BOLANDI, SUPERINTENDENT; ALICE WEISMAN, PRESIDENT; A. LEVERITT, PRINCIPAL,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision.

Upon his full and independent review, the Commissioner concurs with the Administrative Law Judge – for the reasons expressed in her decision – that summary decision is appropriately granted to the Board.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/11/14
Date of Mailing: 7/11/14

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 2275-09
AGENCY DKT. NO. 337-11/08

M.R. ON BEHALF OF B.R.,
Petitioner,
v.
EAST WINDSOR REGIONAL SCHOOL DISTRICT;
MELVIN H. KREPS MIDDLE SCHOOL;
RONALD E. BOLANDI, SUPERINTENDENT;
ALICE WEISMAN, PRESIDENT OF BOARD
OF EDUCATION; and A. LEVERETT, PRINCIPAL,
Respondents.

David H. Coates, Esq., appearing for petitioner (Turp, Coates, Essl and Driggers, attorneys)

Kenneth Skroumbelos, Esq., appearing for respondents (Hill Wallack, LLP, attorneys)

Record Closed: May 1, 2014 Decided: May 27, 2014

BEFORE **SUSAN M. SCAROLA**, ALJ:

STATEMENT OF THE CASE

Petitioner M.R. alleges that her minor child, B.R., was placed in an inclusion math and social studies class even though she objected to such placement. She seeks modification of the school district's procedures for class placement, together with reimbursement for private school tuition incurred. She also contends that there is systematic racial discrimination with regard to placement of students in inclusion classes. Respondents East Windsor Regional School District; Melvin H. Kreps Middle School; Ronald E. Bolandi, superintendent; Alice Weisman, president of the Board of Education; and A. Leverett, principal of Kreps Middle School (collectively, respondents or district) deny the allegations.

PROCEDURAL HISTORY

On November 10, 2008, M.R. filed a petition against respondents alleging that her son B.R., a non-classified student, was placed in inappropriate math and social studies inclusion classes.

On November 20, 2008, respondents filed with the Commissioner a motion to dismiss in lieu of an answer and contended that the petition advanced no cause of action.

On January 20, 2009, in response to the motion to dismiss, petitioner filed a second petition with an additional paragraph alleging:

> Understanding that the inclusion method of instruction is New Jersey practice, the rules were improper in its application. Large numbers of minority students were placed in this two teacher model inclusion classes and it was observed that this class was conducted with less academic rigor as compared to other classes. Even more egregious, I learned that all of the classes were not inclusion, using the two teacher model, despite being told that they were. This process of systematically placing minority children in a less demanding class deprived my child of the challenge he

> needed and the proper education the district promised to provide.

The second petition also included an additional request:

> That the selection of children to participate in the two teacher model inclusion classes should be random and not be based on race or gender.

On February 20, 2009, the matter was transmitted to the Office of Administrative Law (OAL) with directions that the petitioner's amended petition was to be considered as a motion for leave to amend the petition, which needed to be decided as a threshold issue. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On July 31, 2013, the Hon. Joseph Martone, ALAJ, to whom the matter had been assigned, regretfully advised the parties that the file for this matter had been misplaced.[1] Upon locating the file, he issued an Order denying the motion to dismiss and determining that the additional pleading would be permitted as an amended pleading in the case.[2] Respondents filed a timely answer to the amended pleading. The matter was re-assigned to me on August 20, 2013.

The respondents filed a motion for summary decision on or about March 4, 2014. The petitioner filed opposition to the motion for summary decision on or about April 22, 2014. The respondents filed a reply on May 1, 2014.

FACTUAL DISCUSSION

For purposes of this motion, the following is accepted as the petitioner's statement of material facts:

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[1] Neither party appeared to have contacted the OAL in the interim to make inquiry as to the status of the case.

[2] Judge Martone noted in his Order, "Even a cursory review of the petition, dated January 20, 2009, reveals that the petitioner is raising issues of serious concern. . . . While I suspect it is unlikely that East Windsor is selecting children based on race or gender, I believe it to be in the public interest to allow the petitioner to present the basis for her claim."

1. Student B.R. completed the fifth grade as an honor roll student. He is not classified and does not require special education.

2. As his sixth-grade year progressed, B.R. stated to petitioner that his math and social studies classes were too slow, contained content he had already learned, and did not challenge him academically.

3. On September 5, 2008, petitioner spoke to Alice Velez, assistant principal of Kreps Middle School, requesting that B.R. be placed in different math and social studies classes since the classes he was assigned to were below his educational level due to the slow pace and redundant nature of the lessons he received.

4. Petitioner subsequently became aware that B.R.'s math and social studies classes were two-teacher inclusion classes which included students with disabilities.

5. Shortly thereafter, petitioner attended and observed the math and social studies classes B.R. was assigned to and other classes that B.R. was not assigned to.

6. Petitioner observed that the inclusion method applied by the Kreps Middle School was incorrect and improper based on the less challenging nature of the inclusion classes and the large numbers of minority and Hispanic students who were placed in the inclusion classes.

7. In an attempt to have B.R. placed in proper math and social studies classes, petitioner contacted Kreps Middle School assistant principal Alice Velez. Ms. Velez informed petitioner that she would have to discuss the matter with the Kreps Middle School principal, A. Leverett.

8. After petitioner explained the situation regarding B.R.'s improper placement, Kreps Middle School principal Ms. Leverett stated to petitioner that she was not changing the class and that was her final decision.

9. In a further attempt to resolve this issue, petitioner contacted Ronald E. Bolandi, superintendent of the East Windsor Regional School District, and advised him that in a prior year her older son was incorrectly placed in a class that was not at his educational level, and that after an investigation into the matter the East Windsor Regional School District placed him in a proper class.

10. Petitioner then asked Mr. Bolandi that B.R. also be placed in a proper class at his academic level.

11. Mr. Bolandi responded via letter dated September 11, 2008, that "No matter which section of Math Course I your son is in, there will be special education students in the class. That does not make these classes any different than classes without special education students." Mr. Bolandi further stated, "I see no reason to overturn Mrs. Leverett's decision."

12. Because Mr. Bolandi's comments were counter to petitioner's own classroom observations, petitioner attended the September 22, 2008, meeting of the East Windsor Regional School District Board of Education to address her concerns.

13. During the Board meeting petitioner asked the president of the Board, Alice Weisman, what she would do if this were a situation involving her child, and Weisman replied, "Just deal with it." The Board further advised petitioner that instead of trying to find a way out of the remedial class, B.R. should see the class as an opportunity to excel since he was already taught the material.

14. Due to the uncompromising nature of the East Windsor school system and the need to ensure that B.R. receives an appropriate education, petitioner was

forced to remove B.R. from Kreps Middle School and place him in a private school at substantial cost and inconvenience to her family.

The petitioner has indicated that the only evidence she has to support the allegations in her statement of facts are her personal observations at the school, and that this is the basis for her claim. The respondents deny the allegations as presented by the petitioner and contend that the petitioner's son and all other students, both classified and unclassified, were properly placed in their classes, and that all social studies and math classes included students with various disabilities.[3] The respondents have provided empirical data to support their position, including the race, gender, and disability proportions in each challenged class, which is uncontroverted by the petitioner.

LEGAL ANALYSIS

Summary decision may be granted only "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). These provisions mirror the summary-judgment language of R. 4:46-2(c) of the New Jersey Court Rules. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2.

When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth, by affidavit, specific facts showing there is a genuine issue resolvable only by an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). Failure to do so entitles the moving party to summary judgment. Brill, supra, 142 N.J. at 529. If the non-moving party's evidence is merely colorable, or is not significantly probative,

[3] The district did note that male classified students significantly outnumbered female classified students, and that this fact was taken into consideration in its placement of students.

summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). An evidentiary hearing is not required if there is no genuine issue of material fact. Contini v. Bd. of Educ., 286 N.J. Super. 106, 121 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

While it is true that a judge is not to "weigh the evidence and determine the truth of the matter," Brill, supra, 142 N.J. at 540, "there is in this process a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Id. at 536. Thus, the competent evidential materials presented must be scrutinized in a light most favorable to the non-moving party, and it must be considered whether a rational fact-finder could resolve the disputed issue in favor of the non-moving party. Id. at 540.

In this matter, the petitioner claims that the Board engaged in systematic racial discrimination by placing Hispanic and minority children in inclusion classes that were conducted with less academic rigor than non-inclusion classes. She relies on her observations, as well as on affidavits from her two sons, who claim that they were placed in classes that were not sufficiently academically challenging and that included disruptive students. She relies on Oberti v. Board of Education of the Clemonton School District, 995 F.2d 1204, 1220, 1222 (3d Cir. 1993), affirming the district court's decision, 801 F. Supp. 1392 (D.N.J. 1992), for the proposition that the court must consider the possible negative effects of inclusion on the other students in the class, contending that if a student with a disability has a disruptive effect on other children, the placement is not appropriate. However, Oberti stands for the proposition that because "[s]chool is one of the most important learning environments for children," "there is no convincing rationale for depriving [the disabled child] of the valuable experience of learning from his nondisabled peers, and learning to interact with them, in school. Likewise, there is no convincing rationale for depriving his nondisabled peers of opportunities of learning from him, and of learning to interact with him, in school." Oberti, supra, 801 F. Supp. at 1404.

In order for a school district to justify its exclusion of a child with a disability from a regular classroom on the basis of disruptiveness, the school district must show that "despite the assistance of supplementary aids and services, and 'after taking all

reasonable steps to reduce the burden to the teacher, the other children in the class will still be deprived of their share of the teacher's attention.' The education of the other children must be 'significantly impaired' by the inclusion of the child with a disability to justify exclusion on this basis." Id. at 1402 (citations omitted). "The preference or presumption in favor of inclusion will not be rebutted unless the school district shows either that the child's disabilities are so severe that he or she will receive little or no benefit from inclusion; that he or she is 'so disruptive as to significantly impair the education of other children' in the class; or that the cost of providing an inclusive education 'will significantly affect other children in the district.'" Ibid. (citation omitted).

Although presented by the petitioner as an issue requiring a hearing, the district does not dispute that B.R. excelled in math and science. In fact, this issue has never been in dispute. There is no evidence of any disruption occurring in class due to disabled or inclusion students, and, indeed, the petitioner never claimed to have seen any. As to academic rigor, the petitioner has presented no qualifications as to how she could assess the instruction level of any given class. As to any alleged curt interchange between the petitioner and the Board, these exchanges alone cannot support a claim of discrimination, even if it were accepted that they had occurred. Other than her conclusive observations and her assessments of student learning, the petitioner has presented no evidence that could require a fact-finding hearing. She has not disputed the statistical evidence provided by the district for the classes her son attended or those she observed. There are simply no facts in dispute to warrant a hearing.

CONCLUSION

When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth specific facts showing there is a genuine issue resolvable only by an evidentiary proceeding. As to the petitioner's claim for tuition reimbursement, she has provided no authority as to why such reimbursement would be available for a non-classified or non-disabled child. As to her claim that the district should modify its procedures for class placement, she has provided no proof why the procedures then in effect were in error or why they needed to be modified. These claims are totally unsupported by any evidence proffered by the petitioner.

As to the petitioner's contention that the respondents engaged in systematic racial discrimination by the placement of students in inclusion classes, she has also provided no probative evidence that could justify the need for a hearing in this matter other than her non-professional observations. The district provided by affidavit empirical evidence and data showing that the composition of each class challenged by the petitioner had similar proportions of disabled and non-disabled students, males and females, and minority and non-minority students. The petitioner has not responded with any proof or evidence of discrimination in the placement of the students, nor has she challenged the accuracy of the statistics provided by the district. Where the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. The petitioner has not presented sufficient evidence to permit this matter to go to a hearing. Taking all the proofs presented by the petitioner as the non-moving party in the light most favorable to her, the conclusion must be that the motion should be granted.

ORDER

I **ORDER** that the respondents' motion for summary decision to dismiss the appeal is hereby **GRANTED**, and the petition is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 27, 2014
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ

Date Received at Agency: May 27, 2014

Mailed to Parties: May 27, 2014

/mel

290-14

LUCY WALKER AND JANET POINSETTE,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY, AND DONALD CARLISLE, DISTRICT SUPERINTENDENT,	:	
RESPONDENTS.	:	

SYNOPSIS

In May 2013, petitioners – taxpayers in Englewood – demanded the termination of respondent Donald Carlisle's contract as Superintendent of Schools with the respondent Board of Education because, *inter alia*, it was never approved by the Executive County Superintendent pursuant to *N.J.A.C.* 6A:23A-3.1. Subsequently, petitioner Janet Poinsette withdrew from the matter.

In May, 2014, the Acting Commissioner approved a separation agreement between the respondent Board and Dr. Donald Carlisle, which rendered this matter moot.

Accordingly, the petition was administratively dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 7/11/14

OAL DKT. NO. EDUOA 9081-13
AGENCY DKT. NO. 100-5/13

LUCY WALKER AND JANET POINSETTE,	:	
	:	COMMISSIONER OF EDUCATION
PETITIONERS,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY, AND DONALD CARLISLE, DISTRICT SUPERINTENDENT,	:	
RESPONDENTS.	:	

The instant controversy was commenced on May 16, 2013, when petitioners applied for the nullification of respondent Carlisle's contract with the respondent Englewood Board of Education (Board), and Carlisle's removal from his position of superintendent of the Englewood school district. Petitioner Poinsette withdrew from the matter in September 2013, leaving Lucy Walker as the sole petitioner.

On or about May 13, 2014, the respondent Board approved an agreement whereby Carlisle would resign from his employment as district superintendent effective June 30, 2014. The agreement had already been signed by respondent Carlisle, and was executed by a Board representative on May 14, 2014. The Commissioner has approved the agreement, in accordance with *N.J.A.C.* 6A:23A-3.2.

With the resignation of respondent Carlisle, the relief requested in the petition is satisfied and the controversy is rendered moot. Accordingly, the petition is administratively dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/11/14
Date of Mailing: 7/11/14

[1] This decision may be appealed to Superior Court, Appellate Division, pursuant to *N.J.S.A.* 18A: 18A:6-9.1.

293-14

MILDRED WAALE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the respondent State Board of Examiners (SBE) determination that she had not met the requirements for certificates of eligibility (CE) for the School Administrator and Principal endorsements. The petitioner asserted that she had completed the requisite coursework for the CEs she sought, and that her prior internship and work experience established a one-to-one correspondence with the 300-hour internship required for the Principal CE. The SBE contended that petitioner had not satisfied the regulatory requirements set forth in *N.J.A.C.* 6A:9-12.4(a) and *N.J.A.C.* 6A:9-12.5(a).

The ALJ found, *inter alia*, that: the petitioner carries the burden of demonstrating by a preponderance of the credible evidence that she is entitled to the certifications she seeks; petitioner has completed four out of five requirements for the issuance of a CE as a school administrator; the requirement in dispute is completion of the 30 graduate credits set forth in *N.J.A.C.* 6A:9-12.4(a)(2) and *N.J.A.C.* 6A:9-12.5(a); while she has completed 30 graduate credits in addition to her MBA, no competent evidence was presented to support petitioner's contention that these credits were in the areas of study required under *N.J.A.C.* 6A:9-12.4(a)(2); moreover, the appropriate representative of Rutgers University, where the credits were earned, affirmatively declined to issue the required Verification of Program Completion Form – which confirms to the SBE that a candidate has completed an approved program of study toward a New Jersey instructional endorsement; regarding her lack of required internship experience for a CE as a principal, petitioner contended that through her many years of prior experience in education, management and leadership, she acquired skills that are suitable to substitute for the 300 internship hours required by regulation; however, the SBE's determination that petitioner's experience is not directly equivalent to the actual responsibilities of a building principal is reasonable, and the regulatory language makes it clear that all 300 hours must be in an internship directly related to the responsibilities of a building principal. The ALJ concluded that the petitioner has not met her burden of demonstrating that the SBE's decision was arbitrary, capricious and unreasonable.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ, and accordingly adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 7/14/14

OAL DKT. NO. EDU 4574-13
AGENCY DKT. NO. 39-2/13

MILDRED WAALE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	
RESPONDENT.	:	

Before the Commissioner is petitioner's appeal of respondent's determination that she has not met the requirements for earning certificates of eligibility for the endorsements of School Administrator and Principal. Upon review of the record and Initial Decision of the Office of Administrative Law (OAL),[1] the Commissioner concludes that the petition must be dismissed.

Issuance of the above referenced certificates of eligibility is conditioned upon the satisfaction of both academic and experiential requirements (internships). The testimony of Rutgers Certification Officer, Amy Wollock, and Robert Higgins, the Director of the Office of Certification and Induction at the New Jersey State Department of Education, revealed that while petitioner's academic and professional credentials are impressive, she has not satisfied the regulatory requirements set forth in *N.J.A.C.* 6A:9-12.4(a) and *N.J.A.C.* 6A:9-12.5(a).

Those regulations direct that, where a candidate has not earned a masters degree specifically in educational leadership, curriculum/instruction, or a recognized field of leadership or management,[2] and has not completed a post-masters certificate program in educational leadership or educational administration and supervision, he or she must also complete a post masters program in a

[1] Neither party has filed exceptions to the Initial Decision.

[2] The Commissioner interprets the phrase "recognized field of leadership or management" to necessarily assume the context of an educational setting.

coherent sequence of 30 semester hour credits which appear on the transcript of an accredited college or university. *N.J.A.C.* 6A:9-12.4(a)(1)(iii) and *N.J.A.C.* 6A:9-12.5(a)(1)(iii). The subject areas to be covered by the 30 semester hours are set forth in *N.J.A.C.* 6A:9-12.4(a)(2) and *N.J.A.C.* 6A:9-12.5(a)(2). Although petitioner did take various post-masters courses, she did not prove that they specifically covered all of the subject areas set forth in *N.J.A.C.* 6A:9-12.4(a)(2) and *N.J.A.C.* 6A:9-12.5(a)(2), or that they constituted a "post-masters program in a coherent sequence of 30 semester hours." *N.J.A.C.* 6A:9-12.4(a)(1)(iii) and *N.J.A.C.* 6A:9-12.5(a)(1)(iii).

As to the experiential requirements for the certificates of eligibility which petitioner seeks, the parties appear to agree that she has satisfied those relative to a School Administrator Certificate of Eligibility. However, the Administrative Law Judge (ALJ) found, and the Commissioner concurs, that petitioner has not completed the 300 internship hours necessary for a Principal Certificate of Eligibility.

In light of the foregoing, the Commissioner cannot conclude that the Board of Examiners was arbitrary, capricious or unreasonable in its determination that petitioner has not yet completed the regulatory requirements for acquiring the certificates of eligibility which she seeks. The Initial Decision is therefore adopted – for exactly the reasons set forth by the ALJ in her thorough and meticulous findings of fact and law – and the petition is dismissed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/14/14
Date of Mailing: 7/14/14

[3] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N..J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04574-13
AGENCY DKT. NO. 39-2/13

MILDRED WAALE,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Dayna Katz, Esq., for petitioner (DiFranceso, Bateman, Coley, Yospin, Kunzman, Davis, Lehrer & Flaum, attorneys)

Geoffrey N. Stark, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: May 5, 2014 Decided: May 30, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Mildred Waale, challenges the State Board of Examiners' (the Examiners) determination that she lacked the requisite qualifications to be granted Certificates of Eligibility (CE) both as a school administrator and as a principal. She filed a petition of appeal before the Commissioner of Education (the Commissioner) on

February 28, 2013. The Examiners filed its answer and the matter was transmitted to the Office of Administrative Law (OAL) for hearing on March 28, 2013. Waale filed a Motion for Summary Decision on August 20, 2013, which the Examiners opposed on September 12, 2013. Waale replied to the Examiners' opposition via letter brief on September 25, 2013. The motion was denied via order dated November 1, 2013. A hearing was conducted on March 12, 2014. Written summations were filed on April 30, 2014, and May 5, 2014, at which time the record closed.

ISSUE PRESENTED

There are five requirements for issuance of a CE as a school administrator. It is uncontroverted that Waale has completed four of the five. N.J.A.C. 6A:9-12.4(a). These include the requirement that she hold a master's degree; that she complete a 150-hour internship; that she pass a State-approved examination; and that she complete five years of successful educational experience in a public or non-public school or school district, or at a regionally accredited higher education setting in New Jersey or out-of State.[1]

Standing between Waale and the certification she seeks is the requirement that she earn thirty credits, as follows:

> 2. Complete a minimum of 30 graduate credits either within the master's program or in addition to it, in the following quality components of preparation to promote student learning as set forth in N.J.A.C. 6A:9-3.4(a)(1) through (6). Candidates shall be promoting the success of every student by:
>
> i. Facilitating the development, articulation, implementation, and stewardship of a vision of learning that is shared and supported by all stakeholders;

[1] The record reveals that the Examiners earlier questioned whether Waale's master's degree met regulatory requirements. Counsel advised at hearing that the Examiners now agree that Waale's MBA meets the requirements of N.J.A.C. 6A:9-12.4(a). Likewise it is uncontroverted that her internship met regulatory requirements relative to the school administrator CE, notwithstanding earlier indications in the record that this might be in dispute.

> ii. Advocating, nurturing, and sustaining a school culture and instructional program conducive to student learning and staff professional growth;
>
> iii. Ensuring management of the organization, operation, and resources for a safe, efficient, and effective learning environment;
>
> iv. Collaborating with faculty and community members, responding to diverse community interests and needs, and mobilizing community resources;
>
> v. Acting with integrity, fairness, and in an ethical manner; and
>
> vi. Understanding, responding to, and influencing the political, social, economic, legal, and cultural context;
>
> [N.J.A.C. 6A:9-12.4(a)(2).]

Candidates for a CE as principal must meet the same thirty-credit requirement, as well complete as an internship that encompasses 300 hours. N.J.A.C. 6A:9-12.5(a)(2); N.J.A.C. 6A:9-12.5(a)(3). The Examiners contend that Waale has not completed the requisite thirty credits and the internship hours required for the principal CE. The regulation describes the required internship as follows:

> Complete a 300-hour internship in educational leadership aligned to the professional standards for school leaders in N.J.A.C. 6A:9-3.4 and in accordance with the roles and responsibilities as a principal, independent of other course requirements. This internship must either appear on the transcript of a four-year regionally accredited college or university or be certified by a Department-approved program for preparing school principals . . . .
>
> [N.J.A.C. 6A:9-12.5(a)(3).]

At issue is whether the Examiners arbitrarily, capriciously and unreasonably rejected Waale's contention that she completed the requisite coursework for the CE's sought by her; as well as her contention that her prior internship and work experience established a one-to-one correspondence with the 300-hour internship required for the principal CE.

FINDINGS OF FACT

The following background facts are uncontroverted, and I **FIND**:

The Office of Licensure and Credentials (OLC) receives in excess of fifty thousand applications for certification annually.[2] Among those applications are approximately two thousand applications for school administrator or principal certifications of the sort sought by Waale. An application is completed on-line, and reviewed by an examiner, who is an office staff member trained to assist applicants through the certification process, including reviewing applications and seeking additional information.

Waale applied for a school administrator CE in June 2011 and for a principal CE in December 2011. She has an impressive background and extensive experience both in education and in private industry. She holds a master's degree in business administration and a master's degree in educational psychology. She is currently enrolled in a doctoral program at Rutgers and anticipates earning her Ed.D. in December 2014.

Via letter dated July 27, 2011, the OLC notified Waale that her application for the school administrator CE was deficient. (P-2.) A March 8, 2012, notice from the OLC notified Waale that her application for a principal CE likewise was deficient. (P-2.) Thereafter, Waale inquired about the possibility of a credential review; on March 28, 2012, OLC Director Dr. Robert Higgins clarified the applicable procedures, but cautioned Waale that licensure requirements cannot be waived; rather, a credential review consists of a determination "if in your petition you provide evidence that proves fulfillment of requirements for certification and should receive equitable consideration." (P-3.) Accordingly, a review offers the candidate an opportunity to seek to substitute educational and/or work experience for regulatory requirements.

[2] The OLC has since been renamed the Office of Certification and Induction.

In a decision dated November 5, 2012, the Examiners again denied Waale's application for a CE as a school administrator. Relative to the requirement that she complete thirty credits of graduate study, the Examiners wrote:

> Pursuant to N.J.A.C. 6A:9-12.4(a), issuance of a School Administrator Certificate of Eligibility must be predicated on completion of an approved college preparatory program. Procedurally, successful completion of a program is verified by a college/university through a VOPC form. The rationale for relying on a college/university's verification of program completion is clear. By relying on submission by a college or university's VOPC, the Board is assured that an applicant has competed all essential components . . . the Board holistically views completion of the appropriate program of study upon receipt of the VOPC. Rutgers University clearly has indicated that Ms. Waale did not complete program requirements.
>
> [P-5.]

Implicit in this denial was a denial of Waale's application for a principal CE.[3] This appeal followed.

The Thirty Graduate Credits

Waale relied heavily on a letter from Dr. James Giarelli, a department chairperson at the Rutgers Graduate School of Education, which had been submitted to the Examiners as part of her request for a credential review and explained how the courses Waale took at Rutgers correlated with the quality components outlined in N.J.A.C. 6A:9-12.4(a)(2) and N.J.A.C. 6A:9-12.5(a)(2). (P-8.) Waale had supplied the Giarelli letter to the Examiners in response to the following statement contained in the notices that her applications were deficient:

> If you believe that coursework has been completed in the areas noted above, a re-evaluation will be completed when we receive both official college catalog course descriptions for review AND an original letter from the Department

[3] The Examiners initially suggested that the question of Waale's eligibility for the principal certificate was not ripe for adjudication because the Examiners had not addressed her request for review in their decision (P-5); counsel has indicated that this argument has been abandoned by the Examiners.

> Chairperson at the college or university outlining the course or course in which the areas above are included. All graduate credits must appear on a regionally accredited 4-year college/university transcript.
>
> [P-2.]

The Giarelli letter, and its enclosed analysis of Waale's coursework, was moved into evidence because hearsay is admissible in an administrative proceeding. However, the Uniform Administrative Procedure Rules require that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b). The Giarelli letter was not corroborated by competent evidence.

Moreover, hearsay evidence must be accorded the weight deemed appropriate when the nature, scope and character of the evidence, together with the circumstances of its creation and production, are taken into account. N.J.A.C. 1:1-15.5(a). Giarelli did not recall having written the controverted letter, according to Amy Wollock, a representative of Rutgers who produced an email exchange in which Giarelli professed no memory of having vouched for Waale. (R-11.) Waale urges persuasively that time had elapsed, making Giarelli's lack of memory understandable. But this argument begs the question of why a more recent writing from Giarelli, or even better yet, his testimony, were not offered to support his asserted belief that Waale's coursework was aligned with regulatory requirements.

More importantly, Waale readily shared that she drafted the letter and its enclosures herself, and presented it to Giarelli, who placed it on his letterhead, signed it, and sent it to the Examiners for their consideration. Although Waale urged that she never saw the letter in its final form until after her application for credential review was denied, she now confirmed that it contained no changes from the draft she had created for Giarelli's signature. Giarelli ostensibly wrote that an enclosed VOPC "indicate[s] that [Waale] has completed the equivalent of our Masters level educational leadership program." But no VOPC was enclosed with his letter, giving the impression that Waale's draft was not reviewed carefully by Giarelli before he affixed his signature to it. This further diminished the weight I could give this document.

Higgins's testimony placed the thirty-credit course requirement in context relative to the other requirements found in N.J.A.C. 6A:9-12.4 and N.J.A.C. 6A:9-12.5. He pointed out that while the master's degree requirement could be completed one of five ways, Waale, whose master's degree was not "in educational leadership, in curriculum and instruction, or in one of the recognized fields of leadership or management," needed to complete the following requirement:

> Hold a master's degree from a regionally accredited college or university and complete a post-master's program in a coherent sequence of 30 semester-hour credits as they appear on the institution's transcript. The study must be completed at one institution in fields outlined in (a)(1) above. (Emphasis supplied.)
>
> [N.J.A.C. 6A:9-12.4(a)(1)(iii); N.J.A.C. 6A:9-12.5(a)(1)(iii).]

Thus, the regulatory language makes it clear that the thirty credits at issue must be part of a coherent program and completed in addition to the master's degree.[4] Higgins clarified that the language in N.J.A.C. 6A:9-12.4(a)(1)(iii) and N.J.A.C. 6A:9-12.5(a)(1)(iii), and the language in N.J.A.C. 6A:9-12.4(a)(2) and N.J.A.C. 6A:9-12.5 (a)(2), are complementary, as follows:

> **The Court**: Okay so when you look at (a)(1)(iii) and it says "Hold a master's degree and complete a 30 credit" so I can look down at [(a)](2) and get a better understanding what those 30 credits have to look like.
>
> **The Witness**: That's exactly right.

[4] A review of N.J.A.C. 6A:9-12.4(a)(1) reveals that of its five ways to meet the master's degree requirement only N.J.A.C. 6A:9-12.4(a)(1)(iii) is applicable to Waale. She does not contend that she completed a post-master's certificate program at a regionally accredited university or college (N.J.A.C. 6A:9-12.4(a)(1)(ii)); that she completed a State-approved certification program in educational leadership (N.J.A.C. 6A:9-12.4(a)(1)(iv)); or that she holds a master's degree in educational leadership from an out-of-state university (N.J.A.C. 6A:9-12.4(a)(1)(v). As previously noted she does not hold a master's degree in a recognized field of educational leadership or management or in curriculum and instruction. N.J.A.C. 6A:9-12.4(a)(1)(i).

A Verification of Program Completion Form (VOPC) is used by Higgins and his staff to confirm completion of programmatic requirements. (R-3.) The college or university attests to completion of a program of study that meets regulatory requirements; the Department does not do a course-by-course review of classes completed. Higgins stressed that this form must be submitted by the institution of higher education, and not by the candidate, as this is the only way his office can be assured that the required program of study has been successfully completed. The VOPC allows the Department to establish requirements for credit/programmatic completion that are standards based rather than aligned to specific courses that may vary from school to school.

Amy Wollock is the certification officer for Rutgers and she works closely with the Department to successfully secure educational certifications for Rutgers students. Wollock stressed that she is the exclusive Rutgers representative responsible for certifying via a VOPC that a candidate has met regulatory certification requirements. She was unequivocal that Giarelli is not authorized to fulfill this role. Wollock confirmed that Waale had completed thirty-three credits in educational leadership at Rutgers. But according to Wollock, Rutgers likewise will not complete the course-by-course review sought here by Waale. She forwarded a letter to the Board of Examiners that emphatically explained that she would not and could not issue a VOPC to Waale because she did not complete a "state approved an [sic] educational administration program at Rutgers University Graduate School of Education leading to certification as Principal and/or School Administrator." (R-10.) Thus, Wollock likewise appeared to believe that Waale was required to complete her thirty credits in a coherent program of study.

In summary, I **FIND** that while Waale completed thirty graduate credits in addition to her MBA, I received no competent evidence to support her contention that these credits were in the areas of study required by N.J.A.C. 6A:9-12.4(a)(2) and N.J.A.C. 6A:9-12.5(a)(2). Nor were they part of a post-master's "program" as required by N.J.A.C. 6A:9-12.4 and N.J.A.C. 6A:9-12.5, the completion of which must be confirmed via a VOPC. Finally, I **FIND** that the appropriate representative of Rutgers University,

where the credits at issue were earned, affirmatively declined to issue the VOPC needed by Waale.

The Internship

Relative to fulfillment of the internship requirement, it is uncontroverted that Waale completed a 150-hour program through Rutgers for the school administrator certification, and that the evaluations of her performance in that internship were glowing. Waale conceded that she did not complete a similar internship for the principal CE. Higgins explained that the 300-hour requirement must be met by an internship specific to the principal licensure sought by Waale, and that the 150 hours already completed by her could not be applied to that licensure application; Waale disagrees.

Regardless, it is uncontroverted that, at a minimum, 150 additional hours were necessary to meet regulatory requirements. Waale urged that she had extensive professional experience that could and should substitute for the required internship hours. She asserted that her eight years of experience as a learning disabilities teacher-consultant (LDT-C) included managerial experience because she coordinated team meetings, interacted with parents and colleagues, and was asked daily to hone her executive and interpersonal skills. Waale's career in business, which included employment in the telecommunications industry and spanned some twenty years, was marked by steady promotions and increased supervisory responsibility. She was responsible for executive-level problem solving; data analysis; juggling the needs of corporate community stakeholders; and the supervision of subordinates. She hired and fired personnel, and made salary determinations for subordinates. Waale contends that this experience would well equip her to serve as a principal of a school building.

But Higgins replied compellingly that Waale needed to complete 300 hours in an internship placement that specifically exposed her to the role and responsibility of a school building leader, including such responsibilities as evaluating teachers; addressing school safety concerns; guiding and developing educational policy; and coordinating teacher training and professional development. Her experience as a child

study team member and in private industry did not suffice to meet regulatory requirements, in Higgins' view.

I **FIND** that Waale's experience in education and industry did not expose her to the day-to-day work responsibilities of a school building principal, to include supervising teaching staff; directing professional development for educators; addressing the needs of parent, students and other school community stakeholders; and directing the educational mission of a school building.

CONCLUSIONS OF LAW

Waale carries the burden of demonstrating by a preponderance of the credible evidence that she is entitled to the certifications she seeks. Farrar v. State Bd. of Exam'rs, EDU 13763-08, Initial Decision (April 27, 2010), aff'd, Comm'r (July 26, 2010), <http://njlaw.rutgers.edu/collections/oal/>. The Commissioner will "not disturb the decision [of the Examiners] unless the appellant has demonstrated that the Board [of Examiners] or the Commissioner acted in a manner that was arbitrary, capricious or contrary to law." N.J.A.C. 6A:4-4.1; Farrar, supra, EDU 13763-08 (citing Fisher v. State Bd. of Exam'rs, 96 N.J.A.R.2d (EDU) 58). Where there is room for two opinions, action is not considered arbitrary or capricious when exercised honestly and upon due consideration, even though the court may believe that an erroneous conclusion has been reached. Bayshore Sewerage Co. v. Dep't of Envt'l Prot., 122 N.J. Super. 184, 199 (App. Div. 1973). I **CONCLUDE** that Waale has not met her burden of demonstrating that the Examiners' decision was arbitrary, capricious and unreasonable, and that the petition of appeal must be dismissed.

The Thirty Credits

N.J.A.C. 6A:9-12.4(a)(2) and N.J.A.C. 6A:9-12.5(a)(2) require that an applicant complete a minimum of thirty credits either within a master's program or in addition to it in certain "quality components of preparation to promote student learning." N.J.A.C. 6A:9-12.4(a)(1)(iii) and N.J.A.C. 6A:9-12.5(a)(1)(iii) clarify that these credits cannot be randomly earned, but rather must be taken as part of a "post-master's program in a

coherent sequence of 30 semester-hour credits . . . " N.J.A.C. 6A:9-12.4(a)(1)(iii). Thus, the Examiners assert, persuasively so, that the regulations require a candidate for a CE as a school administrator or principal to earn the needed credits in a "program of study."

Indeed, it is well-established that an administrative regulation is subject to the same canons of construction as a statute. In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297, 306 (App. Div. 1987). A regulation should be "construed in accordance with the plain meaning of its language . . . and in a manner that makes sense when read in the context of the entire regulation." Medford Convalescent and Nursing Ctr. v. DMAHS, 218 N.J. Super. 1, 5 (App. Div. 1985); see also Jablonowska v. Suther, 195 N.J. 91, 105 (2008). When the regulations at issue here are read in their entirety, it is clear that applicants for the certifications sought by Waale must complete a thirty credit "program of study," either in addition to and as part of a master's degree program, and that this requirement cannot be met via a random selection of courses. I thus **CONCLUDE** that the Examiners' interpretation of the relevant regulatory language is reasonable; is consistent with the regulatory intent which is to rigorously vet applicants for certification; and is entitled to deference. Indeed, an administrative agency's interpretation of its own regulations is entitled to substantial weight. Allen v. PFRS, 233 N.J. Super. 197, 207 (App. Div. 1989).

The VOPC is the procedural mechanism through which the Examiners assure themselves that a candidate for certification has completed the requisite program of study. Ruiz v. N.J. State Bd. of Exam'rs, EDU 12754-10, Initial Decision (November 9, 2011), adopted, Comm'r (December 23, 2011), <http://njlaw.rutgers.edu/collections/oal/>. In light of the volume of applications received by the Department, it is a reasonable and appropriate alternative to the course-by-course analysis that would otherwise have to be undertaken by the Examiners. Waale attempts to distinguish Ruiz, arguing that the certificate candidate there was required by regulation to complete a "department approved graduate program" under N.J.A.C. 6A:9-13(c)(2). But it is clear that Waale was likewise required to complete her thirty credits as part of a coherent course of study.

Finally, I am cognizant that the Examiners' letters appear to invite Waale to submit a letter from a department chair and a transcript that verify course completion. This is the information she urges she supplied via Giarelli's letter. (P-2.) But any argument that Giarelli's letter should thus afford Waale the relief she seeks remains a nonstarter. Waale offered no competent evidence that her coursework, even if not part of a coherent sequence of study, was otherwise compliant with the regulatory requirements contained at N.J.A.C. 6A:9-12.4(a)(2) and N.J.A.C. 6A:9-12.5(a)(2). I **CONCLUDE** that Waale has not demonstrated that she completed the thirty-credit course of study required by N.J.A.C. 6A:9-12.4 and N.J.A.C. 6A:9-12.5.

The Internship

Relative to the principal CE, Waale acknowledged that she did not complete a 300-hour internship, as required by N.J.A.C. 6A:9-12.5(a)(3), but urges that the 150 hours completed for her administrator's CE be considered in conjunction with her extensive management and teaching experience so that she may qualify for the principal CE. She relies upon regulatory language that allows an applicant to provide evidence of "alternative education and/or experience that the applicant believes is the equivalent to the area(s) of deficiency." N.J.A.C. 6A:9-17.13(a). Indeed, the Examiners have the discretionary authority to consider alternative experience, and to accept it where they determine that the experience establishes a one-to-one correspondence with regulatory requirements. Hutchinson v. Bd. of Exam., EDU16373-12, Initial Decision (April 5, 2013), aff'd, Comm'r (May 15, 2013), <http://njlaw.rutgers.edu/collections/oal/>.

Waale urges that she has more than seventeen years of experience in education, including experience that "demonstrates her abilities in guiding administration, teachers, pupils and parents toward achieving common educational goals." She asserts that she also has more than twenty years of management and leadership experience in positions she held at AT&T Bell Laboratories; that the skills she acquired are a substitute for the internship hours required by the regulation; and that her prior experience will equip her for the challenges she will confront in administering a public school.

But Waale's experience did not expose her to the day-to-day challenges of actually running a public school building; to include supervision of instructional staff, facilities challenges, school safety concerns, and, most importantly directing the educational mission of a school community. While Waale urges that her years of professional experience both in the public and private sectors are aligned with the professional standards for school leaders contained in N.J.A.C. 6A:9-3.4, I **CONCLUDE** that the Examiners' determination that that her experience was not directly equivalent to the actual responsibilities of a building principal is a reasonable one, and entitled to deference. I furthermore **CONCLUDE** that the regulatory language makes it clear that all 300 hours must be in an internship directly related to the responsibilities of a building principal. For this additional reason, it is clear that Waale did not meet the requirements of the regulation relative to eligibility for her CE as a principal.

ORDER

It is hereby **ORDERED** that the petition of appeal be **DISMISSED**.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 30, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: May 30, 2014

Date Mailed to Parties: JUN - 2 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

APPENDIX

Witnesses

For Petitioner:

Mildred Waale

For Respondent:

Dr. Robert Higgins

Amy Wollock

Exhibits

For Petitioner:

P-1 Computer print-out of certification status

P-2 Letters dated July 27, 2011, and March 8, 2012

P-3 Letter dated March 28, 2012, with enclosures

P-4 Letter dated September 6, 2012

P-5 Letter dated December 5, 2012, with decision enclosed

P-6 Diploma

P-7 Diploma

P-8 Letter dated December 23, 2011, with enclosures

P-9 Internship evaluations

P-10 Not admitted

P-11 Email trail

P-12 Not admitted

P-13 Not admitted

P-14 Not admitted

P-15 Not admitted

P-16 Agenda

P-17 Resume

For Respondent:

R-1 Not admitted

R-2 Not admitted

R-3 Sample VOPC form

R-4 Admitted as P-2

R-5 Admitted as P-2

R-6 Admitted as P-5

R-7 Rutgers certification form

R-8 Rutgers certification form

R-9 Admitted as P-8

R-10 Letter dated February 12, 2012

R-11 Email trail

R-12 Not admitted

R-13 Not admitted

296-14

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF LAWANNA MCCLEASE, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In February 2014, the Commissioner of Education issued an Order to Show Cause upon respondent, requiring her to show cause why an order should not be entered suspending her teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9 – for resigning her position on inadequate notice. The respondent failed to answer the order. Respondent was duly advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to respond would cause each allegation raised by the Board to be deemed admitted, and might result in summary decision by the Commissioner.

There being no response to the order to show cause, the Commissioner concluded that the allegations – which respondent has chosen not to deny – may be deemed admitted, and justify suspension of respondent's certification. Accordingly, summary decision was granted to petitioner, and respondent's certificate is suspended for a period of one year from the date of the filing of this decision – a copy of which has been forwarded to the State Board of Examiners for the purpose of effectuating this order.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 7/16/14

AGENCY DKT. NO. 34-2/14

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF LAWANNA MCCLEASE, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN, CAMDEN COUNTY	COMMISSIONER OF EDUCATION DECISION

For Petitioner, Louis R. Lessig, Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on February 12, 2014, by way of an Order to Show Cause served by petitioner (State-Operated School District of the City of Camden) upon respondent (LaWanna McClease), requiring respondent to show cause why an order should not be entered suspending her teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by her contract with petitioner. By notice dated February 14, 2014, the Bureau of Controversies and Disputes (Bureau) acknowledged receipt of proof that the Order to Show Cause had been served upon respondent and directed respondent to answer within 20 days.

No answer having yet been received, on April 2, 2014, the Bureau sent respondent a second notice – via regular and certified mail – directing that she file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The certified mail return receipt card indicates that the April 2, 2014 notice was delivered on April 7, 2014.

No answer having yet been received, on April 28, 2014, the Bureau sent respondent a final notice – via regular and certified mail – directing that she file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted, and might result in summary decision by the Commissioner. The certified mail return receipt card indicates that the April 28, 2014 notice was delivered on May 2, 2014. No answer to the Order to Show Cause has been filed as of this date.

The affidavit submitted by the petitioner in this matter states that the respondent entered into a contract with the petitioner for the 2013-2014 school year; that on November 18, 2013, the respondent informed the district that she would not be fulfilling the term of her employment; and that the respondent resigned effective November 29, 2013, giving only 11 days notice. The respondent has not denied the allegations therein; consequently, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e), and further deems them sufficient to justify suspension of respondent's teaching certification pursuant to *N.J.S.A.* 18A:26-10.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certification is suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/16/14
Date of Mailing: 7/17/14

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

297-14R

OAL DKT. NO. EDU 4858-14
(EDU 17411-13 ON REMAND)
AGENCY DKT. NO. 281-11/13

N.H., on behalf of minor child, H.H.L.,	
PETITIONER,	COMMISSIONER OF EDUCATION
V.	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,	
RESPONDENT.	

The record of this matter, the Settlement Agreement (Agreement), and the Initial Decision on Remand of the Office of Administrative Law (OAL), have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. On April 21, 2014, the Commissioner remanded this matter to OAL based upon a determination that the prior settlement agreement recommended for adoption by the Administrative Law Judge did not include the requisite Board of Education approval, and contained certain provisions that were contrary to the requirements outlined in *N.J.A.C.* 6A:16-5.3(d)1.

Upon review of the revised record on remand, the Commissioner finds that the deficiencies have been corrected and that the Agreement contains the requisite Board approval. Therefore, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/17/14
Date of Mailing: 7/17/14

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04858-14

AGENCY DKT. NO. 281 11/13

N.H. ON BEHALF OF MINOR CHILD H.H.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY,

Respondent.

ON REMAND

OAL DKT. NO. EDU 17411-13

George M. Holland, Esq. (Wanderpolo and Siegel, LLC, attorneys)

Raquel S. Lord, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: June 13, 2014

Decided: June 19, 2014

BEFORE **CAROL I. COHEN,** ALJ:

This matter was transmitted to and filed with the Office of Administrative Law ("OAL") on December 4, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The matter was remanded and received by the OAL on April 23, 2014 for revision of the agreement consistent with the concerns set forth in the remand. The parties produced a new settlement agreement which sets forth that no discipline related to the HIB case was imposed on H.H.L. and that no disciplinary records relating to this matter exist.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

6/19/14
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Date Received at Agency: June 23, 2014

Date Mailed to Parties: June 23, 2014
db

Laura Sardiello
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AGREEMENT AND RELEASE

RECEIVED
2014 JUN 13 P 11:29

This Settlement Agreement and Release ("this Agreement") is made and entered into by and between the Springfield Board of Education (hereinafter "the Board") and N.H. o/b/o H.H.L. (hereinafter, "Petitioner") (collectively, the "Parties"), for full settlement of all claims which were alleged and/or could have been alleged against the Board by Petitioner in the Verified Petition of Appeal arising out of an incident of harassment, intimidation or bullying ("HIB") that occurred on or about April 26, 2013.

WITNESSETH:

WHEREAS, H.H.L. is a student in the Springfield School District (the "District"); and

WHEREAS, on or about April 26, 2013, H.H.L. was involved in an incident (the "HIB incident") wherein H.H.L. was found to have engaged in HIB (the "finding of HIB"); and

WHEREAS, Petitioner N.H. has filed a Verified Petition of Appeal against the Board, bearing Agency Reference No. 281-11/13, in connection with the finding of HIB (the "Petition"); and

WHEREAS, the Parties desire to amicably resolve their differences and avoid the expense and uncertainty of further litigation, and

NOW THEREFORE, in consideration of the foregoing and for other good and valuable consideration, it is hereby agreed by and between the Parties as follows:

1. The finding of HIB is not a part of H.H.L.'s cumulative or disciplinary record and will never be made a part of same.

2. The finding of HIB will never be made a part of any transcript of H.H.L. by the District.

3. The finding of HIB will never be transferred by the District to any other school in or outside of the District, nor to any college, university or other secondary education institution, or to any employer.

4. All documents reflecting the finding of HIB are kept under lock in the office of the District's HIB Coordinator and will remain there until such time as H.H.L. graduates from high school or transfers out of the District, at which time they will be immediately destroyed.

5. The District will never report H.H.L.'s name, initials, local student number, or any other identifying information, other than H.H.L.'s New Jersey student identification ("SID") number, to the State of New Jersey in connection with its obligation to provide data regarding incidents of violence or vandalism or incidents of HIB., and the District represents that it is not obligated to provide any student's name, initials, local student number, or any other identifying information, other than the SID number, to the State of New Jersey regarding incidents of violence or vandalism or incidents of HIB. Petitioner understands that a student's SID number is generated by the State of New Jersey, not the District, when the student enrolls in a public school system. Petitioner further understands that the HIB incident has been reported by the District to the State through the Electronic Violence and Vandalism Reporting System ("EVVRS").

6. H.H.L. has not been subject to any disciplinary action related to the finding of HIB and will never be subject to disciplinary action based on this finding of HIB in the future.

7. **Release and Waiver:** In exchange for the terms set forth herein, Petitioner releases and gives up any and all claims and rights she may have against the Board, its officers, employees and representatives, arising out of alleged acts or omissions, whether known or unknown, that have taken place through the date of this Agreement, in connection with the her Verified Petition of Appeal arising out of the HIB incident.

8. **Agreement To Withdraw and Not To Sue:** Petitioner agrees not to file any lawsuit or claim against the Board, its officers, employees or representatives, based on any events, whether known or unknown, regarding the HIB incident, in any court or tribunal of the United States, New Jersey or any other state, city, county, or locality, for any claims released in this Agreement. Petitioner further agrees to voluntarily withdraw the Petition.

9. **Confidentiality:** The parties agree that neither they nor their attorneys or representatives shall reveal to anyone, verbally or in writing, other than as may be mutually agreed to in writing or to a court of law or government entity, any of the terms of this Agreement, including the existence of this agreement, to the extent permitted by law. Petitioner acknowledges that this confidentiality requirement is a material term to this Agreement.

10. **No Precedent:** The parties agree that this Agreement may not be used to establish precedent in any future proceeding of any type whatsoever involving the Board and that it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of same. This Agreement is a compromise of disputed claims and shall not be construed as an admission by any party of any of the acts or omissions alleged or those that could have been alleged by any party against another party in this matter. This Agreement shall not be construed as an admission by the Board of any wrongdoing. The Petitioner is not a prevailing party entitled to recover attorneys' fees and costs in connection with this matter.

11. **Who is Bound:** The Board is bound by this Agreement. Petitioner and her agents are bound by this Agreement. Those who succeed to Petitioner's rights and responsibilities, such as heirs, the executors of her estate, or her personal or legal representatives, are also bound.

12. **Entire Agreement:** This Agreement contains the sole and the entire agreement between Petitioner and the Board, and fully supersedes any and all prior agreements and understandings between Petitioner and the Board pertaining to the subject matter of this Agreement. Petitioner represents and acknowledges that she has not relied upon any representation or statement by the Board, or its counsel or representatives, with regard to the subject matter of this Agreement, which is not set forth in this Agreement. No other promises or agreements shall be binding unless in writing, signed by Petitioner and the Board, and expressly stated to be a modification of this Agreement.

13. **Counterparts**: This Agreement may be executed in counterparts.

14. **Approval of this Agreement**: The Parties understand and agree that this Agreement has been approved by the Springfield Board of Education. (A certified extract of the Board's resolution is attached hereto as Exhibit A.) The parties further understand and agree that Petitioner shall execute this Agreement with the consent of H.H.L.'s biological father, H.L. The parties further understand and agree that this Agreement is subject to review and approval by the Commissioner of Education, as it will constitute an "Initial Decision" by Administrative Law Judge Carol Cohen, before whom the Parties appeared for a settlement conference on January 29, 2014.

THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK

15. Signatures:

BY SIGNING THIS AGREEMENT, PETITIONER STATES THAT:

A. SHE HAS READ IT;

B. SHE AGREES WITH EVERYTHING IN IT;

C. SHE HAS HAD AN OPPORTUNITY TO CONSULT WITH AN ATTORNEY; AND

D. SHE HAS SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY.

Petitioner

N.H.

Dated: 5-29-2014

Springfield Board of Education

Jacqueline Shanes, Board President

Dated:

EXHIBIT A

EXTRACT OF THE MINUTES OF A MEETING OF
THE BOARD OF EDUCATION OF
THE TOWNSHIP OF SPRINGFIELD
COUNTY OF UNION, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Springfield, in the County of Union, New Jersey, convened in Regular Session on June 2, 2014 at 7:38 PM.

The following members of the Board of Education were present:
Robin Cornelison, Mr. Scott Donner, Mr. Dermot McLeer, Mr. Hector Munoz, Mr. Scott Samansky, Mr. Scott Silverstein, Mrs. Patricia Venezia, Mr. Steven Wolcott, Mrs. Jacqueline Shanes

The following resolution was offered by Mr. Silverstein, seconded by Mr. Wolcott, and adopted by the Board of Education by the Roll Call vote as indicated.

TITLE: SETTLEMENT OF HIB APPEAL

RESOLVED :

RESOLUTION APPROVING SETTLEMENT OF HIB APPEAL

WHEREAS, the Board was the respondent in an HIB appeal bearing Agency Reference Number 281-11/13 and OAL Docket Number EDU 17411-13; and
WHEREAS, the Board Attorney, the HIB Coordinator, and the Superintendent, have recommended resolution of this matter pursuant to the terms set forth in a Settlement Agreement, a copy of which is on file in the office of the HIB Coordinator; and
WHEREAS, the Settlement Agreement does not call for the expenditure of Board funds; and
WHEREAS, the Board finds that entering into a settlement pursuant to the terms set forth in the Settlement Agreement is in the best interests of the District; and
NOW, THEREFORE, BE IT RESOLVED by the Springfield Board of Education that it hereby approves the Settlement Agreement in this matter.

ROLL CALL:
Yeas: Unanimous by all Members present. MOTION CARRIED

STATE OF NEW JERSEY)
)
COUNTY OF UNION)

I, Matthew A. Clarke, Business Administrator/Board Secretary of the Township of Springfield in the County of Union, State of New Jersey, hereby, certify that the foregoing extract from the minutes of the meeting of the Board of Education of said District duly called and held on June 2, 2014 has been compared by me with the original minutes as officially recorded in my Office in the Minute Book of said Township of Springfield Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relates to the subject matter referred to on said extract. In witness, I have hereunto set my hand and affixed the corporate seal of said Board of Education on this 3rd day of June 2014.

SEAL

Matthew A. Clarke
Business Administrator/Board Secretary

From: "Gavin, Eileen"
<Eileen.Gavin@doe.state.nj.us<mailto:Eileen.Gavin@doe.state.nj.us>>
Date: Mon, 12 May 2014 09:21:03 -0400
To: - - [redacted]
Cc: "Allen, Kelly" <Kelly.Allen@doe.state.nj.us<mailto:Kelly.Allen@doe.state.nj.us>>
Subject: FW: EVVRS & HIB Question

[redacted]

Kelly Allen tracked down the answer to the question from the parent's attorney. I believe the response is thorough and complete. Thanks, Kelly!

Eileen

Eileen M. Gavin
County Education Specialist
New Jersey Department of Education
Union County Office
eileen.gavin@doe.state.nj.us<mailto:eileen.gavin@doe.state.nj.us>
voice: 908-654-9860
fax: 908-654-9869

From: Allen, Kelly
Sent: Monday, May 12, 2014 8:59 AM
To: Gavin, Eileen
Subject: RE: EVVRS & HIB Question

Hi Eileen,
I hope you enjoyed the beautiful weekend. Please see the response below to answer the questions from [redacted] You can also tell them that they can send specific questions about EVVRS to evvrs@doe.state.nj.us<mailto:evvrs@doe.state.nj.us>. Feel free to reach out to me if you have any questions.

Thanks!
Kelly

The Commissioner's Annual Report to the Legislature on Violence, Vandalism and Substance Abuse in New Jersey Schools is a public report posted on the DOE website but does not include student-level information. There is no way to identify a student involved in an HIB (or any type) of incident from reviewing the report. The NJSMART number is used only as a student identifier. The data in the EVVRS and NJSMART systems are not connected in any way. To ensure confidentiality, the EVVRS database is protected by a firewall and the highest level of encryption technology available.

Access to EVVRS is limited to registered school district staff. Upon student transfer, the new district would not be able to use this student's ID to gain access to incidents and information previously entered by another district.

From: Gavin, Eileen
Sent: Thursday, May 08, 2014 2:32 PM
To: Allen, Kelly
Subject: FW: EVVRS & HIB Question

Kelly,

Someone familiar with EVVRS may need to provide input to Springfield's question below.

Thanks!

Eileen

Eileen M. Gavin

County Education Specialist

New Jersey Department of Education

Union County Office

eileen.gavin@doe.state.nj.us<mailto:eileen.gavin@doe.state.nj.us>

voice: 908-654-9860

fax: 908-654-9869

-----Original Message-----
From: [redacted]
Sent: Thursday, May 08, 2014 12:08 PM
To: Gavin, Eileen
Subject: EVVRS question

I have a question from an attorney concerning the use of a student's SID number reporting a HIB incident in a EVVRS report.

Is the EVVRS report for a school district publicized on the DOE website anywhere or if the student transfers can another district use the student's SID number to check the EVVRS system and see if he has been determined to be a bully?

This is a 2nd grade child.

Thanks.

[redacted]

298-14

OAL DKT. NO. EDU 5340-12, 11302-12 (CONSOLIDATED)
AGENCY DKT. NO. 109-4/12, 228-8/12

BOARD OF EDUCATION OF THE BOROUGH OF INTERLAKEN, MONMOUTH COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY, BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY, AND BOARD OF EDUCATION OF THE SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS.

AND

M.L., on behalf of minor children, J.F. and D.F.; E.O. and B.O., on behalf of minor children, D.O. and G.O.; J.P. and M.P., on behalf of minor children, A.P. and M.P.; and L.R. and M.R., on behalf of minor children, S.R. and F.R.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF INTERLAKEN, MONMOUTH COUNTY; BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY; BOARD OF EDUCATION OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY; AND BOARD OF EDUCATION OF THE SHORE REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

The Board of Education of the Borough of Interlaken (Interlaken), having applied – pursuant to *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1 – to the Commissioner of Education for severance of its send-receive relationship with respondent Asbury Park Board of Education (Asbury Park) and to establish a send-receive relationship with respondents West Long Branch Board of Education (West Long Branch) and Shore Regional Board of Education (Shore Regional);[1] and

The Boards of Education of Shore Regional and West Long Branch having joined with Interlaken in requesting the establishment of a new sending-receiving relationship between Interlaken and Shore Regional and West Long Branch, and Asbury Park not opposing the termination of the current send-receive relationship; and

Interlaken having conducted a feasibility study in accordance with *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1; and

The parties having complied with the public notice and comment provisions outlined in *N.J.A.C.* 6A:3-6.1(b); and

There being no dispute amongst the parties as to certain relevant facts, including that no substantial educational, financial or racial impact will incur to any of the school districts upon severance of the current sending-receiving relationship between Interlaken and Asbury Park or upon establishment of the proposed sending-receiving relationship between Interlaken and Shore Regional and West Long Branch; and

The feasibility study having established to the Commissioner's satisfaction that the withdrawal of the Interlaken students from the Asbury Park School District, and the entry of the Interlaken students into the Shore Regional and West Long Branch School Districts, would

[1] West Long Branch operates a Pre-K through 8th grade school system and Shore Regional operates a high school for grades 9 through 12.

cause no substantial negative impact on the educational programs of the school districts or on the quality of education received by the pupils in each of the school districts; and

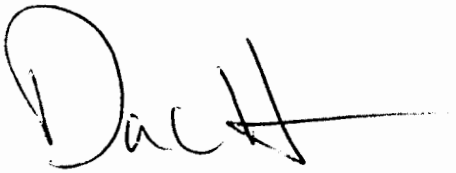
The feasibility study having further established to the Commissioner's satisfaction that there will be no substantial negative impact on the financial conditions of the school districts; and;

The feasibility study having further established to the Commissioner's satisfaction that there will be no substantial impact on the racial composition of the school districts; and

The Commissioner having received no public comments pursuant to *N.J.A.C.* 6A:3-6.1; now therefore

IT IS ORDERED on this 17 day of July 2014 that – pursuant to *N.J.S.A.* 18A:38-13 and *N.J.A.C.* 6A:3-6.1 – the application of Interlaken for severance of its send-receive relationship with Asbury Park and to establish send-receive relationship with West Long Branch and Shore Regional, as set forth in its petition of appeal, is APPROVED.

IT IS SO ORDERED.[2]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/17/14

Date of Mailing: 7/17/14

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

L.A.A., SR. on behalf of minor child L.A.A., JR.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that his son, L.A.A., Jr., was not eligible for a free public education in the Bloomfield Township school district. The Board filed a counterclaim for tuition reimbursement. A hearing in this matter was held at the Office of Administrative Law in April 2014.

The ALJ found that – based on the representations of counsel for both parties – the issues of L.A.A. , Jr.'s residence and the Board's claim for tuition reimbursement have been resolved. The ALJ concluded that the within matter is now moot, as the parties have settled their claims. Accordingly, the ALJ ordered the petition and counterclaim dismissed.

Upon review, the Commissioner concurred with the ALJ that the case may be dismissed as moot. Accordingly, both the petition and the respondent Board's counterclaim for tuition were dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 17, 2014

299-14

OAL DKT. NO. EDU 14661-11
AGENCY DKT. NO. 341-11/11

L.A.A., SR. on behalf of minor child L.A.A., JR.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is a controversy, initiated in November 2011, concerning the domicile of petitioner's minor child, and the related question of whether the child was eligible for a free public education in respondent's school district or whether petitioner owed the respondent Board tuition. Upon review of the record and Initial Decision of the Office of Administrative Law (OAL), the Commissioner concurs with the Administrative Law Judge (ALJ) that the case may be dismissed as moot.

The foregoing determination rests upon the ALJ's representation that at an April 8, 2014 hearing in the OAL, the parties asserted that all issues between them had been resolved. Accordingly, both the petition and respondent's counterclaim for tuition are hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/17/14
Date of Mailing: 7/17/14

[1] This decision may be appealed to Superior Court, Appellate Division, pursuant to *N.J.S.A.* 18A: 18A:6-9.1.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14661-11
AGENCY DKT. NO. 341-11/11

L.A.A., SR., O/B/O MINOR CHILD, L.A.A. JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD,
Respondent.

L.A.A. Sr., father of **L.A.A. Jr.**, petitioner, pro se

Paul C. Kalac, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, LLC, attorneys)

Record Closed: May 8, 2014 Decided: June 3, 2014

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner L.A.A., Sr. on behalf of his son L.A.A., Jr., challenged the determination of the Bloomfield Township Board of Education (District or Board) that L.A.A. Jr. was not a resident of the school district. Additionally, petitioner challenged the Board's counterclaim for tuition for the period of ineligible attendance.

On December 13, 2011, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on April 8, 2014.

Based on a review of the relevant and undisputed evidence I **FIND** as **FACT**:

L.A.A. Sr. and M.C. are the parents of L.A.A. Jr. L.A.A. Sr. and M.C. are divorced and share joint custody of L.A.A. Jr. For periods of time, L.A.A. Jr. resided with his father in Bloomfield and attended the public school. At Times, L.A.A. Jr. also resided with his mother, M.C. who is not a resident of Bloomfield. For school year 2011-2012, the District sought reimbursement from L.A.A. Sr. and M.C. for L.A.A. Jr.'s attendance in the Bloomfield school.

On April 16, 2014, the Board presented Scott Collins who testified to the amount of reimbursement sought for tuition. By letter dated April 7, 2014, the District states in part:

> Dear Judge Bari-Brown:
>
> As you are aware, this firm represents Respondent, Bloomfield Township Board of Education...This matter was remanded by the Commissioner of Education on November 4, 2013, for further clarification as to whether...the parties have implemented the terms of the settlement agreement agreed to on April 13, 2013.
>
> Attached, please find correspondence and a Payor Analysis provided by Debbie Morgano, the Board's Accountant. As per the Analysis, L/A.A.'s mother [M.C.] has made the nine (9) payments of the required ten (10) payments of Five hundred Dollars ($500.00) as of today's date. There appears to be some confusion regarding her submission of a December payment, but the Director of Residency has reached out to [M.C.] to clarify same and we expect the final payment to be made shortly. As a result, the Board is satisfied with the Settlement Agreement and there is no need for further litigation relative to this matter.

Also at the hearing, Counsel for the Board and L.A.A. represented that the issues of L.A.A. Jr.'s residence and the Board's claim for tuition reimbursement, have been resolved.

CONCLUSION

Based on the whole of the evidence I **CONCLUDE** that this matter is moot because the parties have settled their claims. The mootness doctrine is "[t]he principle that when the matter in dispute has already been resolved, there is no actual controversy that would be affected by a judicial decision." Black's Law Dictionary 697 (Abridged 6th Ed. 1991). Indeed,

> It is well established that questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review... for reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest.
>
> Anderson v. Sills, 143 N.J. Super. 423, 437 (N.J.Super. 1976) (citations omitted).

Here, the matter in dispute has been resolved and there is no actual controversy remaining between the parties regarding L.A.A.'s attendance in the Bloomfield School District.

It is hereby **ORDERED** that the petition and counterclaim be **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 3, 2014
DATE

MUMTAZ BARI-BROWN, ALJ

Date Received at Agency:

6-3-14

Date Mailed to Parties: JUN - 4 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

300-14

WAYNE CALANDRIELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contended that the respondent Board improperly withheld a salary increment which should have been restored to him following the satisfaction of his penalty for having been found guilty of unbecoming conduct subsequent to the filing of tenure charges in 2011. In July 2012, the Commissioner determined that the appropriate penalty for petitioner's unbecoming conduct was the loss of his increment for one year, forfeiture of the 120 days of salary withheld pursuant to *N.J.S.A.* 18A:6-14, and an additional four-month suspension without pay – which commenced at the beginning of the 2012-2013 school year. Petitioner returned to his position on or about January 2, 2013, at which time he received his full salary, less the increment withheld pursuant to the Commissioner's decision. Petitioner asserted that his salary increment should have been restored beginning January 1, 2014. Citing *North Plainfield Education Association v. Board of Education of the Borough of North Plainfield*, 96 *N.J.* 587 (1984), the respondent Board maintained that the increment withholding must be treated in the same manner as any other increment withholding, lagging one step behind his regular step. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts in dispute, and the matter is ripe for summary decision; as part of petitioner's penalty for unbecoming conduct, the Commissioner ordered the loss of his increment for one year, which began January 2, 2013; the one-year period expired on or about January 2, 2014, at which time the petitioner was entitled to the increment that he would have received beginning January 2, 2013; the Commissioner did not determine that upon completion of one year of withholding, petitioner's increment would be reinstated as if the lost year had not occurred. The ALJ concluded that the petitioner is entitled to receive any increment that he would have received on January 2, 2013 commencing January 15, 2014, and – going forward – will advance one step behind his regular step.

Upon independent review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. In so deciding, the Commissioner noted that the fact that petitioner will remain a step behind his peers is not – as petitioner contends – an additional penalty, but rather the continuing effect of the increment withholding previously ordered by the Commissioner. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 17, 2014

OAL DKT. NO. EDU 04192-14
AGENCY DKT. NO. 63-3/14

WAYNE CALANDRIELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and reply exceptions – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

This case proceeded in the OAL by way of summary decision, as the facts are not in dispute. Petitioner is a tenured teaching staff member in respondent's school district. In 2011, respondent brought tenure charges against petitioner, alleging unbecoming conduct and other just cause. In a decision dated July 30, 2012, the Commissioner determined that petitioner was guilty of unbecoming conduct and that the appropriate penalty was loss of his increment for one year, the forfeiture of the 120 days of salary withheld pursuant to *N.J.S.A.* 18A:6-14, plus an additional four-month suspension without pay. *In the Matter of the Tenure Hearing of Wayne Calandriello, School District of the Township of South Orange-Maplewood, Essex County*, Commissioner Decision No. 297-12, Agency Dkt. No. 321-10/11.

In a letter decision dated September 26, 2012, the Commissioner clarified that the four-month suspension was to commence at the beginning of the 2012-2013 school year. Accordingly, petitioner did not return to his position until on or about January 2, 2013, at which time

he received his full salary, less the increment withheld pursuant to the Commissioner's decision. The following year, on or about January 15, 2014, petitioner received his paycheck for the period beginning January 1, 2014 and noticed that the salary increment had not been reinstated.

In the instant matter, petitioner challenges the continued withholding of his increment. Petitioner emphasizes that the Commissioner ordered the withholding of his increment for a finite period of one year. Petitioner contends that, upon expiration of that year, he was entitled to reinstatement of the increment. Petitioner further contends that the continued withholding effectively imposes a penalty upon him separate from and beyond that which the Commissioner determined appropriate at the end of the tenure charge proceeding.

Respondent maintains that the increment withholding ordered by the Commissioner must be treated in the same manner as any other increment withholding, as directed by the New Jersey Supreme Court in *North Plainfield Education Association v. Board of Education of the Borough of North Plainfield*, 96 *N.J.* 587 (1984). More specifically, respondent maintains that petitioner's increment must lag one year – "one step behind his regular step." *Id.* at 595.

In the Initial Decision, the Administrative Law Judge (ALJ) concluded that petitioner was not entitled to reinstatement of the withheld increment. Rather, the ALJ determined that, upon expiration of the one year period, petitioner was entitled to the increment that he would have received in January 2013 and that, prospectively, petitioner would advance one step behind his regular step.

The parties' submissions on exception essentially replicate the briefs submitted to the ALJ in support of their respective cross-motions for summary decision below. The Commissioner finds that the arguments advanced therein were fully considered and addressed by the ALJ in her Initial Decision. Accordingly, they will not be revisited in depth here.

Upon his full review, the Commissioner concurs with the ALJ's determinations. Pursuant to the Commissioner's decision in the tenure matter, beginning in January 2013, petitioner forfeited any advancement on the salary guide for a period of one year. Upon expiration of that year,

in January 2014, petitioner became eligible to receive the salary increment that he would have received in January 2013.[1] As with any other increment withholding, petitioner should prospectively advance regularly on the salary guide – one step behind his regular step – absent other legal actions taken by the Board. That he will remain a step behind his peers is not, as petitioner contends, an additional penalty, but rather the continuing effect of the increment withholding previously ordered by the Commissioner. *North Plainfield, supra,* at 595.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the within petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/17/14

Date of Mailing: 7/17/14

[1] Petitioner is a member of the South Orange Maplewood Education Association (SOMEA). The Commissioner notes that respondent and SOMEA have yet to settle upon a new collective bargaining agreement, which expired on June 30, 2013. According to the parties, SOMEA members remain frozen at their current step until a new agreement is reached, at which time members will move on the guide in accordance with the agreed-upon guide adjustments. Accordingly, the Commissioner acknowledges that some of the adjustments contemplated herein will not be effectuated until a new collective bargaining agreement is in place.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 04192-14
AGENCY DKT NO. 63-3/14

WAYNE CALANDRIELLO,
Petitioner,
v.
BOARD OF EDUCATION OF THE SOUTH ORANGE MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,
Respondent.

Sheldon H. Pincus, Esq., for petitioner (Bucceri and Pincus, attorneys)

Philip E. Stern, Esq. for respondent

Record Closed: June 2, 2014 Decided: June 9, 2014

BEFORE **KIMBERLY A. MOSS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This is an appeal by petitioner Wayne Calandriello (Calandriello) from the Board of Education of South Orange-Maplewood (Board) improperly withholding a salary

increment to him. On April 8, 2014, the matter was forwarded the matter to the Office of Administrative Law (OAL) for hearing pursuant to N.J.S.A. 52:14B-1 to -13 and N.J.S.A. 52:14F-1 to 15. A prehearing conference was held on May 13, 2014. At the conference a motion schedule was addressed. Petitioner had filed a motion for summary decision on April 9, 2014. Although respondent's pleadings filed on May 27, 2014, list its brief as opposition to petitioner's motion for summary decision, it is also a cross motion for summary decision. Petitioner filed a reply to respondent's motion on June 2, 2014.

SUMMARY OF RELEVANT FACTS

Calandriello was the subject of a tenure hearing with the Board under the caption In the Matter of Wayne Calandriello, School District of the Township of South Orange-Maplewood, Essex County Docket Number EDU-13720-11, which resulted in the Commission of Education in his decision stating:

> Therefore the Commissioner finds and concludes that the loss of respondent's increment for one year and the 120 days salary withheld pursuant to N.J.S.A. 18A:6-14, following the certification of tenure charges plus an additional four months suspension without pay is sufficient penalty to impress upon respondent the seriousness of [sic] her errors in judgment displayed in this matter.

In a letter dated September 26, 2012, the Commissioner clarified that the additional four month suspension was to commence at the beginning of the 2012-2013 school year. Calandriello returned to his teaching position on January 2, 2013. He received his full salary less the increment. On or about January 15, 2014, Calandriello received his salary and noticed that no salary increment was included in his check. He requested that the Board reinstate the increment retroactive to January 1, 2014. The Board refused to reinstate the increment.

LEGAL ANALYSIS AND CONCLUSION

The parties seeks summary disposition of the matter. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 and the Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

In this matter there are no disputed facts. The issue is whether the decision of the Commissioner of Insurance requires Calandreillo to receive an increment effective January 1, 2014.

The case of DeMarco v. v. Board of Education of the Borough of Glassboro, 1982 S.L.D. 1471, 1981 S.L.D. 1041, 1981 S.L.D. 1034, involves the withholding of an increment as a result of a decision by the Commissioner of Education. In that case the Commissioner Ordered that petitioner be reinstated without the benefit of adjustments of increments to which he might have been entitled. Id at 1035. The Petitioner sought clarification of the language regarding the increment. In that matter the ALJ's decision,

which was upheld by the Commissioner of Education and the State Board of Education, stated:

> ...beginning March 10, 1980, petitioner will forfeit for one year, and that thereafter he will advance regularly on the salary schedule one step behind his regular step, absent other legal actions taken by the Board. Id at 1037.

In this matter the Commissioner Ordered the loss of respondent's increment for one year which began January 2, 2013. The one year period expired on or about January 2, 2014, at that time petitioner was entitled to the increment that he would have received beginning January 2013. He will advance one step behind his regular step. The Commissioner's decision does not state that upon completion of the year that petitioner's increment should be reinstated as if the lost year did not occur.

I **CONCLUDE** that petitioner is entitled to receive any increment that he would have received on January 2, 2013 commencing January 15, 2014. He will advance one step behind his regular step.

ORDER

Based on the foregoing, petitioner's motion to for summary decision is **GRANTED** in part. i.e petitioner is entitled to receive any increment that he would have received on January 2, 2013 beginning on January 15, 2014; and **DENIED** in part, petitioner is not entitled to receive an increment that would put him on the increment level he would be on if the loss year did not occur.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6-6-14
DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

Date Mailed to Parties: JUN - 9 2014

DIRECTOR AND
~~CHIEF ADMINISTRATIVE LAW JUDGE~~

ljb

DOCUMENTS RELIED UPON

- Petitioner's Motion for Summary Decision
- Respondent's Opposition to Petitioner's Motion for Summary Decision
- Petitioner's Reply to Respondent's Opposition

303-14L

307-14

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Acting Commissioner

July 18, 2014

M[redacted] J[redacted]
[redacted]
Ewing, New Jersey 08618

Sanmathi Dev, Esq.
Capehart & Scatchard, P.A.
8000 Midlantic Drive, Suite 300S
P.O. Box 5016
Mount Laurel, New Jersey 08054-5016

Re: *Board of Education of the Township of Hamilton, Mercer County v. M.J., on behalf of minor children, C.J. and C.J., Agency Dkt. No. 283-11/13.*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with the above captioned matter and based upon the respondent's failure to submit an Answer to the petition that complies with *N.J.A.C.* 6A:3-1.5, I have determined to grant summary decision in favor of the petitioner.

On November 18, 2013, petitioner filed a Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 *et seq.*, claiming that minor children C.J. and C.J. were not entitled to attend school in the District between September 5, 2012 and June 20, 2013, in accordance with *N.J.S.A.* 18A:38-1 *et seq.* A copy of the Petition of Appeal was served upon M.J. on November 4, 2013, as was an acknowledgment of filing and notice that an Answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because M.J. failed to respond to the initial notice, on December 11, 2013 a second notice was sent to the respondent, via certified and regular mail, clearly indicating that – absent receipt of an Answer to the Petition of Appeal within 10 days – each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). According to information obtained from the U.S. Postal Service, the copy sent via certified mail was delivered on December 14, 2013. The copy sent via regular mail was not returned. M.J. also failed to respond to the second notice.

On June 10, 2014, a final notice was sent to M.J., via certified and regular mail, again clearly indicating that – absent receipt of an Answer to the Petition of Appeal within 10

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days – each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis. Information from the U.S. Postal Service indicates that the copy sent vial certified mail was not claimed. Once again, the copy sent via regular mail was not returned.

To date, no Answer has been filed on behalf of M.J. Accordingly, petitioner's claim that C.J. and C.J. were not entitled to attend school in the District in accordance with *N.J.S.A.* 18A:38-1 *et seq.* is deemed admitted. It is hereby ordered that M.J. reimburse the petitioner $24,408.00 in tuition costs for the ineligible attendance of C.J. and C.J. in Hamilton Township schools from September 5, 2012 to June 20, 2013.[1]

Sincerely,

David C. Hespe
Acting Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JLC

VIA REGULAR MAIL

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

304-14

304-14L

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Acting Commissioner

July 23, 2014

Eric L. Harrison, Esq.
Methfessel & Werbel
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P.O. Box 3012
Edison, New Jersey 08818

Viola S. Lordi, Esq.
Wilentz, Goldman & Spitzer, Esqs.
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Box 10
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Frederick H. Wu, DAG
Office of the Attorney General
25 Market Street
8th Floor, West Wing
Trenton, New Jersey 08625

Dear Parties:

Upon review of the papers filed in the matter entitled, *Board of Education of the City of Hoboken, Hudson County v. New Jersey State Department of Education and the Board of Trustees of the Hoboken Dual Language Charter School,* Agency Dkt. No. 98-4/14, I have determined – for the reasons set forth below – to grant the respondents' respective Motions to Dismiss the Petition of Appeal for lack of jurisdiction, pursuant to *N.J.A.C.* 6A:3-1.10.

This matter was initiated by way of Petition of Appeal, filed on April 15, 2014. Therein, petitioner contests the March 5, 2014 grant of respondent Hoboken Dual Language Charter School's (HoLa) application for charter renewal and expansion. Petitioner alleges that the decision was inappropriately issued by Assistant Commissioner Evo Popoff, rather than the Commissioner, and that the decision was arbitrary, capricious, and unreasonable.

In lieu of an Answer, respondents filed a Motion to Dismiss[1], along with a supporting certification, exhibits, and a letter brief. Therein, respondents emphasize that the decision at issue was made by Evo Popoff, an Assistant Commissioner acting under authority properly delegated to him by then-Commissioner Christopher Cerf. To that end, Popoff certifies that he is an Assistant

[1] On May 8, 2014, the New Jersey State Department of Education filed a Motion to Dismiss in Lieu of Answer, with supporting certification, exhibits and letter brief. On May 21, 2014, respondent HoLa filed a Motion to Dismiss in Lieu of Answer, which relied upon the Department's submission. HoLa further relied upon the Department's reply brief, which was submitted on June 11, 2014.

Commissioner, and that on March 5, 2014, then-Commissioner Cerf designated Popoff to act on his behalf in all matters relating to the 2013-2014 charter renewal cycle. Popoff further certifies that, in making the decision on petitioner's application for charter renewal and expansion, he was acting in the stead of then-Commissioner Cerf. Respondents maintain that Popoff's determination is, therefore, a final agency decision and that, pursuant to *R.* 2:2-3(a)(2), the exclusive forum for appeal is the Appellate Division of the Superior Court. On this basis, respondents contend that the instant matter must be dismissed for lack of jurisdiction.

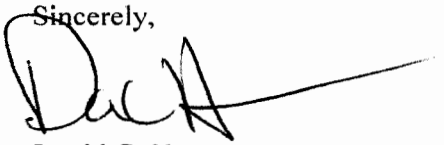
In opposition, petitioner argues that the March 5, 2014 decision was not issued pursuant to properly delegated authority and, therefore, did not constitute a final agency decision of the Commissioner. In the alternative, petitioner argues that, even if the March 5, 2014 decision is a final agency decision, the Bureau of Controversies and Disputes and the Office of Administrative Law have jurisdiction over the instant matter. In that regard, petitioner argues that the statutes and implementing regulations permit, but do not require, appeals to be brought before the Appellate Division. Petitioner further argues that the Commissioner should entertain the Petition of Appeal under his general adjudicatory powers, *N.J.S.A.* 18A:6-9, in light of the facts alleged and constitutional issues presented.

In reply, respondents argue that *N.J.S.A.* 18A:6-9 is inapplicable to the instant matter, since the Petition of Appeal squarely takes issue with the process and decision of the Commissioner and Assistant Commissioner in granting HoLa's renewal application, which is governed by *N.J.S.A.* 18A:6-9.1. Respondents reiterate that the March 5, 2014 decision constitutes a final agency decision, and that the Appellate Division is the only forum capable of hearing the appeal.

Upon full consideration of all submissions, the Commissioner is persuaded that the Petition of Appeal, in its entirety, must be dismissed for lack of jurisdiction. To that end, *N.J.A.C.* 6A:11-2.5 specifies that decisions on charter school renewal applications are, in accordance with *N.J.S.A.* 18A:6-9.1, final agency decisions appealable to the Appellate Division of the Superior Court. Consequently, the Commissioner lacks jurisdiction to rule on the issues presented.

Accordingly, pursuant to the Commissioner's authority under *N.J.A.C.* 6A:3-1.10, the instant Petition of Appeal is hereby dismissed.*

Sincerely,



David C. Hespe
Acting Commissioner

c: County Superintendent
State Law Library

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division

306-14E

306-14

OAL DKT. NO. EDU 6177-14
AGENCY DKT. NO. 125-5/14

NEWARK TEACHERS UNION, LOCAL 481, AMERICAN FEDERATION OF TEACHERS, AFL-CIO AND JOHN ABEIGON,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY AND CAMI ANDERSON,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENTS.	:	

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Pursuant to *N.J.A.C.* 6A:3-1.6(b), a grant of emergent relief is considered an extraordinary remedy that can only be issued upon a finding that petitioner has met the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). The party seeking such relief must demonstrate the existence of each of the following: 1) the movant will suffer irreparable harm if the requested relief is not granted; 2) the legal right underlying the movant's claim is settled; 3) the movant has a likelihood of prevailing on the merits of the underlying claim; and 4) when the equities and interests of the parties are balanced, the movant will suffer greater harm than the other party if the requested relief is not granted. *N.J.A.C.* 6A:3-1.6(b).

Upon a review of the record, the Commissioner concurs with the ALJ – for the reasons set forth in the recommended Order – that petitioners have failed to demonstrate that they will suffer irreparable harm if the request for emergent relief is not granted. In light of the fact that all of the *Crowe* prongs must be met in order for emergent relief to be granted, it is not necessary to address the three remaining factors. Accordingly, the recommended Order of the OAL denying

petitioners' application for emergent relief is adopted, as modified above. This matter shall continue at the OAL with such proceedings as the parties and ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/23/14

Date of Mailing: 7/24/14

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 06177-14

AGENCY DKT. NO. 125-5/14

NEWARK TEACHERS UNION, LOCAL481,
AMERICAN FEDERATION OF TEACHERS,
AFL-CIO AND JOHN ABEIGON,

Petitioners,

v.

STATE OPERATED SCHOOL DISTRICT OF
THE CITY OF NEWARK AND CAMI ANDERSON,

Respondents.

Colin M. Lynch, Esq. for petitioners (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Ramon E. Rivera, Esq., for respondents (Scarinci & Hollenbeck, attorneys)

BEFORE **MICHAEL ANTONIEWICZ**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners have filed a Motion seeking Emergent Relief directing and compelling the respondents, Cami Anderson, the Superintendent for the State-Operated School District of the City of Newark, to attend all Newark Public Schools (NPS) Advisory Board

meetings in order to comply with her obligations pursuant to N.J.S.A. 18A:7A-47(b). On May 20, 2014, petitioners filed a Petition of Appeal with the Commissioner of Education (Commissioner), who transmitted this matter to and filed with the Office of Administrative Law for emergent relief on May 21, 2014. The oral argument scheduled on June 2, 2014 adjourned, at petitioners' request, and rescheduled for June 10, 2014. In support of the motion, petitioners submitted: 1) Notice of Motion For Emergent Relief; 2) Letter Brief; 3) Certified Petition of Appeal and For Declaratory Ruling; and 4) Certification of petitioners. Under cover letter dated June 6, 2014, I received the following documents from the respondents: 1) Brief in Opposition to Petitioners' Motion for Emergent Relief and in support of respondents' Cross-Motion for Summary Decision; 2) Certification of Charlotte Hitchcock, Esq.; 3) Certification of Counsel with Exhibits; Proposed Form of Order; and 4) Certification of Service.

FACTUAL DISCUSSION

A summary of the pertinent **FACTS** are presented as follows:

1) The District of the City of Newark is a State-Operated School District in accordance with N.J.S.A. 18A:7A-1 et seq. since 1995.

2) The District operates and administers the public schools and provides educational services to the residents thereof.

3) The State-Operated School District Superintendent is appointed by the State Board of Education upon the recommendation of the Commissioner of Education. Respondent Cami Anderson was appointed by the State Board of Education in May 2011 pursuant to N.J.S.A. 18A:7A-35.

4) As the State District Superintendent for the District, respondent Anderson may convene and schedule meetings of the District's board of education pursuant to N.J.S.A. 18A:7A-47(b).

5) In the 2013–2014 school year, the District's School Advisory Board (SAB) held monthly business and regular meetings regarding the District.

6) Superintendent Anderson has attended SAB meetings from the beginning of the school year through February 18, 2014.

7) On January 28, 2014, the scheduled SAB meeting took place and the public comment was raucous and tumultuous. The meeting was out of order and the District was unable to properly conduct business.

8) In response to the chaotic nature of the SAB meeting, the District issued an "Open Letter to Newark Families" on or about February 25, 2014. The District stated that the monthly meetings were no "longer focused on achieving educational outcomes for children" and the NPS Leadership, including Superintendent Anderson would no longer attend these meetings "until the SAB can commit to ensuring a space conducive to open dialogue with the community."

9) In order to continue to provide the community with the reports previously delivered at the School Advisory Board meetings, the District's letter provided that "NPS will videotape its monthly update, traditionally presented at the SAB meeting and distribute it directly on its website and on Channel 77, the Newark community cable network." This open letter was posted on the SAB website on that same date.

10) In a separate statement, addressing the District's decision, members of NPS Leadership published individual statements regarding the current state of the SAB meetings. The publicly available statements went on to detail the District's commitment to engagement with the community and dedication to a free, open and productive dialogue.

11) Despite the District's Open Letter, Superintendent Anderson attended the SAB meetings on March 18, 2014 and May 20, 2014. In addition, members of the

NPS leadership, on behalf of Superintendent Anderson, attended subsequent monthly meetings in February, March, April and May.

12) Specifically, Charlotte Hitchcock, Esq., in her capacity as General Counsel and Chief of Staff for the District and on behalf of the Superintendent, attended SAB meetings on February 18, 2014; February 25, 2014; March 18, 2014; March 25, 2014; April 29, 2014; May 20, 2014 and May 27, 2014, subsequent to the February 25, 2014 announcement. Furthermore, Arsen Zartarian, Deputy General Counsel for the District, in his capacity as the Board Secretary and Valarie Wilson, in her capacity as the District's Business Administrator, also attended the following SAB meetings: February 18, 2014; February 25, 2014; March 18, 2014; March 25, 2014; April 29, 2014; May 20, 2014 and May 27, 2014. As such, District representatives were in attendance at all SAB meetings since the February 25, 2014 "Open Letter."

13) There remain two SAB meetings scheduled for June 17 and 24, 2014. District representatives are scheduled to attend all remaining SAB meetings for the 2013–2014 school year.

14) The State District Superintendent has continued to attend other certain meetings, provided information, reports and engage with the public, as well as her deputies and members of the NTU leadership team.

Based upon the above, the petitioners' request for emergent relief is considered.

LEGAL DISCUSSION AND CONCLUSIONS

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards be met for granting such relief pursuant to Crowe v. Degioia, 90 N.J. 126, 132-134 (1982):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has the likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

Petitioners have the burden of establishing each of the above requirements in order to warrant relief in their favor. The petitioners' motion shall be reviewed and decided based upon the Crowe, supra standard.

Petitioners Will Suffer Irreparable Harm
If The Requested Relief Is Not Granted

Turning to the first criteria, it is well settled that relief should not be granted except "when necessary to prevent irreparable harm." Crowe, supra 90 N.J. at 132. In this regard, harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. In other words, it has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). See New Jersey Dep't of Environmental Protection v. Circle Carting, Inc., 2004 N.J. AGEN LEXIS 9687774444 (April 2, 2004) (finding no irreparable harm in connection with the revocation of respondent's solid waste license in that financial loss is generally insufficient to demonstrate this requirement).

The moving party bears the burden of proving irreparable harm. More than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco

Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires a "'clear showing of immediate irreparable injury,'" or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted.)

Petitioners argue that the Anderson's actions creates harm as the petitioners will be deprived of their statutory right to an accounting of the Superintendent's official actions as they occur and their right to publically discuss and comment upon same. They further claim that monetary damages cannot adequately compensate petitioners for this injury. However, nowhere in the petitioners' papers do they allege that the Superintendent has failed to set up meetings of the board and that the Superintendent has failed to set the agenda. In addition, the petitioners have failed to allege that the Superintendent has failed to report to the board on all actions taken. In fact, in oral argument, petitioners' counsel conceded that the Superintendent could report via many different modes of communication, including written reports, websites or through other individuals in the Superintendent's stead. Thus, the statutory right to accounting and public comment has not been infringed.

I accept respondents' position that petitioners have failed to demonstrate irreparable harm. Petitioners' submission does not support a finding that the respondents' actions create irreparable harm to the petitioners. The petitioners still have meetings with a Superintendent's agenda and reports as well as a meeting with an opportunity for full discussions by the board and by the public. The petitioners were unable to provide the Court with any tangible evidence of a failure of the Superintendent to fulfill the requirements set forth in N.J.S.A. 18A:7A-47(b). It is well established law in New Jersey that the claim of irreparable harm must not only be imminent, but must also be concrete and non-speculative. Subcarrier Communications v. Day, 299 N.J. Super. 634, 639 (App. Div. 1997). In short, the Superintendent has and continues to meet her statutory requirements as set forth in N.J.S.A. 18A:7A-47(b).

In sum, I **CONCLUDE** that the petitioners have failed to meet their burden of establishing a clear showing that they will suffer immediate irreparable injury unless the requested relief is granted.

The Legal Right Underlying Petitioners' Claim is Settled and The Petitioners Have The Likelihood of Prevailing on The Merits of The Underlying Claim

Apart from this, in order to prevail on an application for an emergent relief, petitioners must also demonstrate that the legal right underlying their claim is settled and must make a preliminary showing of a reasonable probability of ultimate success on the merits. Crowe, supra, 90 N.J. at 133.

A review of the legal rights of the parties does not support petitioners' entitlement to the relief sought and does not show that the petitioners' claim is settled. Nowhere in N.J.S.A. 18A:7A-47(a) and (b) does it clearly state that a State-Operated School District the Superintendent is required to appear at the board meetings.

> (b) The State district superintendent **may** meet with the board as frequently as necessary for the effective operation of the school district. The meetings of the board **shall** be convened and scheduled at the direction of the State district superintendent and the State district superintendent **shall** determine the agenda. At the meetings, the State district Superintendent **shall** report to the board on all actions taken and on pending actions in a timely fashion and provide an opportunity for a full discussion by the board and by the public of those actions. Meetings shall be conducted pursuant to the provisions of the "Open Public Meetings Act." P.L. 1975, c. 231 (C.10:4-6 et seq.). On a regular basis, but no less than twice each year, the board of education shall report in writing directly to the State district superintendent concerning its assessment of the progress of the district. Copies of the report shall be forwarded to the commissioner and the State board. The State district superintendent shall make such clerical and other resources available as are necessary for the effective operation of the board of education.
>
> [N.J.S.A. 18A:7A-47(b), emphasis added.]

The Legislature was free to **require** the State district superintendent to do certain acts and in a certain manner, but did not. The only overt direction to the superintendent is that the superintendent **may** meet with the board. This is clearly not a statutory requirement. The meetings of the board **shall** be scheduled at the direction of the State district superintendent and the State district superintendent **shall** determine the agenda. It is clear that Anderson has fulfilled these requirements.

In addition, the Legislature, by statute, required that the State district superintendent to report to the board on all actions taken and on pending actions in a timely fashion. However, the statute is silent on the mode of reporting. The statute could have stated that the State district superintendent to report to the board in person, but it did not so state. There is no dispute that reports to the board have been made by Anderson or by some individual in Anderson' place, including the general counsel and chief of staff for the District; the deputy general counsel for the District (Board Secretary); District's business administrator. Accordingly, District representatives were in attendance at all SAB meetings since the February 25, 2014 "Open Letter."

Lastly, the State district superintendent shall provide an opportunity for a full discussion by the board and by the public of the actions. This role too has been fulfilled by Anderson whereby meetings were scheduled, reports presented and open discussions transpired.

I **CONCLUDE** that the petitioners have failed to shoulder their burden of proving that the legal right underlying its various claims is settled and that they have a likelihood of prevailing on the merits of its claims. The petitioners' evidence is not sufficient for the petitioners to carry their burden that they are likely to prevail on the merits.

Finally, in balancing the equities and interests of the parties, the scales tip in favor of respondents. The respondents' power to act as it did is supported by statute and case law. I further **CONCLUDE** that the petitioners have failed to show that the equities favor them and that they will suffer greater harm.

Based on the foregoing, I **CONCLUDE** that petitioners have failed to meet the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting a stay or emergent relief in this matter. Accordingly, I **ORDER** that petitioner's application for such emergent relief be and hereby is **DENIED** and **DISMISSED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 11, 2014
DATE

MICHAEL ANTONIEWICZ, ALJ

jb

308-14

308-14R

IN THE MATTER OF THE TENURE	:	
HEARING OF LOUIS MELILLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY	:	

SYNOPSIS

In 2004, the School District of the City of Elizabeth brought tenure charges of conduct unbecoming against respondent – a tenured custodian – and sought respondent's dismissal from employment. Respondent denied all charges. In September 2010 charges were dismissed following a protracted hearing, but the matter was appealed to the Appellate Division and continued in litigation for three more years. Subsequently – in December 2013 – a settlement was entered into between the respondent and the Board, in which respondent resolved a variety of pending claims, including a civil rights action and several workers compensation claims. As part of the settlement, respondent submitted an irrevocable letter of resignation that was effective June 30, 2014.

The ALJ found and concluded that the tenure charges against the respondent have been rendered moot by his resignation, and that it is in the best interests of the taxpayers of Elizabeth that they incur no further public expense in litigating this matter. Accordingly, the ALJ ordered the tenure charges dismissed.

Upon a comprehensive review of the record, the Commissioner concurred with the ALJ's determination that respondent's resignation – which was effective June 30, 2014 – has rendered the within tenure charges moot. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 7/24/14

OAL DKT. NO. EDU 11969-13
(EDU 11502-04 AND 12620-10 ON REMAND)
AGENCY DKT NO. 363-10/04

IN THE MATTER OF THE TENURE	:	
HEARING OF LOUIS MELILLO,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF ELIZABETH, UNION COUNTY	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination – for the reasons expressed in the Initial Decision – that respondent's resignation from the district effective June 30, 2014 renders the tenure charges moot. Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter and the tenure charges are hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/24/14

Date of Mailing: 7/24/14

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11969-13
AGENCY REF. NO. 363-10/14
(remand of EDU 11502-04 and EDU 12620-10)

IN THE MATTER OF THE TENURE HEARING OF LOUIS MELILLO, SCHOOL DISTRICT OF THE CITY OF ELIZABETH, UNION COUNTY.

John E. Croot, Jr., Esq., for petitioner (Schwartz, Simon, Edelstein and Celso, attorneys)

Sheldon Pincus, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: June 17, 2014 Decided: June 19, 2014

BEFORE **ELLEN S. BASS**, ALJ:

PROCEDURAL HISTORY AND FINDINGS OF FACT

In 2004, when the events pertinent to this dispute arose, respondent, Louis Melillo (Melillo) was employed by petitioner, the Elizabeth Board of Education (the Board), as a custodian under tenure, pursuant to N.J.S.A. 18A:17-3. On September 15, 2004, tenure charges were filed against him in the aftermath of allegations that he had

made sexual advances and inappropriate sexual remarks to students employed by the school district for the summer. On October 14, 2004, the Board determined that probable cause existed to credit the evidence in support of the charges, and that the charges, if so credited, warranted Melillo's dismissal from his employment. The Board certified charges of unbecoming conduct against Melillo pursuant to N.J.S.A. 18A:6-10 et seq. and the matter was transmitted to the Office of Administrative Law (OAL) as a contested case on November 19, 2004.

After a protracted hearing, an Initial Decision was entered on September 2010, dismissing the charges against Melillo. This decision was affirmed by the Commissioner of Education via decision dated November 4, 2010, but was remanded to the OAL for "such proceedings as are necessary to fully resolve the parties' disputes concerning back pay and emoluments." An Initial Decision on the back pay issue was entered on March 8, 2011, and a final decision was issued by the Commissioner on April 25, 2011.

The Board in turn filed an appeal with the Superior Court Appellate Division, which reversed and remanded the matter for a new hearing via decision dated July 25, 2013. The matter was transmitted again to the OAL on August 20, 2013. I conferred with counsel, who asked that the proceedings before me be held in abeyance pending a decision of the Supreme Court of the State of New Jersey on Melillo's Petition for Certification. I granted that request. Certification was denied on December 9, 2013.

Thereafter, I conferred with counsel via telephone on January 16, 2014, who advised that, unbeknownst to them, a settlement had been entered into by Melillo with the Board in which he resolved a variety of other pending claims, to include a civil rights action and several pending workers compensation claims.[1] In a document signed by Mellilo on December 16, 2013, and signed by the Board President on January 13, 2014, Melillo agreed to tender his resignation effective June 30, 2014, in return for payment in

[1] I expressed surprise that counsel was unaware of this settlement; they indicated that they were equally surprised, and explained that both the Board and Melillo were represented by other attorneys in the civil rights and workers compensation matters, and that these attorneys did not see fit to keep them informed about the status of these settlement discussions or inform them of the impending settlement; this notwithstanding the fact that the settlement alludes to the pending tenure matter.

the amount of $121,500.00. (See: Croot Certification, Exhibit "A"). Accompanying the settlement is an irrevocable letter of resignation dated December 17, 2013. (Croot Certification, Exhibit "C"). Per the settlement terms, Melillo released the Board, and held it harmless, from any and all claims which he had previously raised or which he could have raised relative to his employment with the school district.[2]

Counsel for the Board has certified that the settlement agreement was approved by the Board at its meeting of March 20, 2014, and has attached a certified copy of the Board resolution. (Croot Certification, Exhibit "B"). That resolution accepts and approves the settlement agreement and then lists the matters resolved thereby. The resolution includes a reference to OAL Docket Number EDU 11502-04, the docket number for the original tenure charge matter filed by the Board in 2004. However, neither counsel of record here at the OAL, nor the undersigned, were made privy to the negotiations that led up to this settlement, nor were aware that a settlement had been agreed upon until after the execution of the agreement.

The Board formally accepted Melillo's resignation at its meeting of May 8, 2014, per the Board resolution that accompanies counsel's certification. (Croot Certification, Exhibit "D").

I additionally **FIND** as follows:

1. The nature of the charges has been documented by the Statement of Charges and Certificate of Determination to the Commissioner.

2. Under the terms of the settlement agreement, Melillo has resigned his position of employment, effective June 30, 2014. During the period from February 15, 2014, through June 30, 2014, Melillo has been and will remain on an unpaid leave but will receive his full health benefits.

[2] The settlement agreement notes that it resolves a civil rights matter pending in Federal District Court, Melillo v Elizabeth Bd. of Educ., et als, Civil Action No. 2:11-cv-04887 (SDW), together with four pending Worker's Compensation claims (Nos, 2013-29063,2013-29064,2013-29068 and 2013-18063). Although the settlement agreement references a stipulation of settlement relative to the tenure charges (see: paragraph 11), none was attached or ever executed by the parties.

3. The proposed settlement agreement has been entered into with the consent of the parties. It has been approved by the Board of Education, as confirmed by the attached Board resolution.

4. Melillo has entered into this agreement based upon the advice of counsel who assisted in guiding him through the settlement process and he so stipulates in the settlement agreement.

5. The Appellate Division remand was based on the court's determination that the administrative law judge's credibility determinations were unsupported by the record developed at hearing. Accordingly, creation of a completely new evidentiary record would be required on remand, so that the credibility of these witnesses could be assessed anew. The facts that gave rise to these tenure charges arose some ten years ago. Settlement avoids the expense and uncertain result of a hearing where witnesses with pertinent knowledge might be either unavailable, or would have understandably dimmed memories of the events. Elizabeth is a high poverty district with stringent budget limitations. By entering into this agreement, the Board has avoided costly and uncertain litigation involving taxpayer funds.

6. While the agreement contains a confidentiality clause, it acknowledges the Board's obligation to disclose any information contained therein if required to do so via court order.

CONCLUSIONS OF LAW

The settlement agreement consummated by the parties arose out of litigation in other forums, and resulted in Melillo's resignation. Accordingly, I **CONCLUDE** that the tenure charges against Melillo have been rendered moot, and that this matter should be dismissed. An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint it is appropriate to refrain from decision-making when an issue presented

is hypothetical, judgment cannot grant effective relief, or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999) <http://njlaw.rutgers.edu/collections/oal/>; S.J. v. Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004) <http://njlaw.rutgers.edu/collections/oal/>.

The Commissioner has uniformly held that a tenured staff member's resignation moots pending tenure charges. In Re Saez, EDU 11306-05, Initial Decision, (February 22, 2006), aff'd Comm'r (April 4, 2001) <http://njlaw.rutgers.edu/collections/oal/>; In Re Castel, EDU 03428-07, Initial Decision, (February 7, 2008), aff'd Comm'r (March 17, 2008) <http://njlaw.rutgers.edu/collections/oal/>. Melillo's resignation makes a determination whether to terminate his employment meaningless, and renders the issues raised by the pleadings academic. Accordingly, I **CONCLUDE** that the charges should be dismissed.

Moreover, I **CONCLUDE** that, to the extent that the settlement document refers to and purports to incorporate the pending matter, the settlement likewise meets the requirements of N.J.A.C. 6A:3-5.6, and that approval of the settlement is in the public interest. The settlement agreement confirms that these parties had a highly litigious relationship that encompassed disputes in several forums. It is clearly in the best interest of the taxpayers of Elizabeth that they incur no further public expense in litigating these tenure charges.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the tenure charges are **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 19, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: _____

Mailed to Parties: _____

309-14

MYLES HART,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Pro-se petitioner challenged the determination of the respondent that he had not satisfied the requirements for a Teacher of Students with Disabilities endorsement to his Instructional Certificate as required under current regulations. Petitioner began his efforts to become certified in the area of special education instruction in 2003 by taking courses at Rutgers University (Rutgers), with the intent of earning an endorsement as a Teacher of the Handicapped. Subsequently, amendments to the regulations have replaced that endorsement with the Teacher of Students with Disabilities endorsement, and the requirements were changed. Candidates who had begun their course of study under the old regulations were "grandfathered-in", so long as they completed a certificate program of study no later than March 1, 2009. Petitioner in the instant matter did not complete coursework within the regulatory timelines. The Board of Examiners (Examiners) filed a motion to dismiss in lieu of an answer, alleging that petitioner had failed to meet regulatory requirements for issuance of the requested endorsement pursuant to *N.J.A.C.* 6A:9-11.3.

The ALJ found, *inter alia*, that: petitioner bears the burden of demonstrating by a preponderance of the credible evidence that he is entitled to the certifications he seeks; it is uncontroverted that petitioner earned less than the requisite number of credits needed for issuance of the certification he seeks; Rutgers accordingly would not issue a Verification of Program Completion (VOPC) form; and the regulations are not flexible enough to permit petitioner to attain the certification he seeks despite his lack of adequate credits. The ALJ concluded that: petitioner has failed to show that the decision of the Examiners was arbitrary, capricious and unreasonable; the Examiners' determination that petitioner remains ineligible for standard certification is consistent with the regulatory scheme and must be upheld; and, despite petitioner's credibility and passion for working with children with special needs, it cannot be found that the Examiners have acted in a manner that is arbitrary, capricious or unreasonable. Accordingly, the ALJ granted the Examiners' motion to dismiss the petition.

Upon a comprehensive review, the Commissioner concurred with the ALJ's findings and determinations, and adopted the Initial Decision of the OAL as the final decision in this matter.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 7/29/14

OAL DKT. NO. EDU 17942-13
AGENCY DKT. NO. 263-10/13

MYLES HART,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that Board's Motion to Dismiss is appropriately granted. Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter for the reasons stated therein and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/29/14

Date of Mailing: 7/29/14

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 17942-13
AGENCY DKT. NO. 263-10/13

MYLES HART,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Myles Hart, pro se

Frederick Wu, Deputy Attorney General, for respondent, State Board of Examiners (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: June 3, 2014 Decided: June 17, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Myles Hart, challenges the action of respondent, the State Board of Examiners (the Examiners), in denying his application for a Teacher of Students with Disabilities endorsement to his Instructional Certificate. The Board of Examiners reply

that Hart has failed to meet regulatory requirements for issuance of this endorsement, per N.J.A.C. 6A:9-11.3.

PROCEDURAL HISTORY

Hart filed a petition of appeal with the Commissioner of Education (the Commissioner) on October 22, 2013. A motion to dismiss in lieu of an answer was filed on behalf of the Examiners on December 10, 2013, and the contested case was transmitted to the Office of Administrative Law on December 11, 2013. Hart filed a letter in opposition to the motion on March 4, 2014, and the Examiners replied via letter brief dated March 18, 2014. Oral argument was conducted on June 3, 2014, at which time the record closed.

FINDINGS OF FACT

The Examiners' motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. In ruling on a motion to dismiss

> The judge considers whether all the evidence together with all legitimate inferences therefrom could sustain a judgment in favor of the party opposing the motion. The judge is not concerned with weight, worth nature or extent of the evidence. The judge must accept all the evidence supporting the party defending against the motion and accord that party the benefit of all inferences that can reasonably and legitimately be deduced therefrom. If reasonable minds could differ, the motion must be denied.
>
> [37 New Jersey Practice, Administrative Law and Practice § 5.19, at 259-60 (Steven Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000).]

Accordingly, for the purposes of the motion, all facts alleged by the petition will be deemed admitted, and I **FIND** as follows:

In 2003, Hart was the holder of a standard instructional certificate with a Teacher of History endorsement when he accepted a teaching position at Coastal Learning Center, an approved private school for the disabled. At that time, he began his efforts to become certified in the area of special education instruction by taking courses at Rutgers University. He accumulated 15 credits. The certification he sought would have been an endorsement as a Teacher of the Handicapped; with amendments to the regulations that endorsement has now been replaced by the Teacher of Students with Disabilities endorsement.

Prior to its most recent amendments, N.J.A.C. 6A:9-11.3(r) provided as follows:

> A candidate who matriculated and enrolled in a special education teacher preparation program that meets the requirements set forth in N.J.A.C. 6:11, as effective prior to January 20, 2004, no later than spring semester 2005 and completes the program by September 1, 2008 shall be issued the Teacher of the Handicapped endorsement. The candidate shall apply to the Office no later than March 1, 2009. A candidate who meets the requirements in this section but applies to the Office after March 1, 2009 shall be required to meet the requirements of (b) above . . . .

This regulatory language "grandfathered-in" candidates who had commenced their course work under old requirements, but set a time restriction of March 1, 2009, for completion of a certificate program of study. Unfortunately, Hart did not complete his coursework within the regulatory timelines, and accordingly, he was informed that he was required to meet current guidelines for course completion. During the course of his studies, he earned a certificate of eligibility (CE) in special education.

Hart spent much time, effort, and money in his quest for certification and feels aggrieved by what he describes as a change in the rules mid-way. He moreover feels mislead by the various Rutgers and Department of Education representatives he consulted along the way for guidance. Based on what he considers to have been poor advice, Hart enrolled in a University of Phoenix online program, where he completed additional credits. He then returned to Rutgers, but was informed that Rutgers would not accept the work completed at Phoenix. According to Hart, changes in the Rutgers

curriculum caused him to lose even more credits, as instruction that had been previously offered as two classes has now been consolidated into one class with a resultant loss of three credits. In any event, even Hart professes to have earned only 18 credits.

In a decision dated July 25, 2013, the Examiners concluded that Hart had not satisfied the requirement that he complete a 21-27 credit, State-approved graduate program, as verified by a college/university through a Verification of Program Completion (VOPC) form. The Examiners noted that the VOPC is their assurance that an applicant for certification has completed all essential components of the course of study required for certification. Their decision states that "[w]ithout a VOPC, the Board would have to undertake a course by course evaluative role, which would undermine the stringent standards-based program approval processes utilized by colleges, universities, and the regulatory requirements of out-of-state education departments." The Examiners urge that Rutgers confirmed that Hart had failed to complete programmatic requirements, as evidenced by the fact that it declined to supply a VOPC on his behalf.

CONCLUSIONS OF LAW

Hart carries the burden of demonstrating by a preponderance of the credible evidence that he is entitled to the certifications he seeks. Farrar v. State Bd. of Exam'rs, EDU 13763-08, Initial Decision (April 27, 2010), aff'd, Comm'r (July 26, 2010), <http://lawlibrary.rutgers.edu/oal/search.html>. The Commissioner will "not disturb the decision [of the Examiners] unless the appellant has demonstrated that the Board [of Examiners] or the Commissioner acted in a manner that was arbitrary, capricious or contrary to law. N.J.A.C. 6A:4-4.1; Farrar, supra, EDU 13763-08 (citing Fisher v. State Bd. of Exam'rs, 96 N.J.A.R.2d (EDU) 58). Where there is room for two opinions, action is not considered arbitrary or capricious when exercised honestly and upon due consideration, even though the court may believe that an erroneous conclusion has been reached. Bayshore Sewerage Co. v. Dep't of Envt'l Prot., 122 N.J. Super. 184, 199 (App. Div. 1973). I **CONCLUDE** that Hart has not met his burden of demonstrating

that the Examiners' decision was arbitrary, capricious and unreasonable, and that the petition of appeal must be dismissed.

Hart seeks certification as a Teacher of Students with Disabilities, the requirements for which are as set forth with specificity at N.J.A.C. 6A:9-11.3. The regulation plainly requires that "candidates who hold a standard New Jersey instructional certificate shall be issued the appropriate standard special education endorsement upon completion of a Department-approved college special education program . . . ." N.J.A.C. 6A:9-11.3(n). Elsewhere, the regulation clarifies the number of credits that such a program is expected to entail. N.J.A.C. 6A:9-11.3(d)(4) states that the program should be "at a regionally accredited college or university that includes a range of 21-27 credit hours in the topics listed in (e), (f), (g) or (h) below." The Examiners explain in their decision that the range of credits is intended to allow the institution of higher education to customize its program. Precisely because the regulations permit such customization, the Examiners rely on the VOPC for evidence that program requirements have been properly completed. See Ruiz v. N.J. State Bd. of Exam'rs, EDU 12754-10, Initial Decision (November 9, 2011), adopted, Comm'r (December 23, 2011).

It is uncontroverted that Hart has earned less than the requisite number of credits needed for issuance of the certification he seeks and that Rutgers accordingly would not issue a VOPC. I thus **CONCLUDE** that the Examiners' determination that Hart remains ineligible for standard certification is consistent with the regulatory scheme and must be upheld. Hart argued with passion and credibility that he is committed to a career in education and is particularly suited to working with children with special needs. He offered to share letters of recommendation from prior employers, which I advised was unnecessary because, unfortunately, his success in prior jobs is not pertinent to the issue before me. I was thoroughly convinced he would make a wonderful educator, but that fact alone is insufficient to support a finding that the Examiners have acted in a manner that is arbitrary, capricious or unreasonable.

Hart urged that there must be enough flexibility in the regulations to permit him to attain the certification he seeks despite his lack of adequate credits. But unfortunately,

there is not. The regulation speaks in the imperative, using the word "shall." A credentials review does permit an applicant to provide evidence of "alternative education and/or experience that the applicant believes is the equivalent to the area(s) of deficiency." N.J.A.C. 6A:9-17.13(a). The Examiners have the discretionary authority to consider such alternative experience, and to accept it where they determine that the experience establishes a one-to-one correspondence with regulatory requirements. Hutchinson v. Bd. of Exam., EDU16373-12, Initial Decision (April 5, 2013), aff'd, Comm'r (May 15, 2013), <http://njlaw.rutgers.edu/collections/oal/>. But the Examiners do not waive regulatory clear requirements and Hart's inability to present a VOPC evidences his failure to complete a critical programmatic prerequisite for issuance of a standard certificate. I **CONCLUDE** that the Examiners' decision here is reasonable; is consistent with the regulatory intent, which is to rigorously vet applicants for certification; and is entitled to deference.

Finally, Hart's argument that regulatory changes unfairly impeded his ability to earn certification is unavailing. N.J.A.C. 6A:9-11.3(r) provided a clear path for candidates in Hart's position, and a timeline under which he could have been grandfathered-in under earlier requirements. But Hart failed to complete his credits within the timeline set forth in the regulation. Accordingly, the change in regulatory requirements does not alter my view that the Examiners decision relative to Hart's candidacy for certification was reasonable.

ORDER

It is hereby **ORDERED** that the Board of Examiners' motion to dismiss is **GRANTED** and the petition of appeal **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 17, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency:

Date Mailed to Parties: JUN 17 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

310-14

M.P. on behalf of minor child, K.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

On January 23, 2014, petitioner – the parent of K.K., a high school senior in respondent Board's school district – filed an appeal challenging the imposition of a two-day Saturday detention upon K.K. for an incident that occurred on October 3, 2013. The Board filed a motion to dismiss in lieu of an answer, citing the late filing of the petition. The Board's motion was converted by the ALJ to a motion for summary decision under *N.J.A.C.* 1:1-12.5. This case stems from a single incident during which K.K. found a cell phone in a school bathroom, which had been reported stolen the day before. K.K. was found to be in possession of the device after she discovered it, was questioned, admitted that she considered keeping the found phone, and ultimately was assigned a two-day Saturday suspension for violating the student code of conduct by not immediately reporting to the office with the cell phone to turn it over to school officials.

The ALJ found, *inter alia*, that: there are no material facts in dispute, and the matter is ripe for summary decision; petitioner filed his appeal pursuant to *N.J.A.C.* 6A:3-1.1 et seq; the time for filing is clearly set forth at *N.J.A.C.* 6A:3-1.2(i), which provides that a petition before the Commissioner must be filed no later than 90 days after receipt of notice of a final determination by the Board; the petition in the instant matter should have been filed within 90 days of October 3, 2013, the date on which the discipline was imposed. Accordingly, the ALJ concluded that the petition should be dismissed for failure to comply with the requirements of *N.J.A.C.* 6A:3-1.2(i).

Upon review of the record and the Initial Decision of the OAL, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Commissioner adopted the Initial Decision as the final decision in this matter, for the reasons well articulated by the ALJ. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 7/29/14

OAL DKT. NO. EDU 2805-14
AGENCY DKT. NO. 10-1/14

M.P. on behalf of minor child, K.K.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is petitioner M.P.'s challenge to discipline imposed upon K.K., a high school senior, for an incident which occurred on October 3, 2013. Upon review of the record and Initial Decision of the Office of Administrative Law (OAL),[1] the Commissioner concurs with the finding of the Administrative Law Judge (ALJ) that petitioner's appeal of the discipline is untimely. Further, the Commissioner finds that petitioner failed to show that respondent's investigation regarding petitioner's allegations of harassment and bullying was defective, or that the conclusions it drew from the investigation were arbitrary, capricious or unreasonable.

Accordingly, the Commissioner adopts the Initial Decision in its entirety – for the reasons articulated by the ALJ.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/29/14
Date of Mailing: 7/29/14

[1] Neither party has filed exceptions to the Initial Decision.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 02805-14
AGENCY DKT. NO. 10-1/14

M.P. ON BEHALF OF K.K.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,
Respondent.

Joseph Bell, Esq., for petitioner (Bell, Shivas and Fasolo, attorneys)

Nathanya Simon, Esq., for respondent (Schwartz, Simon, Edelstein and Celso, attorneys

Record Closed: June 13, 2014 Decided: June 18, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, the parent of a student enrolled in the Morris Hills Regional School District (the District), challenges the imposition of a two-day Saturday detention by the high school administration. The responding Board of Education (the Board) asks that

the petition be dismissed as untimely, and for failure to exhaust local administrative remedies.

PROCEDURAL HISTORY

Petitioner filed his appeal with the Commissioner of Education on January 23, 2014. The Board filed a motion to dismiss in lieu of an answer on March 4, 2014. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on March 6, 2014. Opposition to the motion was filed by petitioner on March 14, 2014. On April 30, 2014, I conferred with counsel and advised that I would hold the record open briefly to receive any additional submissions. Petitioner filed a supplementary brief dated May 30, 2014. The Board replied via letter filed on June 13, 2014, at which time the record closed.

FINDINGS OF FACT

The salient facts are not in dispute, and I FIND:

K.K. is a twelfth-grade student at Morris Hills High School. On October 3, 2013, the school resource officer (S.R.O.) found her to be in possession of an iPhone that had been reported stolen. K.K. was interviewed by Assistant Principal James Devlin, and she advised that she had found the phone in the lavatory during her second-period class. K.K. turned on the phone in an effort to determine its owner, but found no pictures, messages, or contacts that would be of help. She admitted that she did not immediately bring the phone to the school office, and that her initial thought was to keep it for herself. But according to K.K.'s written statement, she began to think better of keeping it, intended to return it, but before she could do so heard from the S.R.O. via text message with a request that she come to see him.

Devlin determined that K.K.'s actions were a violation of the student code of conduct. She was assigned two Saturday detentions. Superintendent of Schools James Jencarelli points out in his certification that K.K. was not disciplined for theft of the phone, and that indeed, had she been, district policy makes it clear that the

prescribed punishment would have been an out-of-school suspension. K.K.'s parents were notified regarding the discipline to be imposed via letter dated October 3, 2013. The detentions were to have been served on October 5, and 12, 2013, but have not been served to date. According to Jencarelli, K.K. and her father did report for the October 5, 2013, detention and conferred with staff; but K.K. did not remain and actually serve her detention that day.

On or about October 10, 2013, petitioner reported another student had posted harassing comments about K.K. on Twitter in reference to the cell phone incident, and petitioner asserted that his daughter was a victim of harassment, intimidation and bullying (HIB). An investigation took place, and school administration determined that the incident did not rise to HIB. This determination was affirmed by the Board on October 28, 2013, and petitioner was so advised via a letter dated October 29, 2013.

The brief filed by petitioner's counsel makes bald allegations that K.K. was mistreated by investigating school officials when found with the stolen phone, but does so without any supporting affidavits. Accordingly, these claims warrant no further discussion here. A certification from counsel attaches Twitter posts that appear to reflect that the victim of the alleged theft of the phone was nasty and abusive to K.K. But these documents are attached only to a certification of counsel and are otherwise unauthenticated. On November 5, 2013, counsel wrote to the Commissioner of Education stating that his letter served as an "an appeal of the Regional District Board of Education's decision of October 29, 2013." His letter referenced his client's HIB complaint. Via letter dated November 6, 2013, counsel was advised by Kathleen Duncan, Director of the Bureau of Controversies of Disputes, that such a letter did not suffice to initiate an appeal as it was noncompliant with the requirements of N.J.A.C. 6A:3-1.1. Counsel filed nothing further on his client's behalf during the 2013 year.

Thereafter, this petition was filed on January 17, 2014. The covering letter again alludes to relief related to HIB. But the relief sought by the actual petition concerns only the imposition of the two Saturday detentions, which petitioner asks be vacated. While the petition states that an HIB complaint was filed by K.K.'s father, and denied by the

district, the petition makes no further allegations in regard to the alleged bullying incident, nor seeks any relief in regard to that incident.

ANALYSIS AND CONCLUSIONS OF LAW

The Board's motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. Since the motion was accompanied by the Jencarelli certification, I have converted the Board's application to a motion for summary decision under N.J.A.C. 1:1-12.5.

The rule provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Brill, supra, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242,

249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision, and that the District's motion should be granted.

Petitioner has filed his petition pursuant to N.J.A.C. 6A:3-1.1 et seq., which establishes procedures for appeals before the Commissioner of Education. See N.J.S.A. 18A:6-9. The time for filing is clearly set forth at N.J.A.C. 6A:3-1.3(i), which provides that a petition of appeal before the Commissioner must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . . which is the subject of the requested contested case hearing." The "notice of a final order, ruling or other action" of the Board contemplated by the rule has been defined as notice "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Kaprow v. Bd. of Educ. of Berkeley, 131 N.J. 572, 587 (1993).

The Board contends that the statute of limitations tolled from October 3, 2013, the date that petitioner learned that discipline would be imposed on his daughter. Thus, a petition filed not until January 17, 2014, is outside the ninety days required by the regulation. Petitioner replies that the event that triggered his claim is the October 29, 2013, letter indicating that a District investigation revealed no violation of the Anti-Bullying Bill of Rights Act. N.J.S.A. 18A:37-13 et seq. But petitioner's argument is unpersuasive. Both the Board and this forum can be guided only by what the pleading seeks, and not by claims contained in earlier unsuccessful filings, covering letters or briefs of counsel. If this was indeed a petition to challenge a determination under N.J.S.A. 18A:37-14, the petition could have and should have said so. To the contrary, the petition clearly seeks only to overturn a two-day detention; mentions the anti-bullying investigation but seeks no redress in regard to it; and I **CONCLUDE** that the petition should have been filed within ninety days of October 3, 2013, the date the discipline at issue was imposed.

The ninety-day rule has been strictly applied by the Commissioner. See Kaprow, supra, 131 N.J. 572; Morris-Union Jointure Comm'n v. Bd. of Educ. of S. River, 92 N.J.A.R.2d (EDU) 453; Markulin v. Bd. of Educ. of Neptune, 92 N.J.A.R.2d (EDU) 406. The rationale for this requirement was articulated by the New Jersey Supreme Court in Kaprow, supra, 131 N.J. at 582, as follows:

> The [ninety-day] limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration . . . . The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements.

While the Commissioner has the discretion to relax the rule, N.J.A.C. 6A:3-1.16, this extraordinary relief has been reserved only for those situations where a substantial constitutional issue is presented or where a matter of significant public interest is involved, beyond that of concern only to the parties. Portee v. Bd. of Educ. of Newark, 94 N.J.A.R.2d (EDU) 381, 384; Wise v. Trenton Bd. of Educ., EDU 160-00, Initial Decision (July 25, 2000), adopted, Comm'r (September 11, 2000), aff'd, St. Bd. (January 3, 2001), <http://njlaw.rutgers.edu/collections/oal/>. Petitioner's claim has only personal significance, thus making a relaxation of the rule unwarranted.

Accordingly, I **CONCLUDE** that the petition of appeal should be dismissed for failure to comply with the requirements of N.J.A.C. 6A:3-1.3(i). In light of my determination that the petition is untimely, it is unnecessary to address the Board's argument that the petition should be dismissed for failure to exhaust local administrative remedies.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the petition of appeal be **DISMISSED.**

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 18, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: June 18 2014

Date Mailed to Parties: JUN 19 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

311-14

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The Hammonton Board of Education (Hammonton) appealed the October 31, 2013 determination of the Interim Executive County Superintendent for Camden County (ECS) that J.B. and her children were homeless and that Hammonton was the district of origin and responsible for the cost of educating the children. Hammonton contended that the family had voluntarily moved to Gloucester, and that Gloucester is financially responsible for the cost of educating the children in Gloucester schools. Gloucester filed a motion to dismiss in lieu of an answer, arguing that Hammonton's petition – which was filed on November 26, 2013 – was filed in the wrong forum and was untimely pursuant to *N.J.A.C.* 6A:23A-19.2(d) because it was filed directly with the Commissioner of Education rather than with the Division of Finance of the Department of Education (DOF).

The ALJ found, *inter alia*, that: Hammonton's petition was timely filed pursuant to *N.J.A.C.* 6A:23A-19.2(d) as it was filed within 30 days, and the fact that it was addressed to the Commissioner of Education and only copied to the DOF – which is a sub-unit of the Department of Education – does not justify dismissing the matter; to dismiss based on the aforementioned criteria would be placing form before substance and, whenever possible, controversies should be decided substantively on the merits and not dismissed for procedural technicalities; and petitioner is entitled to relief under the doctrine of substantial compliance, as the Commissioner, the DOF, and Gloucester all had timely notice that Hammonton was challenging the ECS decision. The ALJ denied Gloucester's motion to dismiss, and returned the matter to the DOF for a determination of the correct district of residence pursuant to *N.J.A.C.* 6A:23A-19.2(d).

Upon consideration of the sparse record in this matter, the Commissioner adopted the ALJ's denial of Gloucester's motion to dismiss the petition, but rejected the Initial Decision's recommendation that the matter be transmitted to the DOF. In so deciding, the Commissioner explained that petitioner was not appealing a residency determination, but rather the ECS's determination that J.B. and her children were homeless – and that petitioner was the school district financially responsible for the cost of their education. That is a determination to be made by the Commissioner, not by the DOF. Accordingly, the matter was remanded to the OAL for a fact-finding hearing to determine whether J.B. and her family had become homeless when they moved to Gloucester in September 2013, and whether that status remains unchanged going forward.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 7/31/14

OAL DKY. NO. EDU 18575-13
AGENCY DKT. NO. 292-11/13

BOARD OF EDUCATION OF THE TOWN OF HAMMONTON, ATLANTIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF GLOUCESTER, CAMDEN COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is the Hammonton Board of Education's (petitioner or Hammonton) challenge to the determination of the Camden Interim Executive County Superintendent (ECS) that three students who had transferred from the Hammonton school district to the Gloucester school district (respondent or Gloucester) were homeless, and that Hammonton was the "district of origin." Upon review of the sparse record, the Initial Decision of the Office of Administrative Law (OAL) and the parties' exceptions, the Commissioner adopts the Administrative Law Judge's denial of Gloucester's motion to dismiss the petition, but rejects the Initial Decision's recommendation that the matter be transmitted to the Division of Finance of the Department of Education (DOF). The case is instead remanded to the OAL for a fact-finding hearing to determine whether J.B.'s family is homeless.

The allegations in the record, few of which are in evidentiary form, recite that from September 2011 until September of 2013, J.B. and her three children – N.F., V.F. and G.F.

– were domiciled in Hammonton in the house of a relative.[1] The relative's house was sold, requiring the family to move into the home of J.B.'s mother at 21 South Stinson Avenue in Gloucester. On September 10, 2013, J.B. enrolled the three children in the Gloucester school district and submitted an affidavit in which she attested that the family was homeless.

In connection with J.B.'s characterization of her family as homeless, Gloucester forwarded tuition contracts to Hammonton. Hammonton declined to take responsibility for the costs of the children's educations, contending that they were not homeless. Consequently, on October 22, 2013, Gloucester asked the Camden ECS to make a determination about the status of J.B.'s family, and submitted to the ECS copies of its records. Hammonton submitted a letter of opposition on October 29, 2013, and on October 31, 2013, the ECS issued her determination that the family was homeless.

In so determining, the ECS relied on the facts that the family had been forced out of the Hammonton relative's house due to its sale, and that J.B. and her children were "living in a doubled up situation with another relative [in Gloucester] out of necessity and therefore lack[ed] fixed housing due to economic hardship." The ECS further found that Hammonton was the family's "district of origin," making it responsible for the costs of the children's educations pursuant to *N.J.A.C.* 6A:17-2.4.[2] Hammonton appealed the ECS' determinations on November 26, 2013 by way of a petition of appeal. The original petition was filed with the Commissioner and a copy was served on the Division of Finance of the Department of

[1] In its verified petition, Hammonton established that J.B. and her children also resided in Hammonton from at least September 2007 through September 2009.

[2] A copy of the ECS' determination is annexed to Gloucester's exceptions.

Education.[3] On December 20, 2013, in lieu of an answer, respondent filed a motion to dismiss the petition, contending that it was filed in the wrong forum and was untimely. The case was transmitted to the OAL on December 23, 2013.

According to respondent Gloucester, shortly after Hammonton's appeal was transmitted to the OAL, J.B. disenrolled G.F. from the Gloucester school district (on January 15, 2014) and returned with her to Hammonton – to a new address. (Respondent's Exceptions at 2) On March 28, 2014, J.B. disenrolled N.F. from the Gloucester school district, moved him back to Hammonton, and allowed him to quit school. (*Ibid.*) Also according to Gloucester, J.B. indicated that after the conclusion of the 2013-2014 school year, she would transfer V.F. from Gloucester back to Hammonton. (*Ibid.*)

On June 17, 2014, the OAL issued its Initial Decision recommending denial of Gloucester's motion to dismiss Hammonton's petition, and forwarding of the case to the DOF. As mentioned above, the denial of the motion is adopted. Petitioner's appeal of the October 31, 2013 ECS decision was served upon the Commissioner and DOF on November 26, 2013 – less than thirty days after issuance of the objected-to ECS determination. Thus, if petitioner had been challenging a district of residence determination, the ALJ is correct that its November 26, 2013 service upon the DOF of a copy of its petition would have satisfied the requirement in *N.J.A.C.* 6A:23A-19.2 that it "submit a written notification of a dispute to the Division of Finance, within thirty days of receipt of a final notice that a child was determined to be a resident of the district for purposes of State funding."[4]

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[3] Petitioner endeavored on June 17, 2014 to amend its petition to add J.B. as a respondent. However, the Commissioner sees no indication in the file that the ALJ gave petitioner leave to so amend, pursuant to *N.J.A.C.* 6A:3-1.7.

[4] As the ALJ pointed out, petitioner's submission would also have been adequate under the doctrine of substantial compliance.

However, the Commissioner rejects the ALJ's recommendation that the matter be sent to the DOF. Petitioner was not appealing a residency determination. Rather, it was appealing the ECS's determination of homelessness and the ultimate determination concerning which district is financially responsible. That is a determination to be made by the Commissioner, not the DOF.

In the instant case, resolution of the question of whether J.B.'s children were homeless while they were in Gloucester must precede any determinations about their domicile or about which district was financially responsible for their educations. The ECS determined that the children were indeed homeless, and *N.J.A.C.* 6A:17-2.8(a) directs that an appeal from a determination of homelessness be presented to the Commissioner. If the Commissioner concurs that the children were homeless, *N.J.S.A.* 18A:38-1 provides the guidance necessary to identify the district responsible for the costs of the children's educations.

More specifically, if the Commissioner ultimately determines that J.B.'s family was not homeless when the children moved to 21 South Stinson Avenue and enrolled in the Gloucester school district, it will follow that the children were entitled to a free public education provided by Gloucester, pursuant to *N.J.S.A.* 18A:38-1(a) or (b). If the Commissioner adopts the ECS's determination that J.B.'s family *was* homeless, it will follow that Hammonton remained responsible for the costs of the children's educations for the first year of their stay in Gloucester, pursuant to *N.J.S.A.* 18A:38-1(f) and *N.J.S.A.* 18A:7B-12(c). If the family's habitation in J.B.'s mother's house were to continue through September 2014 or further, financial responsibility for the children's educations would switch to Gloucester regardless of the family's "homeless status." *See N.J.S.A.* 18A:38-1(d).

In other words, the threshold issue in this case is whether J.B.'s children were homeless when they entered school in Gloucester in 2013. The ECS opined that they were, and the Commissioner is the correct forum for an appeal from the ECS's determination. Were there a proper record before the Commissioner, he could now adopt or reject the ECS's determination about the children's status and follow the provisions of *N.J.S.A.* 18A:38-1 to assign financial responsibility. Unfortunately, the record is inadequate to allow the Commissioner to make the necessary determinations.

Accordingly, respondent's motion to dismiss the petition is denied and this matter is remanded to the OAL for a fact-finding hearing relating to J.B.'s assertion that she and her family were homeless when they moved to Gloucester in September 2013 – and thereafter.

IT IS SO ORDERED.[5]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/31/14

Date of Mailing: 7/31/14

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 18575-13
AGENCY DKT. NO. 292-11/13

BOARD OF EDUCATION
OF THE TOWN OF HAMMONTON,
ATLANTIC COUNTY,
Petitioner,
v.
BOARD OF EDUCATION
OF THE CITY OF GLOUCESTER,
CAMDEN COUNTY,
Respondent.

Christopher Barrett, Esq., for petitioner (Cooper, Levenson, attorneys)

Cameron R. Morgan, Esq., for respondent (Parker McCay, attorneys)

Record Closed: June 6, 2014 Decided: June 17, 2014

BEFORE **W. TODD MILLER**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves a dispute over whether certain children should be determined as homeless for the 2013-2014 school year, and if so, what is their district of orgin. On November 26, 2013, the Hammonton Board of Education (Petitoner or Hammonton) filed a petition with the Commissioner of Education (Commissioner) seeking a determination that would overturn an October 31, 2013, decision by the

Executive County Superintendent (ECS) that the children in question were homeless when they left Hammonton for Gloucester City in 2013. Hammonton also seeks determination that the children be considered domicled in Gloucester City for the 2013-2014 school year.

Gloucester City Board of Education (Respondent or Gloucester) filed a motion to dismiss, in lieu of an answer, that the action filed by Hammonton was untimely pursuant to N.J.A.C. 6A:23A-19.2(d) because the petition was not filed (i.e. addressed to) with the Division of Finance (DOF) of the Department of Education. This Initial Decision addresses Gloucester's motion for dismissal, in lieu of filing an answer.

The Commissioner determined to treat the matter as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was transmitted to the Office of Administrative Law, where it was filed on December 23, 2013. Several telephone conferences were held along with settlement discussions. The undersigned agreed to hear arguments on the motion to dismiss on June 6, 2014, supplemented with testimony from the parent and grandparent of the children so that a full and complete record could be created. The parent and grandparent failed to voluntarily appear on June 6, 2014 after having been requested to appear by the parties.

FACTS

J.B. is the mother of three (3) children: a sixteen (16)–year-old 10th grader N.F. (DOB 4/27/97), a twelve (12)-year-old 7th grader V.F. (DOB 7/26/01), and a seven (7)-year-old 3rd grader G.F. (DOB 7/16/05). On September 10, 2013, the three children were enrolled in the Gloucester City School District and registered as homeless students. Sometime prior to that date, J.B. moved with her children into Gloucester City from the Hammonton School District, under factual circumstances that remain contested. The house in Gloucester City is occupied by the children's grandparent, with whom the family was living at the time of this petition. Sometime in January 2014, the children's mother and two of the children moved back to Hammonton. One child

remains in Gloucester City with her grandmother. It is unknown whether the Gloucester home was adequate for all the adults and children in September 2013.

Throughout September and October 2013, the homeless liaisons from Gloucester and Hammonton exchanged numerous e-mails regarding the status of the children. Hammonton continued to deny that the children were homeless pursuant to state regulations, N.J.A.C. 6A:17-1.1 et seq., and the McKinney-Vento Homeless Assistance Act. Hammonton contends the family voluntarily moved to Gloucester after the children's mother had a fight with her boyfriend.

On October 22, 2013, Gloucester made a formal request to the ECS for a determination of homeless status for the children and enclosed all paperwork in its possession. On October 29, 2013, Hammonton sent a letter to the ECS requesting a determination that the children were not homeless.

On October 31, 2013, the ECS issued a decision to both Gloucester and Hammonton finding that the three (3) children were determined to be homeless from Hammonton pursuant to the applicable state regulations. The ECS held:

- The family was displaced from a home they were sharing [in Hammonton] when the relative/homeowner developed medical complications and had to be moved to a nursing home precipitating the sale of the homeowner's house[1]; and
- The family is living in a doubled up situation with another relative [in Gloucester City] out of necessity and therefore lack[s] fixed housing due to economic hardship.

Based on those facts, the ECS determined: "As the school district of origin, the Hammonton School District is responsible for the tuition of the children as long as the parent remains homeless or until the family has domiciled at their temporary residence for twelve consecutive months."

[1] Hammonton suggested that these very compelling findings by the ECS are mistaken and that the family merely left Hammonton by design due to irreconcilable differences between the children's mother and her paramour. Hence there are material factual findings by the ECS that remain contested.

The ECS's October 31, 2013, decision was sent to the parties and received via e-mail by the superintendents and homeless liaisons from both Gloucester and Hammonton on November 4, 2013. On November 26, 2013, Hammonton filed a Petition of Appeal directly with the Commissioner of Education, challenging the ECS's homeless determination. Hammonton also served a copy the Petition of Appeal upon the DOF on or about November 25, 2013. (Proof of Service – Hammonton's letter brief dated December 30, 2013; Exhibit 2)

CONCLUSIONS

Gloucester moves to dismiss as untimely the petition filed by Hammonton appealing a homeless decision by the ECS. Gloucester relies upon N.J.A.C. 6A:23A-19.2(d) as interpreted by Board of Education of the Borough of Magnolia v. Board of education of Township of Deptford, OAL DKT. NO. EDU 994-07 (Decided March 27, 2009); Affm'd Com'r of Education (May 9, 2009); Affm'd Superior Court, Appellate Division DKT NO A-4942-08 (Decided June 28, 2010) (unreported). Both the Commissioner and the Appellate Division adopted the findings and legal reasoning put forth by the Honorable Israel Dubin, ALJ. Judge Dubin held that a homeless appeal from an ECS determination must be filed with the DOF within thirty-days. And the failure to timely file with the DOF justifies dismissal of the petition.

The facts of the present matter are clearly distinguishable from Magnoila. Judge Dubin noted in deciding Magnolia that the petitioning district stipulated that its appeal was filed late. Magnolia's appeal was filed with the Commissioner's office on the eighty-eight day and re-filed with the DOF on the 105th day. Therefore, the Magnolia's appeal clearly exceeded the thirty-day filing deadline embodied in N.J.A.C. 6A:23A-19.2(d). Judge Dubin's decision rested entirely upon the undisputed facts that Magnolia did not file any petition within thirty-days.

Indeed, Judge Dubin explained that he might be willing to give Magnolia the benefit of doubt if a petition had been timely filed with the Commissioner's office in lieu

of the DOF. This was a reasonable consideration since the DOF is branch or sub-agency of the Commissioner's office or the State Department of Education. N.J.S.A. 18A:4-22. A timely appeal filed with the right department but wrong sub-division would not justify a dismissal. This logic or approach is strongly supported by appellate cases. Procedural dismissals of a cause or defense are actions of last resort and are disfavored. Lesser sanctions are preferred, particularly when there is no prejudice to the opposing party. Yancsek v. Hull Corp., 204 N.J. Super. 429 (App. Div. 1985); Audubon Volunteer Fire v. Church Const. Co. 206 N.J. Super. 405 (App. Div. 1986).

Unlike Magnolia, Hammonton filed an appeal of the ECS decision with the Commissioner's office well within the thirty-day period. Moreover, Hammonton served a copy of its petition upon the DOF well within the required thirty-days. The applicable regulation only contains nominal filing requirements.

N.J.A.C. 6A:23A-19.2(d) provides:

> (d) A district board of education contesting the **Department's determination** of district of residence shall **submit a written notification** of a dispute to the Division of Finance, within 30 days of the receipt of a final notice that a child was determined to be a resident of the district for purposes of State funding. As part of this written notice, the following information shall be submitted:
>
> 1. A written statement detailing the effort of the district board of education to verify the determination of the Department;
>
> 2. Written rationale for rejecting the determination of the Department; and
>
> 3. Any additional information the district board of education has obtained which might enable redetermination of the district of residence.

The abovementioned regulation contains two ambiguous provisions that aide Hammonton. First, the regulation states that appeals from "the Department's determination" must be filed within thirty-days. "Department" is defined as the "New

Jersey Department of Education" not the ECS or the Commissioner. N.J.A.C. 6A:23A-1.2. I am mindful that buried elsewhere in the regulations it states "the Commissioner of Education delegates to the Executive County Superintendent those powers, tasks and duties that further support efficiency of the district operation ..." Id. But the regulation inclusion of the term "Department" is not synonymous with the "Commissioner of Education" or the "Executive County Superintendent." At no time did Hammonton receive a "department determination of district of residence." Thus, using a plain reading of the regulation as written, the thirty-day period was never triggered because no "Department" decision was issued.

More importantly, the applicable regulation only provides that the appealing party file "**written notification of a dispute**" with the DOF. The petition filed by Hammonton with the Commissioner was indisputably "timely" copied to the DOF. And it contains sufficient substantive information for either the Commissioner or the DOF to discern that a "homelessness or district of origin" matter is being disputed by Hammonton.

I **CONCLUDE** the petition filed by Hammonton with the Commissioner of Education on November 26, 2013, with a copy sent overnight delivery to the DOF on November 25, 2013, meets the minimal requirements found in N.J.A.C. 6A:23A-19.2. The DOF received "**written notification of a dispute**" within thirty days from Hammonton's receipt of the final ECS decision dated October 31, 2013 (served upon Hammonton on November 4, 2013). According to the pertinent regulation all that was required of Hammonton is to submit "written notification" to the DOF within thirty days and that is exactly what happened. Hence, Hammonton satisfied the literal prerequisites contained in the regulation.

I **CONCLUDE** that merely because the Hammonton's petition was addressed to the Commissioner of Education and only copied to the DOF (all within thirty days), does not justify dismissing the present action, particularly when the allocation of residential property (school) taxes are at issue. This would seriously prejudice one of the communities if their tax dollars were allocated improperly. State and Municipal agencies must strive, at all cost, from imposing a potential unjust financial burdens upon

their constituents based upon minor procedural technicalities, as presented here. Ordinarily administrative practice and procedure permits informality or corrections of technical deficiencies in the interest of justice and fairness. N.J.A.C. 1:1-1.3; N.J.A.C. 6A:3-1.16. A dismissal under the unique facts of this case would be placing form before substance to the detriment of the taxpayers in one of these municipalities. When at all possible controversies should be decided substantively on the merits and not dismissed for procedural technicalities.

Finally, I **CONCLUDE** that petitioner is also entitled to relief under the doctrine of substantial compliance.

The elements of this doctrine are:

1. The lack prejudice to the defending party.
2. A series of steps taken to comply with the statute involved.
3. A general compliance with the purpose of the statute.
4. A reasonable notice of the claim.
5. A reasonable explanation as to why there was not strict compliance with the statute.

Bernstein v. Bd. of Trustees of the Teachers' Pension & Annuity Fund, 151 N.J. Super. 71, 77 (App. Div. 1977); Archway Programs, Inc. v. N.J. Department of Education, OAL DKT. EDU 6956-00 (September 2, 2008); adopted, Comm'r (December 4, 2008).

The Commissioner, the DOF, and Gloucester all had timely notice that Hammonton was challenging the ECS decision. There was no shroud of secrecy, lack of notice, or denial of due process visited upon the parties or state agencies. All parties and agencies in interest knew exactly what Hammonton was appealing and why they were appealing. Consequently, there was no demonstrable prejudice to any party or agency if the case is determined under the correct procedural process embodied in the regulations and heard on the merits.

ORDER

Based upon the foregoing, Gloucester's motion to dismiss Hammonton's petition is **DENIED**. This matter is returned to the Commissioner of Education, Division of

Finance so that a decision is made by that office in accordance with N.J.A.C. 6A:23A-19.2 before it is transmitted to the OAL.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B 10.

Within thirteen-days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 17, 2014 — DATE

W. TODD MILLER, ALJ

Date Received at Agency: June 17, 2014

Date Mailed to Parties: June 17, 2014

/jb

DOCUMENTS CONSIDERED

C-1 Petitioner submissions, dated December 30, 2013

C-2 Respondent's submissions, dated December 19, 2013, January 10, 2014, and June 5, 2014

314-14

AAA SCHOOL, LLC,	:	
PETITIONER,	:	
V:	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner herein – AAA School, LLC (AAA), a company that provides transportation services to public schools – alleged that it was improperly denied contracts by the Passaic County Educational Services Commission (Commission) after submitting bids in 2012 and 2013. The Commission asserted that AAA's claims were untimely filed pursuant to *N.J.A.C.* 6A:3-1.3(i), and that the petition should be dismissed. AAA filed its appeal with the Commissioner on April 22, 2014, challenging the Commission's failure to award it contracts in 2012 and 2013. The Commission filed a motion to dismiss in lieu of an answer.

The ALJ found, *inter alia,* that: the Commission's motion to dismiss is appropriately converted to a motion for summary decision under *N.J.A.C.* 1:1-12.5; there are no genuine issues of material fact in this case, and the matter is ripe for summary decision; AAA's petition challenged the failure of the Commission to award it contracts for transportation routes in August 2012 and August/September 2013; the petition was not filed until April 24, 2014 – approximately eight months after AAA's 2013 bid was rejected, and approximately one year and eight months after its 2012 bid was rejected by the Commission; AAA's prior unsuccessful attempts to bring these claims in Superior Court do not alter this conclusion; no compelling matters of public interest are involved in this case so as to justify relaxation of the 90 day rule. Accordingly, the ALJ concluded that the petition of appeal should be dismissed for failure to comply with *N.J.A.C.* 6A:3-1.3(i).

Upon a comprehensive review of the record of this matter, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 4, 2014

OAL DKT. NO. EDU 6429-14
AGENCY DKT. NO. 104-4/14

AAA SCHOOL, LLC,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the Administrative Law Judge that this matter is appropriately dismissed as untimely. Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter – for the reasons clearly articulated therein – and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/04/14
Date of Mailing: 8/05/14

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 06429-14
AGENCY DKT. NO. 104-4/14

AAA SCHOOL, LLC,

Petitioner,

v.

PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION, PASSAIC COUNTY,

Respondent.

El Eldesouky, Principal, appearing pursuant to N.J.A.C. 1:1-5.4(a)5, for petitioner

Derlys Gutierrez, Esq., for respondent (Adams, Gutierrez and Lattiboudere, attorneys)

Record Closed: June 16, 2014 Decided: June 18, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, AAA School, LLC (AAA), is a closely held corporation that provides transportation services to public schools. The petition alleges that AAA was improperly

denied contracts by the Passaic County Educational Services Commission (the Commission) after submitting bids in 2012 and 2013. The Commission asserts that AAA's claims are untimely, and that the petition of appeal should be dismissed.

PROCEDURAL HISTORY

AAA filed its petition of appeal with the Commissioner of Education (the Commissioner) on April 22, 2014. The Commission filed a motion to dismiss in lieu of an answer on May 28, 2014, and the contested case was transmitted to the Office of Administrative Law (OAL) on May 29, 2014.

On June 11, 2014, AAA filed an application for emergent relief, which was denied via letter order dated June 16, 2014. Opposition to the pending motion to dismiss was filed on June 16, 2014, at which time the record closed.

FINDINGS OF FACT

The salient facts are uncontroverted and I **FIND**:

The petition filed by AAA asserts that it was the unsuccessful bidder at a bid opening in August 2014. Since this appears to be a typographical error, the Commission has assumed, as have I, that AAA in fact is challenging the Commission's failure to award it contracts in 2012 and 2013.[1]

In July 2012, the Commission advertised for public bids for a variety of bus routes. The specifications contained certain requirements, including but not limited to requirements as to the size of the bus needed for each route. AAA submitted bids on twelve different routes. Each route required the successful bidder to supply a sixteen passenger yellow bus. One route additionally required a wheelchair accessible sixteen passenger yellow school bus. At a July 26, 2012, bid opening it was determined that AAA had submitted the lowest bid, but its bid package provided proof of ownership of

[1] If this is an incorrect assumption, nothing in the opposition filed by AAA said so.

only two minivans. In a certification dated December 4, 2012, then Assistant Transportation Supervisor Janette Silva attested to several unsuccessful attempts to secure clarification from AAA that it could supply the vehicles required by the specifications. It thus appearing that AAA could not do so, the contract was awarded to another bidder on August 9, 2012.

On October 25, 2012, AAA filed a complaint in the New Jersey Superior Court, Passaic County, in which it disputed the legality of the bid specifications and the award of a contract to another bidder. Via order dated December 21, 2012, the Superior Court transferred the matter to the Commissioner, noting its lack of jurisdiction.[2]

In August 2013, the Commission again advertised for public bids. Nine bus routes were advertised; four required a sixteen passenger yellow bus; one required a sixteen passenger yellow bus that was wheelchair accessible; and the remaining four routes required either a seven or sixteen passenger yellow bus. The specifications also required proof of ownership and registration for all vehicles to be used on the advertised routes. Bidders were required to provide evidence of their ability to obtain automobile liability insurance coverage in the amount of $3,000,000, combined single limit.

AAA submitted the lowest bid on five of the nine advertised routes. Of these five routes, one route required a sixteen passenger yellow school bus that was wheelchair accessible, and two of the routes likewise required sixteen passenger yellow school busses. But AAA did not submit proof of ownership of the required sixteen passenger busses. Silva noted via certification dated January 2014, that while AAA submitted an insurance certification in the required amount, upon attempting to confirm the amount of coverage, the Commission was advised by AAA's insurance carrier that it had reduced its coverage to an amount insufficient to be compliant with the bid specifications. Commission requests for further clarification went unanswered, and in or about

[2] The submissions of the parties leave it unclear what path the 2012 complaint took upon transfer to the Commissioner.

August/September 2013, prior to the start of the school year, it awarded the routes to other bidders.

On December 16, 2013, AAA filed a complaint in the New Jersey Superior Court Passaic County, again alleging violations of the New Jersey Public School Contracts Law. N.J.S.A. 18A:18A-1, et seq. The complaint was dismissed with prejudice on February 14, 2014.

CONCLUSIONS OF LAW

The Commission's motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. Since the motion was accompanied by documents and certification in addition to the pleadings, I have converted the Board's application to a motion for summary decision under N.J.A.C. 1:1-12.5.

This rule provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The regulation mirrors R. 4:46-2(c), which provides that "[t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party . . . offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the

court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)). I **CONCLUDE** that this matter is ripe for summary decision, and that the Commission's motion should be granted.

AAA has filed its petition pursuant to N.J.A.C. 6A:3-1.1 et seq., which establishes procedures for appeals before the Commissioner. See N.J.S.A. 18A:6-9. The time for filing is clearly set forth at N.J.A.C. 6A:3-1.3(i). A petition of appeal before the Commissioner must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education . . . which is the subject of the requested contested case hearing." The "notice of a final order, ruling or other action" of the Board contemplated by the rule has been defined as notice "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Kaprow v. Bd. of Educ. of Berkeley, 131 N.J. 572, 587 (1993).

AAA's petition is clearly out of time, and I **CONCLUDE** that it must be dismissed for noncompliance with the requirements of N.J.A.C. 6A:3-1.3(i). Its petition challenges the failure of the Commission to award it contracts for transportation routes in August 2012 and August/September 2013. The petition of appeal was not filed until April 24, 2014, approximately eight months after AAA's 2013 bid was rejected, and approximately one year and eight months after its 2012 bid was rejected by the Commission. Its prior unsuccessful attempts to bring these claims in the Superior Court do not alter this conclusion. Indeed, AAA again filed a claim in Superior Court in 2013, after having been informed during the prior year that this was not the proper forum. As the Commission points out, after its claim in Superior Court was dismissed via order dated February 14, 2014, AAA then waited yet another two months to file its claim with the Department of Education.

The ninety-day rule has been strictly applied by the Commissioner. See Kaprow, supra, 131 N.J. 572; Morris-Union Jointure Comm'n v. Bd. of Educ. of S. River, 92 N.J.A.R.2d (EDU) 453; Markulin v. Bd. of Educ. of Neptune, 92 N.J.A.R.2d (EDU) 406.

The rationale for this requirement was articulated by the New Jersey Supreme Court in Kaprow, supra, 131 N.J. at 582, as follows:

> The [ninety-day] limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration . . . . The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements.

The concerns expressed in Kaprow are particularly apropos here. AAA has challenged the validity of costly transportation contracts entered into with public funds, and has done so well after these contracts have been consummated.

While the Commissioner has the discretion to relax the rule, N.J.A.C. 6A:3-1.16, this extraordinary relief has been reserved only for those situations where a substantial constitutional issue is presented or where a matter of significant public interest is involved, beyond that of concern only to the parties. Portee v. Bd. of Educ. of Newark, 94 N.J.A.R.2d (EDU) 381, 384; Wise v. Trenton Bd. of Educ., EDU 160-00, Initial Decision (July 25, 2000), adopted, Comm'r (September 11, 2000), aff'd, St. Bd. (January 3, 2001), <http://njlaw.rutgers.edu/collections/oal/>. AAA's claim has only personal significance, thus making a relaxation of the rule unwarranted.

Accordingly, I **CONCLUDE** that the petition of appeal should be dismissed for failure to comply with the requirements of N.J.A.C. 6A:3-1.3(i). In light of my determination that the petition is untimely, it is unnecessary to address the remaining arguments raised by the Commission.

ORDER

Based on the foregoing, the Board's motion to dismiss is **GRANTED**, and the claims raised by the petition are **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 18, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: June 18 2014

Date Mailed to Parties: JUN 19 2014

Laura Sanders

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

315-14

315-14R

OAL DKT. NO. EDU 5643-14
(EDU 14732-13 ON REMAND)
AGENCY DKT. NO. 220-9/13

A.M.T., on behalf of minor child, J.S.T.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/04/14

Date of Mailing: 8/05/14

[1]This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5643-14

(ON REMAND EDU14732-13)

AGENCY DKT. NO. 14732-13

A.M.T. O/B/O MINOR CHILD

J.S.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE

BUENA REGIONAL SCHOOL DISTRICT,

ATLANTIC COUNTY,

Respondent.

A.M.T, parent, pro se

Richard A. Asselta, Esq., for respondent (Capizola, Pancari, Lapham & Fralinger, attorneys)

Record Closed: May 12, 2014 Decided: June 12, 2014

BEFORE **DAMON G. TYNER**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 11, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The Commissioner of Education issued a decision on May 6, 2014, remanding the matter back to the Office of Administrative Law for an original

settlement agreement and Board Resolution. Judge Tyner received the remand file on May 12, 2014, and the record closed on that date.

I have reviewed the record and the terms of the settlements and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties, as well as the Board Resolution approving the settlement.

2. The settlements fully dispose of all issues in controversy and are consistent with the law.

I **CONCLUDE** that these agreements meet the requirements of N.J.A.C. 1:1-19.1 and that the settlements should be approved. I approve the settlements and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 12, 2014
DATE

DAMON G. TYNER, ALJ

Date Received at Agency:

Date Mailed to Parties: June 17, 2014

/jb/lam

AMT on behalf of J.S.T

Agency Docket # 220-9/13

vs.

Board of Education of the
Buena Regional School Dist.
Atlantic County

Settlement Agreement

This matter is in settlement of the above matter. From all incidents stemming from February 21, 2013 to the present as more fully set forth in the Petition of Appeal (and attachments) and the motion to dismiss / motion for summary judgement filed by the Respondent.

Within 10 days of the Court's order approving this settlement, Respondent shall turn over to Petitioner J.S.T's Disciplinary File concerning the incidents stemming from February 21, 2013 and J.S.T's subsequent suspension. Petitioner agrees not to waive J.S.T's confidentiality and terms of this settlement

Petitioner

Gabriel Michelle Thomas

ARIZIEL MICHELLE THOMAS,
ON BEHALF OF J.S.T.

Respondent

Walter Whitaker

WALTER WHITAKER,
SUPERINTENDENT OF THE BUCKEYE
RECREATIONAL SCHOOL DISTRICT.

RESOLUTION

WHEREAS, there is an action with claims pending between the BUENA REGIONAL SCHOOL DISTRICT (the "District"), and A.M.T., on behalf of minor child, J.S.T. before the Commissioner of Education and/or the Office of Administrative Law, namely OAL Docket No. EDU-14732-2013S and Agency Reference No. 220-9/13; and

WHEREAS, the parties desire to fully and finally settle and resolve any and all actions of any kind between them, including the above referenced matter; and

WHEREAS, the parties have executed a Settlement Agreement and have set forth a Settlement Agreement on the record before the Office of Administrative Law which fully and finally settles and resolves any and all actions of any kind between them, including the above referenced matters; and

WHEREAS, the Settlement Agreement provides, in part, that the District shall turn over to Petitioner, J.S.T.'s disciplinary file concerning the incident stemming from February 21, 2013 and J.S.T.'s subsequent suspension and in consideration A.M.T. agrees not to waive J.S.T.'s confidentiality and terms of the settlement; and

WHEREAS, the Buena Regional Board of Education (the "Board"), is a body corporate and politic of the State of New Jersey, charged with the statutory responsibilities of the management and administration of the District in Atlantic County, New Jersey, who has the statutory authority to enter into the Settlement Agreement; and

WHEREAS, an executive session meeting of the Board was held on Tuesday, March 4, 2014 at 6:00 p.m. at 125 Weymouth Road, Buena, New Jersey, where the Board reviewed and considered the Settlement Agreement; and

WHEREAS, during open session, the Board determined by a recorded vote of a majority of the entire membership of the Board with 10 members voting in favor, 0 members voting against, and 0 members abstaining, to approve the Settlement Agreement; and

WHEREAS, the Board specifically recognizes and acknowledges that the settlement is contingent upon approval by the Commission of Education as required by and consistent with all New Jersey Statutes and Administrative Codes; and

NOW, BE IT RESOLVED, that the Board hereby accepts the Settlement Agreement which will fully and finally settle and resolve any and all actions of any kind between the parties, including the above referenced matter, as more fully set forth in the Settlement Agreement.

ADOPTED this 4th day of March, 2014.

Witnessed or Attested to by:

Jann Cohen, Bus. Adm./Board Sect.

BOARD OF EDUCATION OF THE BUENA REGIONAL SCHOOL DISTRICT

By: _____

Debra Bell, President

324-14

OAL DKT. NO. EDU 6398-13
AGENCY DKT. NO. 78-4/13

L.C. on behalf of minor child D.C.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY INSTITUTE OF TECHNOLOGY,	:	
RESPONDENT.	:	

The record of this matter, the proposed "Stipulation of Settlement" (Stipulation) and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon review, the Assistant Commissioner – to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-34 – approves the settlement with the following observations concerning Paragraphs 1, 2 and 4 of the Stipulation.

D.C. has transferred out of respondent's district. Generally, pursuant to New Jersey's Public Records laws and the State's Records Retention and Disposition Schedule, school districts may not expunge the disciplinary records of students who have left the district until seven years have passed. Further, *N.J.A.C.* 6A:16-7.8(a) requires that respondent must provide the new district with all disciplinary records relating to D.C. The Assistant Commissioner assumes that respondent has done so.

However, in the present case, petitioner has persuasively challenged D.C.'s disciplinary records, pursuant to *N.J.A.C.* 6A:32-7.7. It would appear that D.C. may not have been afforded certain due process protections, such as a manifestation determination, proper

notices of disciplinary charges, and a formal hearing before the Board of Education. The remedies available under *N.J.A.C.* 6A:32-7.7(a) include expungement from a student's records of inappropriate information. The Assistant Commissioner agrees with the parties that documents memorializing the discipline imposed upon D.C., in consequence of an incident which occurred on January 9, 2014, could properly be expunged from respondent's files under *N.J.A.C.* 6A:32-7.7(a).

Paragraph 4 of the Stipulation was clearly drafted to address the fact that D.C.'s disciplinary records have been forwarded to his new school district. Respondent cannot force the new district to expunge those records, but has agreed to request same via correspondence. Nor can the Assistant Commissioner require the new district to expunge the records, since that district is not a party to the instant litigation.

Accordingly, the Assistant Commissioner adopts the Initial Decision as the final decision in this matter, dismisses the petition, recommends compliance with Paragraph 4 of the Stipulation, and orders compliance with the remaining settlement terms.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

Date of Decision: 8/11/14

Date of Mailing: 8/12/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6398-13

AGENCY DKT. NO. 78-4/13

L.C. ON BEHALF OF MINOR CHILD, D.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BURLINGTON COUNTY INSTITUTE OF TECHNOLOGY, BURLINGTON COUNTY,

Respondent.

Sean M. Benoit, Esq., for petitioner (Disability Rights New Jersey, attorneys)

Brett E.J. Gorman, Esq. for respondent (Parker McCay, P.A., attorneys)

Record Closed: March 26, 2014 Decided: April 30, 2014

BEFORE **ROBERT BINGHAM II**, ALJ:

This matter was transmitted to the Office of Administrative Law on May 13, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the Stipulation of Settlement (J-1). A letter from both attorney representatives amends paragraph seven of the Stipulation of Settlement, in that no board resolution is required for the instant matter. (J-2.)

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

April 30, 2014
DATE

ROBERT BINGHAM II, ALJ

Date Received at Agency:

Date Mailed to Parties: June 24, 2014
/bdt
Attachments

APPENDIX

EXHIBITS

JOINT:

J-1 Stipulation of Settlement

J-2 Letter from Brett E.J. Gorman, Esq., counsel for respondent, and Sean Benoit, Esq., counsel for petitioners, dated March 25, 2014

File No. 12414-0607
Law Offices
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
(856) 596-8900
Attorneys for Respondent, Burlington County Institute of Technology

L.C., on behalf of minor child, D.C. Petitioners, v. BURLINGTON COUNTY INSTITUTE OF TECHNOLOGY BOARD OF EDUCATION, Respondent.	**BEFORE THE COMMISSIONER OF EDUCATION** OAL DOCKET NO. EDU: 06398-2013S Agency Ref. No.: 78-4/13 **STIPULATION OF SETTLEMENT**

WHEREAS, L.C. is an educationally disabled student as defined in N.J.A.C. 6A:14-1.1 *et seq.*, and

WHEREAS, the Burlington County Institute of Technology Board of Education (hereinafter "the Board" or "the District") is the local educational authority with the responsibility of providing a free, appropriate, public education to D.C.; and

WHEREAS, the have engaged in lengthy settlement discussions; and

NOW, THEREFORE, the Parties desire to settle the Due Process Proceedings in an amicable way, they hereby agree as follows:

1. The District agrees to expunge all of D.C.'s school records of any and all references to the disciplinary incident that occurred on January 9, 2013, specifically the incident

that occurred on January 9, 2013 at the District in which it was alleged that, while at the District in shop class, D.C. picked up and waved a hammer in a threatening manner at other people in the class and then later watched an inappropriate music video by the "Insane Clown Posse" on a District computer.

2. The District agrees to expunge D.C.'s records of any and all references to any disciplinary action that was taken as a result of the January 9, 2013 incident described in paragraph 1. This shall include, but not be limited to, expungement of the long-term suspension, expungement of the psychiatric report by Dr. James Hewitt dated January 11, 2013 and expungement of any and all references to the March 7, 2013 hearing in front of the Board of Education, as well as any findings and actions taken by the Board of Education as a result of that March 7, 2013 hearing.

3. Petitioner acknowledges that D.C. is now enrolled in the Riverside School District and that the District is no longer custodian of D.C.'s school records.

4. The District agrees to submit to the Riverside School District a letter asking the Riverside School District to expunge D.C.'s records of all the information as outlined in paragraphs 1 and 2 of this settlement agreement.

5. Petitioner's acknowledge that as D.C. is no longer enrolled at the District, D.C. would need to undergo the application process for admission to the District to be re-enrolled at the District.

6. The Board and Petitioners each hereby verify, affirm, and represent that they have had the opportunity to discuss the terms of this Agreement with counsel and that they are fully satisfied with the representation provided by their counsel.

7. This Agreement is subject to formal approval by the Board, following full execution and approval by Petitioners. In the event the Board thereafter approves the Agreement, it shall be executed forthwith by the Board and shall become effective immediately.

8. In exchange for the consideration set forth herein, the Petitioners dismiss, release, and discharge the Board from any and all claims asserted, and which could have been asserted, whether known or unknown, in the Due Process Proceedings, arising out of acts or omissions occurring through the date of this Agreement, including, but not limited to, claims concerning an alleged denial of a free and appropriate public education, special education services, homebound instruction, independent evaluation, out of district placement, discrimination, inappropriate discipline, reimbursement for educational costs, reimbursement for medical/counseling services, compensatory education, and damages or injuries to D.C. Petitioners further dismiss, release, and discharge any and all claims for attorney's fees and expert costs, and any other fees and costs incurred through the date of this Agreement. As used in this Agreement, the term "Board" means: the Burlington County Institute of Technology, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible.

9. Petitioners represent that they have sole authority, as D.C.'s parents, to enter into this Agreement.

10. The Parties acknowledge that they have read and understand the terms of this Agreement, that they had an opportunity to have the Agreement read by counsel, that they are satisfied with the advice of their respective counsel, and that they are entering into this

Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

11. The Parties mutually waive any claims for attorney's fees with the understanding that each Party shall be responsible for their own fees and costs, including physicians', experts', and attorneys' fees and costs, incurred in connection with this dispute, to the extent applicable. No party shall be deemed a "prevailing party."

12. The Parties agree that they will not communicate the terms of this Agreement to any persons or entities other than their attorneys, accountants, tax advisors, agents and/or any other individuals necessary to effectuate this settlement, and, but only with the written agreement of the other Party, others whom a Party may desire to advise. Except that, both parties agree that D.C. is permitted to disclose this agreement without any restrictions to any school district that he is enrolled in from now until he graduates from high school, as well as to any post-high school educational or training facilities and any other higher education institutions that D.C. applies to or attends. Additionally, the Parties may produce or disclose this Agreement as required by operation of law or lawful subpoena or order of court or pursuant to official discovery proceedings. If a Party is required to produce or disclose this Agreement, it will first advise the other Party as soon as practicable.

13. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any Party. The Parties agree and acknowledge that this Agreement is the product of mutual draftsmanship and any rule of law requiring that it be construed against the drafter shall not apply.

14. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral and all contemporaneous oral agreements, understandings and negotiations. This Agreement may only be amended in writing by way of a document signed by all Parties.

15. This Agreement may be executed in multiple counterparts, and it shall be fully valid, legally binding, and enforceable whether executed in a single document or in such counterparts.

IN WITNESS HEREOF, the parties have set their hands this____ day of December 2013.

BURLINGTON COUNTY INSTITUTE OF TECHNOLOGY

Rose Mary Prioppi

Respondent

Date: 2/19/14

Lisa M. Cerreto

L.C o/b/o D.C., Petitioner

Date: Feb. 10th, 2014

Brette Gorman,
counsel for BCIT

325-14

M.O'K. AND S.O'K. on behalf of minor children K.O'K., A.O'K. AND C.O'K.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF CRESSKILL, BERGEN COUNTY AND BOARD OF EDUCTION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The parties herein asked for determinations regarding where the petitioners' children should attend school and which school district should be financially responsible for the children's educations. Petitioners contended that they remain homeless under 42 *U.S.C.A.* § 11432A and *N.J.A.C.* 6A:17-2.3(a)(3) in the aftermath of being evicted from their longtime home in Cresskill in 2011, and that their children are therefore entitled to be enrolled in Cresskill schools, with tuition paid either by Cresskill or Little Ferry – where they have lived, with S.O'K.'s parents, for most of the period since the 2011 foreclosure. Respondent Cresskill Board of Education (Cresskill) filed a motion for summary decision acknowledging that the family was rendered homeless in 2011 and the children were therefore entitled to be enrolled in its schools, but contending that Little Ferry became responsible for the cost of the children's education and transportation to Cresskill schools after one year. Little Ferry submitted a reply brief arguing that Little Ferry is now the district of residence and is responsible for the children's education, and that they must be enrolled in Little Ferry schools.

The ALJ found, *inter alia*, that: the facts reflect that, after they became homeless, the O'K. family resided in Little Ferry with S.O'K.'s parents for more than a year before they were displaced by Hurricane Sandy, and have now been back in Little Ferry for another year; their living arrangement with S.O'K.'s parents has become sufficiently fixed, regular and permanent so as to preclude a finding of homelessness under *N.J.A.C.* A:17-2.2 – 2.3 and *N.J.S.A.* 18A:7B-12(c); accordingly, the O'K. children are no longer entitled to free enrollment in Cresskill schools; once the family resided in Little Ferry for more than one year, Little Ferry became financially responsible for the education of the O'K. children; and Little Ferry shall reimburse Cresskill for the full cost of the educational program provided to the O'K. children for the 2013-2014 school year. The ALJ granted summary judgment to respondent Cresskill, finding that the children are no longer homeless, and ordered that the children be enrolled in Little Ferry schools.

Upon review, the Commissioner adopted the determination of the ALJ that Little Ferry is financially responsible for the education of the O'K. children for the 2013-2014 school year and thus owes Cresskill tuition for that year. However, the Commissioner disagreed with the ALJ's conclusion that petitioners' children are no longer homeless. Finding that the O'K.'s are still homeless, the Commissioner granted the petition requesting continuation of the children's education in Cresskill, and ordered that Little Ferry will remain financially responsible until the parents establish a permanent residence or are deemed domiciled in another jurisdiction pursuant to *N.J.S.A.* 18A:38-1d.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 8/12/14

OAL DKT. NO. EDU 14830-13
AGENCY DKT. NO. 214-9/13

M.O'K. AND S.O'K. on behalf of minor children K.O'K., A.O'K. AND C.O'K.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF CRESSKILL, BERGEN COUNTY AND BOARD OF EDUCTION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY,	:	
RESPONDENTS.	:	

The parties to the instant controversy ask for determinations about 1) where petitioners' children should attend school and 2) which school district should be financially responsible for the children's educations. Upon review of the record, the Initial Decision of the Office of Administrative Law (OAL) and the parties' exceptions, the Commissioner adopts the determination of the Administrative Law Judge (ALJ) that respondent Little Ferry Board of Education (Little Ferry) is financially responsible for the educations of petitioners' children for the 2013-2014 school year and, accordingly, owes respondent Cresskill Board of Education (Cresskill) tuition for that year. However, the Commissioner finds that the record does not support the ALJ's conclusion that petitioners' children are no longer homeless and should attend school in Little Ferry.

Procedurally, this matter has come before the Commissioner by way of a motion brought by Cresskill for summary disposition, which was joined by petitioners, and an Initial Decision "on the papers."[1] It appears that initially the parties all agreed that summary

[1] In their exceptions, petitioners correctly point out that while the ALJ stated that she was granting Cresskill's motion for summary disposition, she made a determination about homelessness which is the opposite of the determination which Cresskill's motion sought.

disposition was appropriate. However, in its March 2014 responsive brief Little Ferry recognized that the parties may have misunderstood each others' positions. Notwithstanding the foregoing, the Commissioner is satisfied that the two primary issues posed by the parties may be resolved by summary disposition.

As to the question concerning which district should pay for the children's educations, it is undisputed that petitioners have resided with S.O'K's parents in Little Ferry for over a year. Pursuant to *N.J.S.A.* 18A:38-1(d), that is long enough for them to be *deemed* domiciliaries of Little Ferry, triggering Little Ferry's obligation to fund the children's educations, pursuant to *N.J.S.A.* 18A:38-1(a).

The foregoing finding regarding domicile and Little Ferry's financial responsibility does not settle the separate questions of whether petitioners are homeless and, if so, whether it is in the best interests of their children to be transferred from Cresskill schools to the Little Ferry school district. *See, e.g., A.M. and M.S. on behalf of minor children A.S. and L.S. v. Board of Education of the Town of Dover, Morris County,* Commissioner Decision No. 222-11 (June 15, 2011) at 3. As mentioned above, the Commissioner rejects the ALJ's determination that petitioners are no longer homeless, and offers the following analysis.

N.J.A.C. 6A:17-1.1 *et seq.* provides guidance regarding the education of homeless students. Those regulations were promulgated with the intent that nothing in them would "limit the educational rights of homeless children and youth or school district responsibilities under Subtitle VII-B of the Stewart B. McKinney-Vento Homeless Assistance Act (42 *U.S.C.* secs.11431 *et seq.*) (McKinney-Vento Act)." *See, N.J.A.C.* 6A:17-2.1. Thus, in deciding where petitioners' children should attend school, it is necessary to refer both to New Jersey's regulations and the corresponding provisions of the McKinney-Vento Act.

The threshold inquiry, *i.e.*, whether petitioners may be considered homeless, may be evaluated pursuant to both *N.J.A.C.* 6A:17-2.3(a)[2] and 42 *U.S.C.* sec. 11434a(2)(A) and B(i). The regulation *N.J.A.C.* 6A:17-2.3(a)(3), for example, provides that children are homeless when they stay in the home of relatives or friends, with whom they are temporarily residing because the family lacks a regular or permanent residence of its own. Similarly, 42 *U.S.C.* sec. 11434a(2)(A) and (B)(i) describe homeless children as those "who lack a fixed, regular, and adequate nighttime residence . . ..," including, *inter alia,* "children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason . . . ." Thus, an evaluation of "homelessness" cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality. The reasons for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant.

In the present case, the facts were stipulated and/or were supported by the verified petition and sworn answers to interrogatories. Petitioners' answers to both Cresskill's and Little Ferry's interrogatories reveal that petitioners lost their home through foreclosure in October 2011. After a year of living with S.O'K's parents in Little Ferry, flooding from hurricane Sandy badly damaged the parents' home, destroyed petitioners' cars, furniture and remaining belongings, and forced petitioners to find other temporary housing, first with a relative in Paramus, New Jersey, and then with relatives in Queens, New York. On or about May 16, 2013, petitioners returned to S.O'K.'s parents' home in Little Ferry, where the two parents and three children occupy the bottom floor of the house, which floor has no shower, sink or kitchen. Because there is only one small bedroom on that floor, the 13-year old daughter and ten-year old son share a bunk-bed in the parents' bedroom and the oldest son, 18, sleeps in the common area. *See,* Par. 15 of petitioners' answers to Little Ferry's interrogatories. Petitioners have always maintained that they wish to return to Cresskill, where M.O'K. lived for 27 years and where the three children were raised until their home

[2] The corresponding New Jersey statute is *N.J.S.A.* 18A:7B-12(c).

was foreclosed upon. Although neither parent is currently employed and the family's sole income consists of Social Security Disability benefits, they certify that they are actively searching for housing in Cresskill.

The forgoing facts rebut Little Ferry's claim (which is opposed not only by petitioners but was also opposed by Cresskill in both its summary disposition motion and its reply brief to the other parties' responses to its motion) and the ALJ's finding that petitioners are not homeless. Pursuant to *N.J.A.C.* 6A:17-2.3(a)(3), petitioners are clearly staying in the home of relatives because the family lacks a regular or permanent residence of its own and because of economic hardship. Similarly, pursuant to 42 *U.S.C.* sec. 11434a(2)(B)(i), petitioners' children are "sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason . . . ." Moreover, the setting in which the children live constitutes a less than regular and adequate nighttime residence. 42 *U.S.C.* sec. 11434a (2)(A).

In their February 14, 2014 responsive brief, petitioners cite to a persuasive case from the Pennsylvania Federal District Court. The fact pattern in that case was not dissimilar to the instant matter. A grandmother and the grandson whom she was raising lost their home to a fire. They were forced to live with the grandmother's daughter, under less than ideal conditions, but stayed in the daughter's house for an extended period of time. After the end of the school year in which the fire occurred, the district of origin declined to provide a free public education to the child, reasoning that the grandmother and grandchild's continued residence in the daughter's house signified that they were no longer homeless.

Interpreting the federal McKinney-Vento Act, the federal district court judge disagreed, determining that the child qualified as a homeless student because he lacked a fixed, regular and adequate nighttime residence, and was sharing the housing of other persons due to loss of housing, economic hardship or a similar reason. Moreover, the judge pointed out that the district of origin had recognized the child as homeless from January through June 2009, and nothing about the

student's situation had changed subsequent thereto. In finding that the district of origin was obliged to continue to educate the child, the judge stated: "the [McKinney-Vento] Act makes it clear that there is no maximum duration of homelessness. Instead the LEA [district of origin] must accommodate a homeless child for the entire time that they are [sic] homeless." *L.R. v. Steelton-Highspire School District,* 54 *IDELR* 155 (M.D. Pa. 2010), *citing* 42 *U.S.C.* sec. 11434a (3)(A)(i).

The foregoing precludes the Commissioner from determining that petitioners are no longer homeless.[3] What remains to be addressed is the question of whether it is in the best interests of the children to continue attending the Cresskill schools or transfer to the Little Ferry School district.[4] *N.J.A.C.* 6A:17-2.6(b) directs that the chief school administrator of the school district of origin shall decide upon the district of enrollment for a homeless child – based upon the best interests of that child. Throughout its summary disposition motion Cresskill, the school district of origin, contended that the Executive County Superintendent's determination that petitioner's children must attend school in Little Ferry, "must be reversed." *See, e.g.* Cresskill's March 18, 2014 Reply Brief at 3 and 10-11. Now, in its reply-exceptions, it reverses itself and requests that the Commissioner adopt the Initial Decision.

However, incorporated into the McKinney-Vento Act is a presumption that continuation in the school district of origin is the most desirable option for homeless students – unless the parents or children disagree. 42 *U.S.C.* sec. 11434(g)(3). Petitioners clearly do not

[3] The Commissioner recognizes that the status of some homeless families can evolve into acceptable and permanent situations. However, the Commissioner is not persuaded that the case at bar manifests such an evolution.

[4] The Executive County Superintendent and ALJ referenced, as a justification for transferring petitioners' children to the Little Ferry school district, the children's high rate of absenteeism from the Cresskill schools during the 2012-2013 school year. Petitioners point out that the referenced absences occurred during the period of time in which petitioners were temporarily residing in Queens, New York, and driving their children to school in Cresskill, New Jersey. In exceptions submitted on July 7, 2014, Cresskill endeavors to rebut petitioner's point by offering attendance reports for the 2013-2014 school year, which reports are nowhere to be found in the record before the Commissioner. *N.J.A.C.* 1:1-18.4(c) specifically precludes a party from referring in exceptions to evidence that was not presented to the ALJ.

disagree. In the present case, the McKinney-Vento presumption seems appropriate. In that regard, the record reflects the following facts:

- In October 2011, the children had to leave the only home they had known.
- After a year in their grandparents' house, at which time they were presumably becoming familiar with the new surroundings, a flood ruined their possessions and forced them to move.
- After a week in Paramus and six months in Queens, they returned to Little Ferry.
- Their quarters in Little Ferry are cramped and offer little privacy.
- All three children receive special education services, making curriculum and staffing in the provision of their programs especially important.

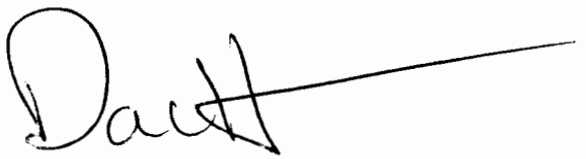
Thus, it appears that an important element of normalcy and continuity in the children's lives for the past two and one half years has been their education in Cresskill. Cresskill advises in its reply exceptions that petitioners' oldest child has graduated from high school and is no longer a subject of this controversy. However the middle child – a teenager – and the youngest child have been attending school in Cresskill since Kindergarten, and throughout the disruptive experiences of eviction from their home, destruction of their belongings by a flood, four moves and temporary residence in the homes of others.

After reviewing the facts which were certified, and examining the applicable law, the Commissioner is satisfied that the petition requesting the continuation of the education of petitioners' children in Cresskill should be, and is hereby, granted. Further, Cresskill's cross-claim against Little Ferry for tuition reimbursement – beginning with the 2013-2014 school year and going forward – is granted and Little Ferry's counterclaim against petitioners is dismissed. Cresskill's summary disposition motion has been resolved in its favor by the foregoing determinations except that, on the issue of where petitioners' children should attend school, the relief requested in the motion is granted

and Cresskill's eleventh hour application for the children's enrollment in the Little Ferry school district is denied.

Accordingly, the Commissioner orders Little Ferry to reimburse Cresskill for tuition and transportation for the 2013-1014 school year. Little Ferry will remain financially responsible until the parent(s) establish a permanent residence or are deemed domiciled in another jurisdiction pursuant to *N.J.S.A.* 18A:38-1d.

IT IS SO ORDERED.[5]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/12/14

Date of Mailing: 8/12/14

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 14830-13
AGENCY DKT. NO. 214-9/13

M.W. and S.O. o/b/o K.O., A.O., and C.O.,
Petitioners,
v.
CRESSSKILL BOARD OF EDUCATION,
NEW JERSEY STATE COMMISSION OF EDUCATION,
BERGEN COUNTY OFFICE OF EDUCATION,
Respondent.

Jessica Limbacher, Esq. for petitioners (Volunteer Lawyers for Justice, attorneys)

Stephen R. Fogarty, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: March 18, 2014 Decided: June 13, 2014

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, M.O. and S.O., the parents and legal guardians of K.O., A.O., and C.O. appeal the June 14, 2013, determination of the Bergen County's Interim Executive

County Superintendent (ECS) that their children were no longer homeless and that they are domiciled in Little Ferry School District (Little Ferry) who is responsible for their education.

As a consequence of this determination, on September 3, 2013, petitioners' filed a petition of appeal with the Commissioner of Education. An Answer to the petition was filed by the Cresskill Board of Education (Cresskill) on September 20, 2013. Additionally, Cresskill filed a Cross-Claim against the Little Ferry Board of Education which was subsequently amended on October 7, 2013.

On October 10, 2013, respondent Little Ferry filed an Answer to Cresskill's Cross-Claim and filed a Counter Claim against the petitioners.

The matter was transmitted to the OAL on October 17, 2013. On November 6, 2013 an amended petition was filed by the petitioners and answers thereto were filed by the respondent. A telephone conference was held on November 21, 2013, wherein hearing dates were established for February 20, 21, 2014. On December 2, 2013, Cresskill filed an Answer to the Amended Petition of Appeal, Separate Defenses, and an Amended Cross-Claim against Respondent Little Ferry Board of Education. On January 6, 2014, Petitioners filed an Answer to the Counterclaims. On or about January 20, 2014, Cresskill filed a motion for summary decision pursuant to N.J.A.C. 1:1-12.5.

FACTS

I **FIND** the following to be undisputed thus they are adopted as the **FACTS** herein.

M.O. and S.O. lived at a residence in Cresskill New Jersey for more than two decades. Their children, K.O., A.O., and C.O. were enrolled in the Cresskill School District. Each child receives special education and related services under the Individuals with Disabilities Education Act. On October 3, 2011, the family was evicted from their Cresskill residence following a foreclosure. On that date, the family moved to S.O.'s parents' home in Little Ferry, New Jersey. They lived there until October 30,

2012, when it was rendered uninhabitable due to flooding caused by Hurricane Sandy. The children were briefly enrolled in the Little Ferry School District before re-enrolling in the Cresskill School District in November 2011.

When S.O.'s parents' home became uninhabitable, the family stayed at S.O.'s sister's home in Paramus, New Jersey from October 30, 2012, through November 4, 2012. Thereafter, they lived at M.O.'s mother's home in Woodside, New York from November 4, 2012, through May 16, 2013. The family returned to S.O.'s parents' home in Little Ferry, New Jersey from May 16, 2013, through the present. It is undisputed that the family currently shares the lower level of [S.O.'s parents'] house with two bedrooms. A.O., a 13-year-old girl, and C.O., a 10-year-old boy, are sharing one bedroom with bunk beds; M.O. and S.O. are in the second bedroom, and K.O. sleeps in a common area. The family uses the upstairs shower, bathtub, and kitchen. K.O., A.O., and C.O. have remained enrolled in the Cresskill School District since November 2011.

In January 2013, the Bergen County Interim Executive County Superintendent (ECS) determined that K.O., A.O., and C.O. would be educated in Cresskill for the remainder of the school year pursuant to the McKinney-Vento Act and N.J.A.C. 6A;17-2.6, and the matter would be re-reviewed at the end of June 2013. K.O., A.O., and C.O. remained in the Cresskill District through June 2013.

On June 14, 2014, a new Interim ECS determined that the family's home in Little Ferry was no longer "temporary" under N.J.A.C. 6A:17-2.3(a)(3) because they resided at the same address for more than one year. Instead, the Executive County Superintendent concluded that the family was domiciled in Little Ferry under N.J.S.A. 18A:38-1(d) and that Little Ferry would be responsible for the education of K.O., A.O., and C.O. beginning in the 2013-14 school year. He also noted that out of one hundred and sixty-three school days, K.O. was tardy twenty times and absent twenty-five times, A.C. was tardy seven times and absent twenty-nine times, and C.O. was tardy three times and absent forty times. He further noted that most of those absences were unexcused and thus in his opinion the children were not receiving a "thorough and efficient" education at Cresskill.

Petitioners' appeal seeks to keep their children in the Cresskill School District with tuition paid for by Cresskill and/or Little Ferry. The children remain enrolled in the Cresskill School District during the pendency of these proceedings.

In Cresskill Motion for Summary Decision it acknowledges that the family became homeless when evicted on October 3, 2011, and thus were entitled to be enrolled in their school district. Once, however, the family resided in the Little Ferry residence for more than one year, Little Ferry became responsible for the cost of their education under N.J.S.A. 18A:38-1(d). Thus, it is Little Ferry Board that is responsible for the children's education in and transportation to the Cresskill schools for the 2013-14 school year.

Later in January 2014, petitioners submitted a letter indicating their intent to join the Cresskill Board of Education's Motion for Summary Decision. In February 2014, the Little Ferry Board of Education submitted a reply brief agreeing that the matter was ripe for summary decision, but arguing that it was responsible for the children's education since they resided in Little Ferry for more than one year and are deemed domiciled in Little Ferry under N.J.S.A. 18A:38-1(d). It maintains that the children must be enrolled in the Little Ferry School District and that it is prepared to offer each child a free and appropriate public education.

Petitioners reply to Little Ferry's brief contends that they remain homeless under the 42 U.S.C.A. § 11432a and N.J.A.C. 6A:17-2.3(a)(3). They also maintain that N.J.S.A. 18A:38-1(d) governs only financial responsibility for children and does not annul the protection allowing homeless children to remain in their prior schools under the McKinney-Vento Act and corresponding State rules. They contend that school placement decisions must be made in the children's best interests and that remaining in Cresskill is in the children's best interests because they (1) have attended Cresskill's schools for an extended period; (2) the consistency in the location, curriculum, and staffing is important; and (3) they have been displaced twice in the last two and a half years first when evicted from their childhood homes and then again during Hurricane Sandy.

Little Ferry replies now that questions of material fact remain regarding whether petitioners are homeless, and if so, whether attending school in Cresskill is in the children's best interests. It contends that N.J.A.C. 6A:17-2.2 and 2.3 require that a family lack a "fixed, regular and adequate residence" to be considered homeless rather than lacking a permanent residence. It contends that petitioners have resided in Little Ferry long enough for that home to be deemed sufficiently "fixed, regular and adequate" for the family to no longer be homeless such that they should attend school in their current domicile, Little Ferry. It also maintains that whether keeping the children in Cresskill is in the best interest of the children is a disputed fact. It emphasizes that the Interim ECS observed that the children's poor attendance records reflect an absence of continuity of instruction for the children in Cresskill.

Cresskill submitted a responsive brief in March 2014 reiterating that Little Ferry should be held financially responsible for the education of K.O., A.O., and C.O., but the children should remain enrolled in Cresskill's schools rather than Little Ferry's schools. Cresskill argues that whether petitioners are homeless, and if so, whether attending school in Cresskill is in the children's best interests, are questions of law, rather than fact, so summary decision should still be granted.

DISCUSSION, FINDINGS AND CONCLUSIONS

The rules governing motions for summary decision in an OAL matter are embodied in N.J.A.C. 1:1-12.5. These provisions mirror the language of R. 4:46-2 of the New Jersey Court Rules. Under N.J.A.C. 1:1-12.5(b), the motion for summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." The opposing party must submit responding affidavits showing that there is indeed a genuine issue of material fact, which can only be determined in an evidentiary proceeding, and that the moving party is not entitled to summary decision as a matter of law; failure to do so, entitles the moving party to summary judgment. Brill v. Guardian Life Ins. Co., 142 N.J. 529 (1995). Moreover, even if the non-moving party comes forward with some evidence, the courts must grant summary judgment if the evidence is

"so one-sided that [moving party] must prevail as a matter of law." Id. at 536. If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998). However, "the court must grant all the favorable inferences to the non-movant." Brill, supra, 142 N.J. at 536.

At issue is whether K.O., A.O., and C.O. are homeless children under N.J.A.C. 6A:17-2.2, -2.3, and N.J.S.A. 18A:7B-12(c).

New Jersey law provides school districts with certain responsibilities regarding the education of homeless children. See N.J.S.A. 18A:7B-12.1; N.J.A.C. 6A:17- 2.1 to -2.9. The State Department of Education's rules governing the education of homeless students in New Jersey apply to district boards of education providing general education services to students in grades preschool through 12 and special education services to students ages three through 21. N.J.A.C. 6A:17-2.1. The rules incorporate requirements contained in the re-authorized Stewart B. McKinney-Vento Homeless Education Act [42 U.S.C.A. §§ 11431 to 11435] as part of the Federal No Child Left Behind Act of 2001, P.L. 107-110. See 35 N.J.R. 5469(a), 5469. However, the rules do not limit the educational rights of homeless children and youth or school district responsibilities under the McKinney-Vento Act. N.J.A.C. 6A:17-2.1.

The McKinney-Vento Act provides that "each State educational agency shall ensure that each child of a homeless individual and each homeless youth have equal access to the same free, appropriate public education, including a public preschool education, as provided to other children and youths." 42 U.S.C.A. §§ 11431(1). The Act authorizes the U.S. Secretary of Education to provide funding to states complying with the Act's requirements regarding the education of homeless children and youths; by accepting the federal funds, a state agrees to comply with the Act's requirements. See 42 U.S.C.A. §§ 11432(c).

A "homeless child" is defined as a child "who lacks a fixed, regular and adequate residence, pursuant to N.J.S.A. 18A:7B-12 and N.J.A.C. 6A:17-2.3." N.J.A.C. 6A:17-2.2. N.J.S.A. 18A:7B-12(c) explains that "'homeless' shall mean an individual who

temporarily lacks a fixed, regular and adequate residence[.]" Homelessness exists under N.J.A.C. 6A:17-2.3(a)(3) when a child resides in "[t]he residence of relatives or friends with whom the homeless child is temporarily residing out of necessity because the family lacks a regular or permanent residence of its own[.]"

Similarly, "homeless children and youths" under the McKinney-Vento Act

> (A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of [42 U.S.C.A. § 11302(a)(1)]; and
>
> (B) includes--
>
> > (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason[.]
>
> [42 U.S.C.A. § 11434a(2).]

Both prongs (A) and (B) must be satisfied to qualify as a homeless child under Section 11434a(2). See L.R. v. Steelton-Highspire Sch, Dist., 2010 U.S. Dist. LEXIS 34254, *13 (M.D. Pa. 2011).

The definition of homelessness under the McKinney-Vento Act has been interpreted as having no maximum duration. Ibid. In L.R., a child and his grandmother were displaced from their home due to fire in 2009. Id. at 2. They lived at a relative's home for more than one year when the child's original district refused to re-enroll him. Id. at 1-2. The grandmother sought a preliminary injunction requiring his reenrollment. She testified that she shared a bedroom with the child in the new home, was trying to save money to move, and was "on the priority list for subsidized housing" with the hope that she would be permanently housed in the original district in the immediate future. Id. at 2-3.

The district court judge concluded that the child "qualifies as a homeless student because he lacks a 'fixed, regular, and adequate nighttime residence,' 42 U.S.C.[A.] § 11434a(2)(A), and he is 'sharing the housing of other persons due to loss of housing, economic hardship or a similar reason,' 42 U.S.C.[A.] § 11434a(2)(B)(i)." Id. at 13. The

judge emphasized that "[t]he [original district] recognized him as a homeless student from January 2009 through June 2009" and "[h]is situation has not changed since then." Ibid. She also noted that the McKinney-Vento Act "makes it clear that there is no maximum duration of homelessness" and that a local school board "must accommodate a homeless child for the entire time that they are homeless" under 42 U.S.C.A. § 11432(g)(3)(A)(i). Ibid. Therefore, the judge granted the grandmother's motion for a preliminary injunction.

Nonetheless, although homelessness does not have a maximum duration, the living arrangements of a family that becomes homeless and then stays with relatives may become "sufficiently fixed, regular, and adequate so as to preclude a finding of homelessness" after a period of time. See L.C. v. Bd. of Educ. of the Twp. of Branchburg, 96 N.J.A.R.2d (EDU) 1002, 1006. A child "residing temporarily at the home of a relative out of necessity because [the family] lacked a regular or permanent residence of their own" may qualify as homeless under N.J.A.C. 6A:17-2.3(a)(3), but "[t]his is not to say that any stay with a relative means that the parent or child is homeless" and "if the stay lasts for an extended time, it cannot be described as temporary." S.J. v. Bd. of Educ. of S. Orange-Maplewood Sch. Dist., EDU 5656-07, Initial Decision at 9 (January 22, 2008), <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (March 3, 2008), <http://www.state.nj.us/education/legal/commissioner/2008/mar/97-08.pdf>.

In L.C., a mother and daughter rented a home in Branchburg, New Jersey for ten years before encountering financial problems and being removed from the home. L.C., supra, 96 N.J.A.R.2d at 1003. The pair moved into the mother's brother's apartment in another school district. Ibid. The mother viewed the move as a temporary one and intended to return to Branchburg when she located affordable housing. Ibid. The new apartment was small and their possessions were kept in storage. Ibid. The mother paid half the rent for the apartment although the lease was in her brother's name, he was there only part-time. The Branchburg Board of Education determined that the family was not domiciled or entitled to a free education in the district. Id. at 1004.

On appeal, the mother argued that she was homeless and entitled to continue enrollment in the Branchburg schools. Id. at 1005. The ALJ rejected this argument and concluded that the daughter was "not 'homeless' since she has 'a fixed, regular and adequate residence'" under N.J.S.A. 18A:7B-12. Ibid. The ALJ found that the apartment was "fixed and regular" because the mother "has been living continuously [there] since September, 1995[,]" receives her mail there[,] and pays one-half of the rent[.]" Ibid. No testimony suggested that the apartment was "inadequate in the sense that it lacks any essentials of a residence such as heat, electricity or cooking facilities." Ibid.

The mother also argued that her situation constituted homelessness under N.J.S.A. 18A:7B-12 because she intended to return to Branchburg rather than make the apartment her permanent residence. The ALJ also rejected this argument and explained that

> the statute does not require that the "fixed, regular and adequate residence" be permanent. Rather, the statute is intended to address situations, for example, of a parent who has no place to live, or moves frequently from place to place or is temporarily living in a motel. While the Somerville apartment may not be L.C.'s permanent address in the sense that she will never move again, it is sufficiently permanent to be considered her domicile for purposes of N.J.S.A. 18A:38-1.
>
> [Id. at 1005.]

It was concluded and ordered that the child should be removed from the Branchburg schools. Ibid.

The Commissioner adopted the initial decision and explained that while the mother's "living arrangements with her brother may not be permanent in the sense that she may wish to eventually return to Branchburg, the evidence shows them to have become sufficiently fixed, regular, and adequate so as to preclude a finding of homelessness." Id. at 1006 (emphasis in original). In short, it was concluded that the family had become residents of the district and the brother's home had become their fixed and regular resident.

Likewise, in the present matter, the facts reflect that the family resided in the Little Ferry residence with S.O.'s parents for more than a year before it became uninhabitable due to Hurricane Sandy. The family then returned to the Little Ferry residence after it became inhabitable again. They have remained in that residence through the present, a period of almost another year. Further, the facts presented regarding the living arrangements at S.O.'s parents' residence is "adequate" under N.J.A.C. 6A:17-2.2 and N.J.S.A. 18A:7B-12(c). The family resides downstairs and it consists of at least two bedrooms and a common living area where K.O. sleeps. While the family uses the bathroom and kitchen facilities on the first floor of the home, there is no suggestion that the facilities are inadequate or that there is a problem accessing same. Finally, it must be emphasized that the home does not lack any of the features ordinarily associated a proper dwelling such as heat, electricity, or cooking facilities, or that the home is otherwise deficient.

I **FIND** that the facts herein do not demonstrate that K.O., A.O., and C.O. lack a fixed and regular residence under N.J.A.C. 6A:17-2.2 and N.J.S.A. 18A:7B-12(c). Nor do the facts presented demonstrate that the family living arrangements with S.O.'s parents in Little Ferry is only a temporary arrangement under N.J.A.C. 6A:17-2.3(a)(3). The reasonable inference from the facts herein is that the family left the Little Ferry residence only because it became uninhabitable following Hurricane Sandy and then returned when it became inhabitable. If not for the damage caused by Hurricane Sandy, the family would have been residing in Little Ferry for almost three full years. This situation is not one where the family has no place to live or moves frequently from place to place. The reasonable inference from the facts herein is that absent the family's voluntary decision to move out of the Little Ferry home, they will continue residing there indefinitely. Like the child in L.C., K.O., A.O., and C.O.'s living arrangement with S.O.'s parents in Little Ferry has have been become sufficiently fixed, regular and permanent so as to preclude a finding of homelessness under N.J.A.C. 6A:17-2.2, -2.3, and N.J.S.A. 18A:7B-12(c) even though they moved into the home

when they became homeless.[1] The fact that they may desire to move does not diminish that their current living arrangements is regular and fixed so as to be deemed permanent.

The statutory scheme of N.J.S.A. 18:17B-12.1 requires a showing that the children's continued enrollment in a particular district is in their best interest. See N.J.S.A. 18A:7B-12.1(c) and N.J.A.C. 6A:17-2.6.

Generally speaking, homeless child's district of residence is responsible for the education of that child in New Jersey. N.J.S.A. 18A:7B-12.1. The district of residence remains the district in which a parent last resided prior to becoming homeless if a parent temporarily moves from one district to another due to homelessness. N.J.S.A. 18A:7B-12(c). It must "determine the educational placement of the child after consulting with the parent or guardian" and either (a) "continue the child's education in the school district of last attendance," (b) "enroll the child in the district of residence if the district of residence is not the district of last attendance," or (c) "enroll the child in the school district where the child is temporarily living[.]" N.J.S.A. 18A:7B-12.1. The option selected must be in the child's best interest. Ibid.

It is clear that the statutory scheme of N.J.S.A. 18A:7B-12.1, et seq. favors that a homeless child be continued in the school district of origin. This is consistent with the McKinney-Ventro Act, which also expresses a preference for enrollment in the school of origin.

However, it must be emphasized that such a preference is not absolute and enrollment decisions must ultimately be made in the best interest of the children. Pursuant to N.J.A.C. 6A:17-2.6(a)(1), the children herein could be enrolled in the district where they are currently living, Little Ferry, under N.J.A.C. 6A:17-2.6(a)(3). Significantly, the Interim ECS noted a disturbing amount of absences and tardiness by each of the three children, most of which was unexcused by the Cresskill schools. Such

[1] Identical analysis would apply under the McKinney-Vento Act's similar definition of homelessness, because only children who lack a "fixed, regular, and adequate nighttime residence" qualify as homeless under that definition. 42 U.S.C.A. § 11434a(2)(A).

a level of absences and tardiness raises significant concerns about the feasibility of the children's continued enrollment in Cresskill and whether such enrollment is in the children's best interest. No explanation for the cause of those absences. There is no indication that the children attendance history was problematic prior to the foreclosure. However, a reasonable inference is that such a high level of absences might be avoided by enrolling the children closer to where they currently live in Little Ferry.

While the parties have not addressed the distance from Little Ferry to Cresskill, it is general knowledge that Little Ferry is some 10 miles from Cresskill. I have determined that the children are not homeless, thus I **FIND** that they are no longer entitled to free enrollment in the Cresskill Schools.

The remaining and final issue is whether Little Ferry is financially responsible for the education of under N.J.S.A. 18A:38-1(d).

As a general rule, N.J.S.A. 18A:7B-12.1 mandates that when a child is homeless and attends school in any district other than the district of residence (the district the parent last resided in prior to becoming homeless), the district of residence "shall pay the costs of tuition for the child to attend school in that district and shall pay for any transportation costs incurred by that district[.]" Cf. N.J.A.C. 6A:17-2.4 (stating that the school district of origin must "pay the cost of tuition when the child attends school in another school district[,]" and "provide transportation for the child"). However, "[w]hen the homeless child attends school in the district of residence while temporarily residing in another district, the district of residence shall provide for transportation to and from school pursuant to the provisions of [N.J.S.A. 18A:58-7]." Ibid.

Public schools are free to children within a school district as set forth in N.J.S.A. 18A:38-1(d).

> whose parent or guardian, even though not domiciled within the district, is residing temporarily therein, but **any person who has had or shall have his all-year-round dwelling place within the district for one year or longer shall be deemed to be domiciled within the district** for the purposes of this section[.] Emphasis added

[N.J.S.A. 18A:38-1(d).]

N.J.S.A. 18A:38-1(d) has been interpreted to "impose[] a limit upon how long a former district of domicile is financially responsible for the education of homeless children." A.M. v. Bd. of Educ. of the Town of Dover, EDU 9780-10, Final Decision at 3, Comm'r, (June 14, 2011), <http://www.state.nj.us/education/legal/commissioner/2011/jun/222-11.pdf>. The new district becomes financially responsible to educate a homeless child after one year of living in the district. Ibid.[2]

I **FIND** that the family resided in Little Ferry for more than one year between October 3, 2011, and October 30, 2012, after they moved from their district of residence, namely Cresskill. Once the family lived in Little Ferry for more than one year, it became financially responsible for the education of K.O., A.O., and C.O. When the Little Ferry home became temporarily uninhabitable, the family stayed in Paramus for less than one week and in New York for approximately seven months before returning to Little Ferry. As of May 16, 2014, they have now spent another full year in Little Ferry. Accordingly, I **FIND** and **CONCLUDE** that Little Ferry remains financially responsible for the education of K.O., A.O., and C.O. under N.J.S.A. 18A:38-1(d) because they lived in Little Ferry for more than one year. Therefore, I **CONCLUDE** that Little Ferry shall reimburse the Cresskill Board of Education for the full cost of educational program provided to K.O., A.O., and C.O. for the 2013-2014 school year.

[2] However, although the original school district may be released from financial responsibility for the homeless child once they live in a new district for more than one year, this release does not necessarily include removal of the children from the original school district's schools.

ORDER

It is hereby **ORDERED** that Summary Judgment is hereby **GRANTED** to the respondent Cresskill Board of Education that the children are no longer homeless. And it is further **ORDERED** that the children be enrolled in the Little Ferry School District or in lieu of same that Little Ferry reimburses Cresskill for the 2013-2014 school year.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 13, 2014

DATE

IRENE JONES, ALJ

Date Received at Agency: 6/13/14

Date Mailed to Parties:

sej

ORDER

It is hereby **ORDERED** that Summary Judgment is hereby **GRANTED** to the respondent Cresskill Board of Education that the children are no longer homeless. And it is further **ORDERED** that the children be enrolled in the Little Ferry School District or in lieu of same that Little Ferry reimburses Cresskill for the 2013-2014 school year.

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June 13, 2014

DATE

IRENE JONES, ALJ

Date Received at Agency: 6/13/14

Date Mailed to Parties: JUN 17 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

sej

326-14

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SCOTT RIXFORD, INTERIM EXECUTIVE COUNTY SUPERINTENDENT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board of Education (Board) challenged the respondent Bergen County Interim Executive County Superintendent's (ECS) denial of its application for a waiver of the maximum salary amount for superintendents established pursuant to *N.J.A.C.* 6A:23A-1.2 and *N.J.S.A.* 18A:17-24.1. The ECS determined that the Learning Center – a magnet school program operated by the Board and overseen by the district superintendent – did not constitute "an additional school district" within the intent of applicable regulations; accordingly, the Board's request for waiver was disallowed.

The ALJ found, *inter alia,* that: *N.J.S.A.* 18A:7-8(j) directs each ECS to review and approve all superintendent employment contracts in their county; at issue here is the applicability of the "additional district salary increment," defined by regulation as "$10,000 for each additional district served by a superintendent pursuant to *N.J.S.A.* 18A:17-24.1"; the ECS was correct in his contention that the word "district" means a school district duly constituted in accordance with Title 18A; the Learning Center is clearly not a local school district established pursuant to chapters 8 or 13 of Title 18A, and nowhere does the Board so allege. The ALJ concluded that the ECS correctly determined that the statutory and regulatory scheme offered him no leeway to grant the salary adjustment sought by the Board, and dismissed the petition.

Upon comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 8/08/14

OAL DKT. NO. EDU 03919-14
AGENCY DKT. NO. 23-1/14

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SCOTT RIXFORD, INTERIM EXECUTIVE COUNTY SUPERINTENDENT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon a comprehensive review of the record, the Commissioner concurs with the Administrative Law Judge's (ALJ) determination – for the reasons expressed in the Initial Decision – that the respondent properly concluded that the superintendant was not eligible for the $10,000 additional district salary increment under *N.J.A.C.* 6A:23A-1.2 and *N.J.S.A.* 18A:17-24.1. Accordingly, the recommended decision of the ALJ is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/08/14
Date of Mailing: 8/12/14

* This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 8A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 03919-14
AGENCY DKT. NO. 23-1/14

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,

Petitioner,

v.

SCOTT E. RIXFORD, INTERIM EXECUTIVE COUNTY SUPERINTENDENT, BERGEN COUNTY,

Respondent.

Robert Jacobs, Esq., for petitioner (Winne, Banta, Hetherington, Basralian and Kahn, attorneys)

Daniela Ivancikova, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Record Closed: June 6, 2014 Decided: June 24, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Board of Education of the Borough of Ridgefield (the Board), appeals the denial by Interim Executive County Superintendent Scott Rixford (Rixford) of its request for leave to compensate its chief school administrator an additional $10,000 above the regulatory salary cap for serving "an additional school district" as defined by N.J.A.C. 6A:23A-1.2. Rixford determined that the magnet school program operated by the Board did not constitute "an additional school district" within the intent of the regulation, and accordingly, disallowed the Board's request.

PROCEDURAL HISTORY

The Board filed its appeal with the Commissioner of Education on January 30, 2014. Rixford filed a motion to dismiss in lieu of an answer on March 27, 2014. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on March 31, 2014. Opposition to the motion was filed by the Board on April 24, 2014. Rixford replied via letter dated April 29, 2014. Oral argument was conducted on June 6, 2014, at which time the record closed.

FINDINGS OF FACT

Rixford's motion is filed in accordance with N.J.A.C. 6A:3-1.5(g), which permits the filing of a motion to dismiss in lieu of an answer. In ruling on a motion to dismiss

> The judge considers whether all the evidence together with all legitimate inferences therefrom could sustain a judgment in favor of the party opposing the motion. The judge is not concerned with weight, worth nature or extent of the evidence. The judge must accept all the evidence supporting the party defending against the motion and accord that party the benefit of all inferences that can reasonably and legitimately be deduced therefrom. If reasonable minds could differ, the motion must be denied.
>
> [37 New Jersey Practice, Administrative Law and Practice § 5.19, at 259-60 (Steven Lefelt, Anthony Miragliotta & Patricia Prunty) (2d ed. 2000).]

Accordingly, for the purposes of the motion, all facts alleged by the petition will be deemed admitted, and I **FIND** as follows:

On November 14, 2013, the Board sought permission from Rixford to compensate an incoming superintendent of schools in an amount in excess of the maximum established by N.J.A.C. 6A:23-1.2, urging that the incumbent would have additional responsibilities and duties associated with running what the Board described as a "de facto additional school district." Via letter dated November 18, 2013, Rixford denied the Board's request, stating that "[a]lthough Ridgefield runs a magnet school program for students with various learning disabilities, this program does not qualify as an additional school district which would qualify for an additional district salary increment."

At issue are the duties and responsibilities attached to managing the Ridgefield Magnet School Program, also known as The Learning Center (Learning Center). The Learning Center draws from other local school districts, and provides a continuum of services for students from ages 3-21 in a public school setting. As of the date of the Board's submission, 230 out-of-district students attended the Learning Center; they come from five different counties and represent some 51 different sending school districts.

The Learning Center operates pre-school disabled and pre-school autistic programs; autism and Asperger's programs for students aged 5-21; multiply disabled programs for students aged 5-21; and a behavioral disabilities program for high school students. The Board additionally operates the STRIVE (Strides Toward Reaching Independence via Education) Program, which is a school-to-career transition program. To operate these additional programs, the Board employs over 125 teacher assistants, 40 special education teachers, eight speech therapists, four occupational therapists, three physical therapists, two behaviorists, three program supervisors, a transition program coordinator, six job coaches, a special education supervisor, and clerical personnel. The operating budget for these programs exceeds $10,000,000 per year.

The Ridgefield superintendent is responsible for the oversight and operation of these additional programs, including but not limited to hiring, supervising and evaluating staff; curriculum development; and transportation coordination. He or she oversees a complex bookkeeping system. As part of his or her responsibilities, the superintendent must integrate the educational programs offered by the regular K-12 schools and those offered at the Learning Center to ensure that all students receive an appropriate educational program.

The Board urges that a similar request by the Northern Valley Regional High School District (Northern Valley) was granted by the Executive County Superintendent for Bergen County. It shares a February 25, 2011, letter from counsel for Northern Valley in which he requests that consideration be given to its superintendent's additional duties as chief executive officer (CEO) of Region III, a special education, transportation, curriculum, and professional development consortium of districts that provides special education services to Bergen County students, most specifically children with autism in grades K-12. Northern Valley is the local educational agency (LEA) that coordinates services for Region III, and accordingly its superintendent is responsible for administering and operating the program. Via letter dated November 17, 2011, then Executive County Superintendent Robert Gilmartin granted Northern Valley's request, specifically stating that he was authorizing a salary increase of $10,000 above the regulatory maximum "for a second district responsibility," a reference to the Northern Valley superintendent's responsibilities relative to Region III.

ANALYSIS AND CONCLUSIONS OF LAW

In accordance with N.J.S.A. 18A:7-8(j), the Executive County Superintendent of Schools must "[r]eview and approve, according to standards adopted by the commissioner, all employment contracts for superintendents of schools, assistant superintendents of schools, and school business administrators in school districts within the county, prior to the execution of those contracts." The legislature granted the Commissioner broad authority to adopt the rules and regulations "deem[ed] necessary to implement the provisions" of N.J.S.A. 18A:7-1 to -15. See N.J. Ass'n of Sch. Admin. v. Cerf, 428 N.J. Super. 588, 594 (App. Div. 2012). Among the regulations so

promulgated are those that place a cap on the salaries that a local district may pay its superintendent of schools. N.J.A.C. 6A:23A-3.1(e)(2) provides that "[n]o contract for a superintendent . . . shall include an annual salary in excess of the maximum salary amount plus, if applicable, additional district salary increment(s) and/or a high school salary increment." "Maximum salary amount" is defined by N.J.A.C. 6A:23A-1.2, which correlates permissible maximum salaries with student enrollment figures and provides for a waiver of the maximum salary amount for districts with enrollments of 10,000 or more. It is agreed all around that this waiver is inapplicable here.

Rather, at issue is the applicability of the "additional district salary increment," defined by regulation as "$10,000 for each additional district served by a single superintendent pursuant to N.J.S.A. 18A:17-24.1." N.J.A.C. 6A:23A-1.2. The Board urges that the Learning Center is akin to an additional district, and that it is entitled to a full evidentiary hearing at which it could prove that point. Rixford contends that the word "district" means a school district duly constituted in accordance with Title 18A; it is incontrovertible that the Learning Center is not such a district; and for this reason the Board cannot prevail. I agree.

It is well-established that an administrative regulation is subject to the same canons of construction as a statute. In re N.J.A.C. 14A:20-1.1, 216 N.J. Super. 297, 306 (App. Div. 1987). When interpreting a statute or regulation, our courts assume that the framers intended to ascribe to words their ordinary meaning. Jablonowska v. Suther, 195 N.J. 91, 105 (2008). The intent of a statute or regulation should be gleaned from a view of the whole and of every part of the statute, with the real intention prevailing over the literal sense of its terms. Schierstead v. City of Brigantine, 29 N.J. 220 (1959). An agency's interpretation of its own regulations is entitled to deference. Matturi v. Bd. of Tr. of the Judicial Ret. Sys., 173 N.J. 368, 381 (2002).

Plainly, the Learning Center is not a "district" within the intent of the statutory and regulatory scheme governing local district expenditures, and the Board has proffered no evidence to the contrary. N.J.S.A. 18A:1-1 states that "'[d]istrict' means a school district." N.J.A.C. 6A:23A-1.2 provides that

ORDER

Based on the foregoing, it is hereby **ORDERED** that the petition of appeal be dismissed.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 24, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: June 25, 2014

Date Mailed to Parties: JUN 25 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

327-14L

327-14

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Acting Commissioner

August 8, 2014

Sonya B[redacted], *pro se*
[redacted]
Hamilton, New Jersey 08629

Sonya B[redacted] *pro se*
[redacted]
Trenton, New Jersey 08611

Sanmathi Dev
Capehart & Scatchard, P.A.
8000 Midlantic Drive, Suite 300S
P.O. Box 5016
Mount Laurel, New Jersey 08054

Re: *Board of Education of the Township of Hamilton, Mercer County v. S.B., on behalf of minor child, C.B., Agency Dkt. No. 282-11/13.*

Dear Parties:

Upon review of the Petition of Appeal filed in connection with the above captioned matter and based upon the respondent's failure to submit an Answer to the petition, I have determined to grant summary decision in favor of petitioner.

On November 18, 2013, petitioner filed a Petition of Appeal pursuant to *N.J.A.C.* 6A:3-8.1 *et seq.* claiming that minor child C.B was not entitled to attend school in the petitioner's District between October 1, 2012 and June 20, 2013, in accordance with *N.J.S.A.* 18A:38-1 *et seq.* A copy of the Petition of Appeal was served upon S.B. on November 4, 2013, as was an acknowledgment of filing and notice that an Answer to the petition was due within 20 days. *N.J.A.C.* 6A:3-1.5.

Because S.B. failed to respond to the initial notice, a second notice was sent to the respondent on December 11, 2013, via certified and regular mail, clearly indicating that – absent receipt of an Answer to the Petition of Appeal within 10 days – each count in the petition would be deemed admitted and this matter may be decided on a summary decision basis pursuant to *N.J.A.C.* 6A:3-1.5(e). According to information obtained from the U.S. Postal Service, the copy sent via certified mail was delivered on January 2, 2014. The copy sent via regular mail was not returned. S.B. also failed to respond to the second notice.

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has either properly (petitioner's position) or improperly (respondent's position) enrolled a student while in its conditional approval status. I therefore **FIND** that petitioner has failed to meet its burden of establishing that LCEC will suffer irreparable harm if the relief sought is not granted.

While I have determined that no irreparable harm exists at this time, it is not necessary for me to address the remaining criteria under Crowe, supra. Nevertheless, I will address the three remaining criteria.

Is Petitioner's Right to Claim Well-Settled and is Petitioner Likely To Prevail?

As for the second and third requirements for the granting of Emergent Relief, petitioner argues there is a clear legal right underlying its claim and that it has a likelihood of prevailing on the merits of the underlying claim. I **FIND** the legal right underlying petitioner's claim is not settled and I further **FIND** petitioner does not, at this time, have a likelihood of prevailing on the merits of the underlying claim.

There is a substantial factual question as to whether the current LCEC program is one or two programs. There appears substantial evidence showing that currently, the Speer program was terminated and/or eliminated by the Department at the request of the school. Accordingly, there remains only one program at the current address for the LCEC.

In addition, there is presently evidence supporting the fact that LCEC is mainstreaming PSSD students at the current location. Despite the petitioner's position that there is no mainstreaming in the Scoles program, there was presented evidence by the respondent supporting the position that Scoles is doing at the very least some mainstreaming. Chavez in her certification has raised the issue based on her visit to LCEC that Scoles is mainstreaming.

Furthermore, in order to show that LCEC is likely to prevail on the merits, the petitioner must show that the Department's decision placing LCEC on conditional approval status was arbitrary, capricious or unreasonable. It would appear however,

that the decision by the Department was not arbitrary, capricious or unreasonable. The respondent has presented sufficient evidence in its papers that at this point in time, LCEC has failed to comply with the New Jersey regulations governing PSSDs and at the very least, LCEC has failed to adequately respond to the Department's copious requests for information regarding the layout and functioning of the school. LCEC was approved solely as a special, self-contained class program for students with disabilities as per the certification of Peggy McDonald. The School was not approved to "mainstream" students as it appears to be doing. These facts alone fail to support any allegation that the Department's decision was arbitrary, capricious or unreasonable.

The Balance of Equities and Interests of the Parties

As for the fourth requirement for granting Emergent Relief, the petitioner avers that when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the Department if Emergent Relief is not granted. LCEC argues that the greater loss and potential for loss will be suffered by it without a corresponding risk of loss by the Department. In this case, the Department has an interest in making sure that students with disabilities in New Jersey receive a free and appropriate public education. The Department must review such schools and maintain that those private schools for disabled students are operating in accordance with federal and state law. These goals are not pursued when the Department retains reservations about the operation of the school in accordance with law. There is some hardship to LCEC in its current state, however, the decrease on most, if not all, hardship to the School can easily wane by correcting the issues raised by the Department and presenting adequate proofs to the Department confirming same.

The Department advised LCEC in writing that it will remain on conditional approval status until such time that the school demonstrates that it is operating its special class programs in accordance with N.J.A.C. 6A:14-4.7(a). There are clearly burdens which go along with having a conditional approval status on an educational program; however, the school with such a status has the power to address and resolve the issues which lead to that status.

I agree with the Department's position when it states that it represents the "interests of New Jersey students" who "will suffer a significant hardship if LCEC's request for emergent relief is granted." Therefore, I **FIND** that the equities do not favor on balance the grant of Emergent Relief.

IT IS therefore on this 3rd day of July, 2014,

ORDERED that Petitioner's application for Emergency Relief is **DENIED**.

For the reasons set forth above, it is hereby **ORDERED** that petitioner's request for Emergency Relief pending final hearing is hereby **DENIED**. This Order on application for Emergency Relief shall remain in effect until the issuance of the decision on the merits in this matter.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 3, 2014

DATE

MICHAEL ANTONIEWICZ, ALJ

sej

329-14

STATE BOARD OF EXAMINERS DKT. NO. 1213-122
AGENCY DKT NO. 7-5/14A

IN THE MATTER OF THE	:	
REVOCATION OF THE CERTIFICATE	:	COMMISSIONER OF EDUCATION
OF QUINCEY HOLLOWAY BY THE	:	DECISION
STATE BOARD OF EXAMINERS.	:	

Order of Revocation by the State Board of Examiners, April 4, 2014

For the Respondent-Appellant, Louis P. Bucceri, Esq.

For the Petitioner-Respondent State Board of Examiners, Angela L. Velez, Deputy Attorney General (John J. Hoffman, Acting Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with the appellant Quincey Holloway's appeal of the State Board of Examiners' (Board of Examiners) Order of April 4, 2014, revoking his School Social Worker Certificate. On appeal, the appellant contends that the record in this matter does not support the Board of Examiners' modification of the two-year suspension recommended by the Administrative Law Judge (ALJ). The appellant argues that the Board of Examiners engaged in arbitrary and capricious conduct when it modified the penalty without rejecting or modifying the ALJ's findings of fact as to the credibility of the Board of Examiners' witnesses. As a result, the appellant maintains that the Commissioner should reject the Board of Examiners' decision revoking his certificate, and impose a two-year suspension of his certificate as was recommended by the ALJ.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board of Examiners so long as the appellant received due process and the Board of Examiners' decision is supported by sufficient

331-14

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N.J. Attorney I.D. No.: 01811-2010

IN THE MATTER OF DONNA KOCH, NIKOLCE MILEVSKI, EDWARD PUZIO, ANTHONY DAMATO, ROSE MARIE ALOIA; GARFIELD BOARD OF EDUCATION	:	OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EEC 02177-2011N **CONSENT ORDER FOR SETTLEMENT WITH NIKOLCE MILEVSKI**

WHEREAS, Petitioner, New Jersey Department of Education, School Ethics Commission ("SEC") and Respondent, Nikolce Milevski ("Respondent") have mutually agreed to settle the above-captioned matter, with JOHN J. HOFFMAN, Acting Attorney General of New Jersey, by Geoffrey N. Stark, Deputy Attorney General, appearing on behalf of the SEC, and Adam S. Weiss, Esq., appearing on behalf of Respondent Nikolce Milevski; and

WHEREAS, this matter arose from the SEC's decision of December 21, 2010, finding probable cause to credit the allegations that Respondent violated N.J.S.A. 18A:12-24.1, (c), (d), and (h);

and

WHEREAS, on September 11, 2012, the Honorable Leslie Z. Celentano, A.L.J., granted partial summary judgment to the Commission on the limited issue of whether, in relevant part, Respondent violated the School Ethics Act by voting to appoint an interim business administrator without the recommendation of the chief school administrator and in contravention of N.J.S.A. 18A:27-4.1; and

WHEREAS, the settlement of this matter shall not constitute precedent or be considered an admission of guilt in other pending or future litigation.

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. Respondent acknowledges that, consistent with the September 11, 2012, finding of Judge Celentano granting partial summary decision to the Commission, that Respondent's actions constituted a violation of N.J.S.A. 18A:12-24.1(c), N.J.S.A. 18A:12.24.1(d), and N.J.S.A. 18A:12-24.1(h).

2. The parties agree that the SEC will recommend that the Commissioner impose the penalty of a censure.

3. The Commissioner agrees that he will adopt the SEC's recommendation and impose the penalty of a censure for the conduct described in the attached affidavit.

4. By accepting the penalty of a censure, Respondent

agrees to waive any and all hearings to which he is entitled pursuant to N.J.S.A. 18A:12-29 and N.J.A.C. 6A:28-10.7, and Respondent further agrees that he will not oppose the censure.

5. The parties agree that this Consent Order fully resolves all issues between them arising from the SEC's December 21, 2010, Decision finding probable cause.

Adam S. Weiss, Esq.
Attorney for Respondent

Date: 7/21/14

Geoffrey N. Stark, D.A.G.
Attorney for Petitioner

Date: 7/23/14

As to penalty only

David C. Hespe
Commissioner of Education

Date: 8/13/14

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N.J. Attorney I.D. No.: 01811-2010

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IN THE MATTER OF DONNA KOCH, NIKOLCE MILEVSKI, EDWARD PUZIO, ANTHONY DAMATO, ROSE MARIE ALOIA; GARFIELD BOARD OF EDUCATION	:	OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EEC 02177-2011N **AFFIDAVIT OF NIKOLCE MILEVSKI**

Nikolce Milevski, of full age, being duly sworn upon his oath, deposes and says:

1. I was a member of the Board of Education of the City of Garfield ("Board") during the 2010-2011 school year.

2. As of May 2013 I no longer serve as a member of Board.

3. I attended the Board meeting on November 22, 2010.

4. During the November 22, 2010, Board meeting, Mr. Edward Puzio made a motion to appoint as interim business

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333-14

R.N. on behalf of minor child A.N.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner – the mother of A.N., a student in the Farmingdale School District – challenged the respondent Board's rejection of an application for A.N.'s admission into Upper Freehold Regional's Advanced Mathematics and Algebra Academy (Academy), an Interdistrict Public School Choice Program. Petitioner alleged that the Board's action in revoking A.N.'s acceptance into the program after initially sending a letter of welcome was arbitrary, capricious and unreasonable. A.N. has an Individualized Education Program (IEP) in his home district which, for the 2012-2013 school year, contained at least 23 modifications including one that called for A.N. to be able to dictate responses to tests and other work in lieu of writing them, and participation in the Wilson reading program. The Board contended that petitioner failed to provide A.N.'s full IEP with his application, and the late notice of necessary accommodations, together with the related financial and administrative burden that the district would need to assume if A.N. were accepted into the Academy program, justified the Board's rejection of A.N.'s application pursuant to the Interdistrict Public School Choice Program Act, *N.J.S.A.* 18A:36B-20(c). The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: there are no disputed issues of material fact; in the instant matter, the Board determined to reject A.N.'s application to the district's choice program based on several factors, including the late notice of necessary accommodations and the financial and administrative burden that the district would have to assume if it were to accept A.N.; by the time the district was provided with A.N.'s complete IEP in May 2013 and had the opportunity to review it, the district's budget for the upcoming school year had been set, and there was limited time to secure a qualified instructor for the required Wilson program; and under *N.J.S.A.* 18A:36B-20(c), a district may reject the application of a classified student if that student's IEP would create an undue financial or administrative burden on the district. The ALJ concluded that petitioner has not shown that the district's May 2013 determination to reject A.N.'s application was unreasonable, and granted the Board's motion for summary decision.

Upon a full and independent review, the Commissioner concurred with the findings and conclusion of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 14, 2014

OAL DKT. NO. EDU 9482-13
AGENCY DKT. NO. 151-7/13

R.N. on behalf of minor child A.N.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT.	:	

The controversy now before the Commissioner concerns one of respondent Upper Freehold Regional School District Board of Education's (UFRSD) Interdistrict Public School Choice Programs, *i.e.,* the Advanced Mathematics and Algebra Academy (Academy).[1] Respondent rejected an application to the program which had been submitted by petitioner, R.N., on behalf of her minor child, A.N., and petitioner challenges the rejection. After review of the record, the May 14, 2014 Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions thereto[2] and respondent's reply to petitioner's exceptions, the Commissioner cannot

[1] A description of the Interdistrict Public School Choice Program was provided in the Initial Decision of the Office of Administrative Law (OAL) and will be relied upon for purposes of the instant final decision.

[2] The Commissioner disagrees with respondent's contention that petitioner's exceptions should not be considered. Said exceptions were stamped in on May 28, one day after the deadline for filing exceptions to the May 14, 2014 Initial Decision. However, a notation at the top of the exceptions indicates that they were faxed to the Department of Education (Department) on May 27 at 4:09, making them timely. The Commissioner will not deny petitioner its say because of an innocuous discrepancy between a fax notation and a filing stamp.

conclude that respondent's decision to reject petitioner's application was arbitrary, capricious, unreasonable, or contrary to applicable school law and regulations.

Procedurally, the matter comes to the Commissioner as a recommended grant of summary disposition to respondent.[3] More specifically, respondent applied for summary disposition on December 16, 2013, contending that the material facts are not in dispute and that – pursuant to *N.J.S.A.* 18A:36B-20(c) – respondent was entitled to reject R.N.'s application after determining that acceptance of A.N. into its Advanced Mathematics and Algebra Academy (Academy) would be burdensome financially and administratively. As with any motion for summary disposition, the threshold task is to establish whether there are material facts which are genuinely disputed.

In her papers opposing summary disposition and in her exceptions, petitioner has maintained that competing evidence about several material facts precludes summary disposition and, therefore, the Initial Decision should not be adopted. Examination of the record does reveal factual disagreements. First, there has been disagreement about what petitioner was asked to submit with her application. Second, the parties' representations about the requirements of A.N.'s IEP have not been harmonious. Third, the parties' estimates of the costs of implementing A.N.'s IEP differed significantly.

Relevant to the first area of disagreement are the affidavits of petitioner and UFRSD employee Louise San Nicola. Petitioner contends in her December 19, 2013 affidavit (R.N. Affidavit) that UFRSD knew at the beginning of the application process what A.N.'s IEP required because 1) she submitted the first two pages of the 2012-23 IEP with her Choice

[3]Respondent's answer and summary disposition motion were filed on December 16, 2013.

application, 2) she was told by someone at UFRSD that she need only submit the first two (of thirteen) IEP pages, 3) UFRSD Superintendent Richard Fitzpatrick (Fitzpatrick) called her after receiving her application to request that she waive the IEP requirement that A.N. participate in the Wilson reading program (Wilson program), and 4) after she wrote a letter to Fitzpatrick waiving the Wilson program, she was never again told to submit additional documents or information. (R.N. Affidavit, Para. 2-3)

By way of contrast, Louise San Nicola – the UFRSD employee responsible for collecting and reviewing the paperwork from choice program applicants – stated that petitioner did not submit the required copy of A.N.'s 2012-13 IEP with her November 26, 2012 application. San Nicola averred that she contacted petitioner on November 30, 2012 to request the IEP and did not tell petitioner that the first two pages of the IEP would be sufficient. Nonetheless, on or about November 30, 2012 petitioner sent San Nicola only the first two pages of A.N.'s thirteen-page IEP for 2012-13. (San Nicola Certification, July 15, 2013, Para. 7-10)

The specific language of petitioner's affidavit relates that an unspecified employee at UFRSD told her "that it was standard practice to submit the first two pages of the IEP because it contained all the information that was needed." (R.N. Affidavit, Para. 2) The Commissioner notes that in an email dated May 24, 2013 from petitioner to Mark Guterl, Principal of respondent's Stone Bridge Middle School, petitioner made the same allegation, *i.e.*, that it was standard practice to only submit the first two IEP pages. At that point in time, however, petitioner attributed the opinion about standard practice to the Farmingdale child study team lead, a Ms. Barrall, who is said to have told petitioner: "normally it is only required to send the first two pages of an IEP (she said it is quite common practice that only the first two pages be requested to get a general idea of services)." (Exhibit E to Fitzpatrick Certification, July 15, 2013)

In light of the facts that 1) petitioner cannot identify who at UFRSD allegedly advised her to submit only two IEP pages, 2) petitioner's description of what respondent allegedly told her is very similar to what Barrall (of the Farmingdale child study team) is purported to have told her, and 3) petitioner's claims – concerning who told her to submit only two IEP pages – were made over a year after A.N.'s IEP was requested, the Commissioner finds petitioner's assertions on this issue to be less persuasive than those of San Nicola. But in the end, the foregoing factual disagreement does not affect the ultimate issue in the instant controversy, and is consequently not a material factual dispute which would preclude summary disposition.

The application form for potential choice students states on page five that "Acceptance into the Choice Program is conditional upon the Upper Freehold Child Study Team acceptance of the final 2012-13 annual [IEP] review/re-evaluation, if applicable. Falsifying information on this application will render acceptance as null and void." (Exhibit C to Petition [emphasis added]) Thus, any indications of acceptance from respondent that may have been provided to petitioner, such as an "acceptance letter" sent to petitioner on December 21, 2012, were provisional pending the child study team's review and approval, *vel non,* of A.N.'s IEP. Petitioner did not reach out to respondent's child study team until April 10, 2013 – when she emailed its secretary asking for a child study team meeting. (Exhibit I to Petition) By the time petitioner met with the child study team, on May 16, 2013, respondent's budget for the following school year had been approved and could not be modified to accommodate extra expenses. (Fitzpatrick Certification, February 3, 2014, Para. 15)

The significance of the foregoing becomes evident when comparing the first two pages of A.N.'s 2012-13 IEP, to the entire 2012-13 IEP (Exhibit B to Petition), the latter of which petitioner brought to the May 16, 2013 meeting with respondent's child study team. The initial

two pages of A.N.'s 2012-13 IEP had indicated that A.N. required in-class supports in Language Arts, Social Studies and Science (not math), that he needed unspecified "modifications," that he did not need supplementary aids and services, but that he participated in the Wilson program. (Exhibit B to the petition) However, the balance of A.N.'s 2012-13 IEP, which respondent first reviewed at the May child study team meeting, contained many modifications not referenced on the IEP's first 2 pages. (Fitzpatrick Certification, July 15, 2013, Para. 17)

More specifically, the full IEP contained about 23 other accommodations which A.N. had been receiving in his home district and had been deemed to need, including one that called for A.N. to be able to dictate responses to tests and other work in lieu of writing them. (Exhibit B to Petition) Further, the previously unpresented IEP pages revealed more detailed and specific information about those accommodations, and contained comments from teaching staff members which shed more light on A.N.'s capabilities and limitations.

Significant accommodations not evident on the first two pages of the 2012-13 IEP were the placement of A.N. in small group environments for his math instruction, testing in a separate room with questions read aloud, modifications of tests, and provision of a scribe in all subjects except math. As to the latter accommodation, in a July 15, 2013 certification, Learning Disabilities Teacher-Consultant Louise Smith related that at the May 16, 2013 child study meeting petitioner was adamant that A.N.'s IEP required him to have a scribe. (Smith Certification, Para 12) According to Smith, R.N. indicated that provision of a scribe was an important issue, that A.N. would likely have an emotional meltdown without one, and that it was unacceptable for respondent not to provide a scribe. (Smith Certification, Para. 14) Petitioner does not deny that she took this position at the May 16, 2013 child study meeting. *See* Paragraph

10 of petitioner's Counter-Statement of Material Facts in her December 23, 2013 opposition to summary disposition.

Teacher comments on the 2012-13 IEP included the observation by A.N.'s social studies teacher (on page three of the 2012-13 IEP) that A.N. "can get frustrated when the class goes too fast or he does not get the topic." (Exhibit B to Petition) A.N.'s science teacher wrote that A.N. "will show frustration when he is overwhelmed or slower than other students in the class." (*Ibid.*) And his language arts teacher noted that A.N. would "get overwhelmed with the idea of homework or larger assignments. . . ." The Farmingdale child study team noted that A.N.'s "reading difficulties impact his ability to succeed in the general education classroom without supports." (*Ibid.*)

On May 17, 2013, consequent to the first-time review of A.N.'s full IEP at the May 16, 2013 meeting, Smith emailed petitioner and advised that respondent would not accept his 2012-13 IEP. (Smith Certification, Para.15) Smith advised in the email that respondent would not provide A.N. with a scribe, and suggested that, in any event, a computer might be better than a scribe for A.N. (Exhibit I to Smith Certification) Smith did identify test accommodations which could be provided. (*Ibid.*)

The record indicates that petitioner wrote back to Smith on May 20, 2013 stating that A.N. was "willing to give [a keyboard] a try," however his transition should be monitored and his emotional difficulty addressed "as his frustration threshold maybe [sic] low on writing assessments and he will need good support." (E-mail dated May 20, 2013, Exhibit II to Smith Certification) Smith noted that "this was contrary to [petitioner's] position at the meeting and A.N.'s identified needs in the IEP." (Smith Certification, Para. 16)

At this point Fitzpatrick contacted petitioner. In a May 24, 2013 telephone conversation, he expressed the view that A.N. should stay in his home district for the 2013-14 school year. (Fitzpatrick Certification, July 15, 2013, Para. 18) Acknowledging that petitioner had offered to remove multiple accommodations from A.N.'s IEP, he told petitioner that UFRSD could not ignore A.N.'s IEP, and conveyed his "concern about taking away all of A.N.'s related services that were believed necessary by his home school district." (*Ibid.*) Further, he expressed uncertainty as to whether respondent could meet all of A.N.'s educational needs. (*Ibid.*)

On May 27, 2013, in an email to petitioner, Fitzpatrick confirmed that A.N. was not accepted to the Academy and explained that the services required by A.N.'s IEP would create encumbrances which would change the accelerated character of the Advanced Mathematics and Algebra program. (Exhibit E to Fitzpatrick Certification, July 15, 2013) He suggested that, rather than removing all of A.N.'s accommodations just to allow him to attend the Academy, petitioner should make provisional modifications to A.N.'s educational program and monitor his responses: "Clearly withdrawing services will not make his needs disappear and we all want him to do his very best now and in the future."[4] (*Ibid.*)

Fitzpatrick followed the email up with a letter dated May 29, 2013, formally setting forth the reasons for the rejection of petitioner's/A.N.'s application to the Academy. (Exhibit M to Petition) He began by reminding petitioner that the full 2012-13 IEP had been due with her application on December 3, 2012, that the application form cautioned that acceptance was contingent upon the child study team's approval of A.N.'s IEP, and that she did not provide A.N.'s full IEP until May 16, 2013.

---

[4] Fitzpatrick also reminded petitioner that A.N.'s acceptance to the choice program was expressly conditioned upon receipt of all documents which had been requested in the application form. (Exhibit E to Fitzpatrick Certification, July 15, 2013)

He stated that, without experiencing undue financial and administrative burdens, respondent could not provide the range of services/accommodations called for in A.N.'s IEP: the seventeen weekly 45-minute in-class resource programs for A.N.'s general education classes; a scribe for A.N.'s written work in all content areas; provision of class notes; multiple modifications and reductions to homework requirements, tests and grading; reading tests aloud; repetitive, clarified and reworded directions; extra time for class and tests; editing of A.N.'s written work by teacher; small-group administration of tests and quizzes; assistance with organization of A.N.'s schedule and planner; books on tape or read-aloud computer software. (Exhibit M to Petition)

Fitzpatrick's letter further communicated that to provide the range of services A.N. needed, it would have to fundamentally alter the nature of the Academy program – which was "rigorous" and "fast paced," requiring "superior mathematics ability, strong literacy skills, strong expressive language skills and the ability of participants to frame thoughts related to math using both their verbal and mathematical strengths." (Exhibit M to Petition) He juxtaposed the foregoing to A.N.'s IEP which noted that A.N.'s "broad mathematics and math calculation skills scores are average; his basic reading skills score is in the low average range," and that A.N. was easily frustrated when overwhelmed or slower than the other students in the class. (Exhibit M to Petition at 1 and 2, referencing Exhibit K to Petition at 2 and 4) Fitzpatrick also reiterated that petitioner's willingness to waive services recommended by A.N.'s IEP would "not resolve his need for the delivery of services which appear to be essential to his development in all content areas."[5] (Exhibit M to Petition, at 2)

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[5] Fitzpatrick reiterated the foregoing in Paragraphs 20-21 of his July 15, 2013 certification.

There is no material dispute concerning the difference between the amount and character of information set forth in the first two pages of A.N.'s 2012-13 IEP versus what was revealed in the IEP as a whole. And, as explained by the Administrative Law Judge (ALJ) in his August 15, 2013 order[6] recommending denial of petitioner's application for emergent relief, it was "necessary that [A.N.'s] IEP be evaluated by District administration and the District child study team in order to determine whether A.N. met the program requirements, and whether the District would be able to satisfy the requirements of the IEP, and do so without imposing too great a financial burden." (Order at 6) Therefore "[t]he choice district ha[d] the right, even though it admitted the student in a December 2012 letter, to reject the student after review of the complete IEP, which was not submitted to the District until May 16, 2013." (Order at 7)

The "material" factual dispute which petitioner contends is relevant to the impact that acceptance of A.N. would have upon respondent and its Academy, was framed by petitioner in her December 19, 2013 papers opposing summary disposition. In her affidavit, R.N. stated that A.N.'s 2013-14 IEP at Farmingdale did not call for a scribe and that for the first four months of the 2013-14 school year A.N. had not been using one. (R.N. Affidavit, Para. 9) Petitioner also averred that A.N. was not participating in the Wilson reading program at Farmingdale, but was instead receiving private tutoring at petitioner's expense. (R.N. Affidavit, Para. 10) Petitioner reported that A.N. was doing well without the scribe and Wilson program (R.N. Affidavit, Para. 8), and reasoned in her brief opposing summary disposition and in exceptions that it had been unreasonable for respondent to determine that accepting A.N. into the Academy would cause an undue financial burden.

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[6] Said order was adopted by the Commissioner on August 23, 2013.

The foregoing assertions are not helpful to petitioner for the following reasons. First, the express language on the choice program application put petitioner on notice that it was the 2012-13 IEP which she was required to submit. Clearly, at the time the application had to be considered, the full 2012-13 IEP would have been the most reliable indicator of which services and accommodations the applicant was deemed to need and which were actually being provided. This could be compared with the other required information and documents, such as report cards, to assess how the student was doing under the IEP. By way of contrast, the draft 2013-14 IEP (Exhibit K to Petition), undisputedly submitted by petitioner to the UFRSD child study team for the first time in May 2013, was speculative and an inferior tool by which to predict A.N.'s capabilities and needs. Even less relevant to the decision respondent had to make in May 2013 are petitioner's contentions that A.N. did without the scribe and the Wilson program during the 2013-14 school year.

Second, in point of fact, the draft 2013-14 IEP did not indicate that A.N. would no longer participate in the Wilson program. More specifically – on page 3 – it stated that A.N. "receives additional pull-out instruction in the Wilson Program at the Farmingdale School." Further – on pages 7 and 8 – it called for most of the services, accommodations and modifications required by the 2012-13 IEP, and – on page 4 – it contained teacher input similar to what had been included in the 2012-13 IEP. For example, A.N.'s language arts teacher stated that A.N. still demonstrated "frustration and anxiety with the idea of homework or longer assignments . . . ." His social studies teacher noted that he was easily frustrated with himself when he did not timely complete his assignments. And his science teacher stated that A.N. had difficulty beginning assignments independently and was still easily frustrated when overwhelmed or slower than the other children in the class. As did the 2012-13 IEP, the draft 2013-14 draft IEP advised that

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A.N.'s "reading difficulties impact his ability to succeed in the general education classroom without supports."

Third, the absence of any mention of a scribe in the 2013-14 IEP – which was annexed as Exhibit K to the July 2013 petition – may signify that Exhibit K is not a copy of the 2013-14 draft IEP which was actually presented to the UFRSD child study team in May 2013. More specifically, in multiple locations on the Exhibit K version of the 2013-14 IEP, reference is made to the provision to A.N. of a keyboard: "Mrs. Newell requested keyboarding be used in the classroom for written assignments" (page 3); "it was discussed at the meeting that [A.N.] will have access to a keyboard for writing activities in the classroom" (page 3); keyboard is added to the bottom of the list of planned modifications (page 7); (r)esponse accommodations/modifications to tests to include "recording responses on a word processor" (page 10). However, the issue of keyboarding as a replacement for a scribe was not raised until months after the date on which the draft 2013-14 IEP was supposed to have been composed.

March 20, 2013 is set forth on the draft 2013-14 IEP as the date on which the child study team met for reevaluation of A.N.'s IEP. However, the record contains no reference to or discussion of keyboarding until May 17, 2013, when Smith proposed it as an alternative to the use of a scribe – which petitioner had demanded in the child study meeting of the previous day. (*See,* Exhibit J to Petition) The first appearance in the record of petitioner's agreement to keyboarding was in her May 20, 2013 email to Smith, in which she indicated A.N. would try to use a keyboard instead of a scribe but he would have to be monitored and his emotional needs would have to be addressed. (Exhibit II to Smith Certification)

Similarly, the Commissioner finds the absence of the scribe requirement in Exhibit K to be inconsistent with the fact that the draft 2013-14 IEP was supposedly written on or about

March 20, 2013. This was a period of time in which A.N. was still receiving the services of a scribe, and it was prior to the May 16, 2013 child study meeting at which petitioner not only contended that A.N. needed a scribe, but also insisted that his IEPs called for same. (Smith Certification, Para. 12 and 14)

In sum, the Commissioner cannot conclude that there exists a genuine issue of fact about the information available to respondent in May 2013 concerning A.N.'s IEP. The record supports respondent's contention that the IEP documents finally presented to it on May 16, 2013 gave it reason to believe that if it accepted A.N. as a choice student it could not – without ignoring A.N.'s IEP – avoid providing A.N. with both a scribe and the Wilson program.

The third category of facts alleged by petitioner to be material and disputed is the quantum of expenses which respondent would incur in accepting A.N. to the Academy. Respondent presented its estimated costs via Fitzpatrick's February 3, 2014 certification with attachments. Fitzpatrick explained that in order to accept A.N., respondent would have had to hire an extra Wilson program instructor at a cost of approximately $68,000 per year. (Fitzpatrick Certification, Para. 9 and Exhibit C) He added that such instructors are not easy to find. (*Ibid.*) Fitzpatrick also estimated that it would cost $42,489 per school year to provide A.N. with a scribe. (Fitzpatrick Certification, Para. 11 and Exhibit D) By way of contrast, Exhibit B to Fitzpatrick's certification, a printout from the State Department of Education's projected choice aid for UFRSD, indicated that the amount of State dollars respondent would receive for a 2013-14 choice student such as A.N. would be the much smaller sum of $10,970.

In an attempt to rebut respondent's presentation about the costs it would incur in accepting A.N. to the Academy, petitioner offered a notarized letter dated February 12, 2014, from the superintendent and the business administrator of the Farmingdale school district. The

letter advised that Farmingdale had a full-time Wilson program instructor on staff, and estimated that A.N.'s three Wilson classes per week had cost the district $190 for the school year. It is unclear how many students receive instruction from the Wilson program teacher at a time, how many periods the instructor teaches per week, and what the instructor's salary is. Thus, it is not known how Farmingdale arrived at the $190 figure. The notarized letter indicated that the approximate cost for the use of a scribe for the 2014 NJASK assessment would be $639.60 (15 hours of testing with a one-on-one scribe). No other information about the costs of providing a scribe was offered.

Even if the Commissioner were to accept the notarized letter from Farmingdale as evidence, the scant information provided therein does not rebut the evidence in Fitzpatrick's certification. Farmingdale was apparently able to provide A.N. with Wilson instruction by adding him to other students receiving such instruction from a teacher who was already on staff. Its costs, therefore, would not likely be the same as those incurred by respondent to find and hire an extra teacher. Nor do we know what Farmingdale's instructor's salary was, making it impossible to compare it with the pay to which a teacher in respondent's district would be entitled under the applicable collective bargaining agreement. The notarized letter provided even less means of comparing the costs in the two districts of providing a scribe.

In sum, there is no material dispute of fact concerning the costs which respondent maintains it would incur in accepting A.N. to the Academy, and there is no genuine dispute of facts about the accommodations which – in May 2013 – appeared necessary for A.N. The ALJ did not err in making a summary determination.

As was explained in the Initial Decision, the provision of the Interdistrict Public School Choice Act controlling the instant controversy is *N.J.S.A.* 18A:36B-20(c), which provides:

> A choice district may reject the application for enrollment of a student who has been classified as eligible for special education services pursuant to chapter 46 of Title 18A of the New Jersey Statutes if that student's individualized education program could not be implemented in the district, or if the enrollment of that student would require the district to fundamentally alter the nature of its educational program, or would create an undue financial or administrative burden on the district.

The foregoing is also reflected in a document issued by the State Department of Education (which may be found on the Department's website), entitled "Interdistrict Public School Choice Policy Frequently Asked Questions, Updated and Revised June 7, 2013". (Exhibit II to Respondent's Summary Disposition Brief)

The Commissioner concurs with the ALJ that acceptance of A.N. into the Academy would have been financially burdensome for respondent, and that the accommodations itemized in A.N.'s IEP were inconsistent with the rigorous and accelerated nature of the Academy program – which required candidates to be strong both in mathematical ability and literacy. It was thus not arbitrary, capricious or unreasonable for respondent to decide against accepting A.N. [7]

[7] Further, Pursuant to *N.J.S.A.* 18A:36B-20(d), Fitzpatrick wrote a detailed letter to petitioner explaining the reasons for not accepting A.N.

Accordingly, the Commissioner adopts the Initial Decision of the OAL as the final decision in this case.[8] Summary disposition is granted to respondent and the petition is dismissed.

IT IS SO ORDERED.[9]



ACTING COMMISSIONER OF EDUCATION

Date of decision: 8/14/14

Date of mailing: 8/15/14

[8] Counts 2-4 of the petition were not addressed in the Initial Decision and petitioner has not addressed them in her exceptions to same. They are, in any case, without merit. As regards Count 2, petitioner has enjoyed due process by exercising the remedy available to individuals who wish to challenge decisions made by choice districts. *See, N.J.S.A.* 18A:36B-20(d) and *N.J.A.C.* 6A:12-6.2. As regards Counts 3 and 4, "expulsions" are imposed in consequence of unacceptable student behavior and are disciplinary in nature. The regulations governing expulsions are therefore not relevant to the instant controversy.

[9] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9482-13
AGENCY DKT. NO. 151-7/13

R.N. ON BEHALF OF MINOR CHILD, A.N.,

Petitioner,

v.

BOARD OF EDUCATION OF THE UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent.

Sean M. Benoit, Esq., for petitioner (Disability Rights New Jersey, attorneys)

Erin Callahan, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: April 15, 2014 Decided: May 14, 2014

BEFORE **RONALD W. REBA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

A.N. is an eleven-year-old special education student in the Upper Freehold Regional School District. A.N.'s mother, R.N., filed with the Commissioner of Education a petition of appeal and a motion for emergent relief regarding A.N.'s placement and related services. The emergent-relief motion was filed with the Office of Administrative Law (OAL) on July 10, 2013. The parties submitted documentation in support of their respective positions, and I heard oral argument on July 18, 2013. The parties were thereafter given time to investigate a possible settlement, but no accord could be reached. I issued an Order denying emergent relief on August 15, 2013, based on my conclusion that petitioner had not satisfied the four-prong test of Crowe v. DeGioia, 90 N.J. 126, 132–34 (1982). Petitioner sought emergent relief from the Commissioner of Education, who affirmed the denial on August 26, 2013.

On December 13, 2013, the respondent school district filed a motion for summary decision and submitted a brief in support of its motion. On December 20, 2013, the petitioner filed a counter-statement of material facts and a letter brief in opposition to respondent's motion for summary decision. I heard oral argument on the motion on January 15, 2014. At that time, I determined that the record would remain open on the District's motion for summary decision and directed that the parties provide me with certifications addressing the anticipated costs of providing A.N. with an appropriate educational program in the District.

On February 4, 2014, the respondent submitted the February 3, 2014, certification of Richard M. Fitzpatrick, Ed.D., the District's superintendent, along with corresponding exhibits related to the costs associated with providing A.N. with an appropriate educational program as contemplated by the District in May,2013. Petitioner submitted a response to the District's submission dated February 14, 2014. Included with the petitioner's response was correspondence from the superintendent of A.N.'s current school district, Farmingdale. By letter dated March 7, 2014, the District

objected to the petitioner's assertions in its correspondence. By letter dated March 10, 2014, the petitioner responded to the District's letter. No further submissions were received.

DISCUSSION

The pertinent factual discussion from the August 15, 2013, Order is incorporated here:

> Respondent, Upper Freehold Regional School District (District), is what is termed a "choice district," as provided for under the Interdistrict Public School Choice Program Act, N.J.S.A. 18A:36B-14 to -24. What this means is that the District has programs in its educational curriculum that would be open not only to the District's own children, but also to the children of neighboring districts. N.J.S.A. 18A:36B-16. The record indicates that for the 2013–2014 school year the District was offering five interdistrict public school choice programs, one of which is the Advanced Mathematics and Algebra Program. The program is designed for students in the fifth through seventh grades who have demonstrated readiness to learn math at a faster pace and to experience a variety of engaging math challenges. The record indicates that there were approximately five available seats for the sixth-grade program at the District's Stone Bridge Middle School. In order to be accepted for the program, the applicant was to complete and submit to the District a general application for enrollment. The applicant would be required to submit a transcript of the most recent report card, for non-resident applicants a Notice of Intent to Participate form to be forwarded to the applicant's home district and official school transcript, a copy of the most recent NJAS Individual Score report, and a recommendation from the prior year's mathematics teacher. In addition, the application required a copy, if applicable, of the applicant's current Individualized Education Program (IEP) and/or 504 program, as the program was offered not only to mainstream students but also to students who have an IEP or 504 plan. The application has language that indicates that acceptance into the choice program is conditional upon the Upper Freehold child study team's acceptance of the 2012–2013 annual review/reevaluation, if applicable.

A.N. resides in Farmingdale, New Jersey, and the Farmingdale Board of Education is his home school district. A.N. has a specific learning disability, but apparently is an above-average student in mathematics. A.N., through his mother, R.N., applied for enrollment in the District's Advanced Mathematics and Algebra Program on November 26, 2012. On or about November 30, 2012, the District contacted R.N. requesting a copy of A.N.'s IEP. The record indicates that on November 30, 2012, R.N. sent, via e-mail, the first pages of A.N.'s 2012–2013 IEP, but not the entire IEP as requested. On December 21, 2012, R.N. received an acceptance letter from Upper Freehold congratulating A.N. for having been accepted into the Interdistrict Public School Choice Program as a sixth grader in the Advanced Mathematics and Algebra Program at Stone Bridge Middle School. A.N.'s own district did not have an advanced mathematics program for him, and such a program was not part of his IEP.

Apparently, on December 21, 2012, petitioner was contacted by the District's superintendent of schools, Dr. Richard M. Fitzpatrick, who expressed concern about the fact that A.N. was receiving the Wilson reading program at Farmingdale, but that the District was unable to provide that service to A.N. R.N. at that point stated that she would waive any responsibility by the District, and that she would provide the reading program separately for A.N. From December 2012 through the beginning of May 2013 there were several contacts between the school district and R.N. regarding services that A.N. would need, as well as an exchange of general information in order to facilitate a smooth transition for A.N. from the Farmingdale School District to the Upper Freehold Regional School District. On May 16, 2013, R.N. met with the District's child study team, and at that time a complete copy of A.N.'s IEP for the 2012–2013 school year, as well as a draft of the IEP for the 2013–2014 school year, was submitted for review. A.N.'s IEP for 2012–2013 contained approximately twenty-three modifications, one of which was allowing dictated responses in lieu of written responses; other accommodations included having A.N. read tests rather than write tests. The 2013–2014 IEP apparently indicated that A.N. had demonstrated frustration and anxiety with the idea of homework or longer assignments, and that his reading difficulties impacted his ability to succeed in a general education classroom without support. It was alleged at the May 16, 2013, meeting that R.N. had indicated that A.N. needed a scribe, otherwise he would suffer emotional meltdown. This was apparently refuted by R.N., who indicated that a scribe would not be

> needed for A.N. This one issue was addressed by Louise Smith, a learning disabilities teacher consultant, who informed R.N. that A.N. would not be provided with a scribe and would be getting a computer instead.
>
> On May 27, 2013, Dr. Fitzpatrick e-mailed R.N., indicating that the services that A.N. needed were impossible to deliver and that the District could not accept A.N. into the Advanced Mathematics and Algebra Program. The superintendent, in his certification, indicated that the decision not to accept A.N. into the District's Advanced Mathematics and Algebra Program for the 2013–2014 school year was made for several reasons, including the failure of R.N. to initially provide a complete copy of A.N.'s IEP, as required. After eventually receiving and reviewing the entire IEP, it was determined by the District that the required services for A.N. could not be provided. The superintendent indicated that the District would potentially have to hire additional personnel to provide A.N. with the services necessary to satisfy the 2013–2014 IEP. Although R.N. tried to waive the accommodations to the superintendent, it was determined that the District could not overlook the 2012–2013 IEP and the recommendations for accommodations in the upcoming 2013–2014 IEP. Accordingly, A.N.'s application was rejected.

The District superintendent, in his February 3, 2014, certification, reiterated that the District did not receive a complete copy of A.N.'s IEP until May 16, 2013, and that at that point the District realized that the IEP required that Wilson Reading Program instruction and a scribe be provided for A.N. The District determined that it could not provide an appropriate education for A.N. because of the accommodations required by his IEP without incurring undue administrative and financial burdens. The superintendent indicated that the costs of educating a mainstream student enrolled in sixth, seventh or eighth grade for the 2012–2013 school year was $12,318, and that the State only reimbursed the District $10,970 for each of the choice-district students, leaving the District to bear the balance of the cost of educating the student of approximately $1,348. In addition, the superintendent asserted that a Wilson Reading Program instructor for A.N. would cost the District more than $68,000, which consists of $57,477 in salary plus $10,692 in benefits, for just the 2013–2014 school year. The superintendent stated that if A.N. were enrolled in the District, the District would have to provide the Wilson Reading Program every year as needed until A.N. graduates from

high school. In addition, the District would have had to hire a scribe or another individual to assist A.N. The salary of such a professional is approximately $42,489, i.e., $26,464 in salary plus $16,025 in benefits. Once again, the District would have to provide this service every year as needed until A.N. graduates from high school. The cost to the District of accepting and enrolling A.N. for the 2013–2014 school year, taking into account the choice aid the District would have received and the cost of educating a mainstream pupil, would total more than $110,000. The superintendent noted that the District's budget had already been finalized by May 2013, so that trying to fund services for A.N. would have been a tremendous task.

Submitted along with the superintendent's certification was correspondence indicating the cost per pupil for tuition, as well as the reimbursement by the State for the choice student. In addition, the District included the salary guide for the teachers who were mentioned in the superintendent's certification.

The letter from the Farmingdale school district superintendent submitted by petitioner in response to the District's submission indicates that the Wilson Reading Program for A.N. cost the Farmingdale school district $190 in the 2012–2013 school year, during which the district had a certified Wilson teacher on staff full-time. There was no cost to Farmingdale for the Wilson Reading Program in the 2013–2014 school year because R.N. had withdrawn A.N. from the Wilson Program. The Farmingdale superintendent also indicated that R.N. on behalf of A.N. had opted out of testing in 2013, but that if a scribe were used during the 2014 NJ ASK assessments, the cost of a one-on-one scribe for about fifteen hours of testing would be approximately $639.60.

The District objected to the letter from the Farmingdale superintendent and the assertions contained therein, arguing that the District had provided a certification of the Upper Freehold superintendent with its correspondence, while the petitioner merely forwarded a letter from the Farmingdale superintendent that had not been certified and pertains to the 2012–2013 school year. In addition, the District objected because the submission by the petitioner is not relevant to what the Upper Freehold costs would be as contemplated by the District in May 2013 for the following school year.

It seems that the disparate costs given by the parties for the Wilson Reading Program and scribe accommodations can be explained by the different staffing concerns of the Upper Freehold and Farmingdale districts and the fact that those particular accommodations are currently waived by R.N. on behalf of A.N.

ANALYSIS

N.J.A.C. 1:1-12.5 governs motions for summary decisions. The provisions of N.J.A.C. 1:1-12.5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. Pursuant to these rules, a case may be dismissed before it is heard if, based on the papers and discovery that have been filed, it can be determined "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). To survive a summary-decision motion, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid. Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

"An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2. While it is true that a judge is not to "weigh the evidence and determine the truth of the matter," Brill, supra, 142 N.J. at 540, "there is in this process a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Id. at 536. Thus, a judge is to scrutinize the competent evidential materials presented, in a light most favorable to the non-moving party, and consider whether a rational fact-finder could resolve the disputed issue in favor of the non-moving party. Id. at 540. When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth, by affidavit, specific facts showing that there is a genuine issue resolvable only by an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). Given this burden shift, a party opposing a summary-decision motion "who offers no substantial or material facts in opposition to the motion cannot

complain if the court takes as true the uncontradicted facts in the movant's papers." Burlington Cnty. Welfare Bd. v. Stanley, 214 N.J. Super. 615, 622 (App. Div. 1987).

The New Jersey Supreme Court's standard for summary judgment is designed to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, supra, 142 N.J. at 539 (citation omitted).

The Commissioner of Education has jurisdiction to hear and determine all controversies arising under the school laws. N.J.S.A. 18A:6-9. The Interdistrict Public School Choice Program Act, N.J.S.A. 18A:36B-14 to -24, applies to students such as A.N. who seek to participate in a choice-district program.

Regarding application by a student to a choice district, N.J.S.A. 18A:36B-20(c) provides:

> A choice district may reject the application for enrollment of a student who has been classified as eligible for special education services pursuant to chapter 46 of Title 18A of the New Jersey Statutes if that student's individualized education program could not be implemented in the district, or if the enrollment of that student would require the district to fundamentally alter the nature of its educational program, or would create an undue financial or administrative burden on the district.

This information is also provided in a document entitled "Interdistrict Public School Choice Policy Frequently Asked Questions," which is among the documents submitted by the parties. If a student is rejected, the choice district must provide a reason for that rejection in the letter of notice. The appeal of the rejection notice may be made to the Commissioner. N.J.S.A. 18A:36B-20(d).

In the instant case, the District determined to reject A.N.'s application to be enrolled in the choice program in Upper Freehold based on several factors, including

the late notice of necessary accommodations and the financial and administrative burden that the District would have to assume if it were to accept A.N. In order for petitioner R.N. to be successful in this matter, she must show that the District's rejection of A.N.'s application was improper.

I have reviewed the materials provided by the parties. The parties disagree regarding what the costs would be for educating A.N. in the 2013–2014 school year if he were to be educated in the choice district.

The petitioner submitted a letter from A.N.'s current school district. The letter indicates the costs that the Farmingdale School District has incurred in implementing A.N.'s accommodations, as well as the cost it anticipates it would incur to provide a scribe if R.N. chose to have A.N. participate in NJ ASK testing in 2014. It is noted that the school A.N. attends had a certified Wilson teacher on staff in 2012–2013, that A.N. was withdrawn from the Wilson Program at the beginning of the 2013–2014 school year, and that R.N. on behalf of A.N. opted out of NJ ASK testing in 2013.

The District submitted a certification from its superintendent, along with documents supporting the District's assessment of the costs it would incur if it were to implement A.N.'s IEP. The District argued that if it were to accept A.N. for the 2013–2014 school year, it would have to make special accommodations in the mainstream class for A.N., which may be practically and financially very difficult, if not impossible. The total cost as calculated by the District to enroll A.N. as a student and implement the accommodations in A.N.'s IEP exceeded $110,000. This figures includes finding and hiring a certified Wilson Reading Program instructor. The District argued that this would have presented an undue administrative and financial burden. By the time the District was provided with A.N.'s complete IEP in May 2013 and had the opportunity to review it, the District's budget for the upcoming school year was set, and time would have been short to secure a qualified instructor. Further, once a child is accepted into a school district, the district is responsible for educating that student at least through his graduation from high school. I accept the District's argument that it may have to expend large sums of money for a reading-program instructor or a scribe for A.N.

Although many of A.N.'s required accommodations are currently waived by the parent, the District cannot ignore the possibility that those accommodations will have to be provided at a later date.

The provisions of N.J.S.A. 18A:36B-20(c) are clear. A school district "may reject the application for enrollment of a student who has been classified as eligible for special education services . . . if that student's individualized education program . . . would create an undue financial or administrative burden on the district." The petitioner carries the burden of proof to demonstrate that A.N. has not been treated fairly. Even accepting all of the information offered by the petitioner, taking into consideration the figures submitted and the circumstances described by both parties, I **CONCLUDE** that the petitioner has not shown that the District's May 2013 determination that accepting A.N. for the 2013–2014 school year would create an undue financial or administrative burden on the District was unreasonable.

Based upon all of the foregoing, I **CONCLUDE** that the respondent's motion for summary decision should be granted because there exist no disputed issues of material fact that might allow petitioner to override the protection afforded to the choice district by N.J.S.A. 18A:36B-20(c).

ORDER

It is therefore **ORDERED** that the District's motion for summary decision is **GRANTED**, and petitioner's appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 14, 2014
DATE

Ronald W. Reba
RONALD W. REBA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/cad

334-14

BOARD OF TRUSTEES OF THE PASSAIC COUNTY ELKS CEREBRAL PALSY CENTER,

PETITIONER,

V.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Passaic County Elks Cerebral Palsy Center (CP Center) challenged the Department's determination that petitioner – a private school for students with disabilities (PSSD), which is authorized to receive special education students from public school districts on a tuition basis – may not include in its tuition charges for the 2009-2010 school year the cost of two four day/three night out-of-state field trips (Spring Trips) to Baltimore, Maryland and Hershey, Pennsylvania. The Department's Office of Fiscal Accountability and Compliance (OFAC) contended that the expenses associated with the Spring Trips were non-allowable costs under *N.J.A.C.* 6A:23-18.5(a)(68) because they were excessive and patently unreasonable. Petitioner asserted that these costs should be allowed in the calculation of its actual cost per pupil for the year in question.

The ALJ found, *inter alia*, that: the IDEA mandates that a free appropriate public education be tailored to meet the unique needs of the handicapped child, supported by services necessary to permit the child to benefit from instruction; this mandate is implemented through a separate Individualized Education Program (IEP) for each classified student; by the time a child turns 16, the IEP must include a statement with appropriate measurable post-secondary goals based upon age-appropriate transition related to training education, employment, and independent living, and the transition services needed to assist the child in reaching those goals; careful analysis of the specifics of the Spring Trips at issue here – based on undisputed facts – leads to the clear conclusion that these trips were relevant and necessary educational and transitional opportunities, consistent with the students' IEPs; the cost of these trips was carefully calculated, was far less than the alternative format proposed by OFAC's expert, and was reasonable. The ALJ concluded that OFAC's determination that the costs of the Spring Trips are non-allowable is arbitrary, capricious and unreasonable. Accordingly, he reversed the determination of OFAC and ordered the tuition rates for 2009-2010 to be recalculated to reflect that the Spring Trips were allowable costs pursuant to *N.J.A.C.* 6A:23A-18.2(a)(1).

Upon a thorough review of the record and consideration of the exceptions of the parties, the Commissioner concurred with the ALJ's determination – for the reasons outlined in the Initial Decision – that the expenses for the Spring Trips are allowable costs under *N.J.A.C.* 6A:23A-18.2(a)(1). Accordingly, the Commissioner ordered that these costs be included in the tuition rate for the 2009-2010 school year.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 14, 2014

OAL DKT. NO. EDU 16074-12
AGENCY DKT. NO. 327-11/12

BOARD OF TRUSTEES OF THE PASSAIC COUNTY ELKS CEREBRAL PALSY CENTER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the Department of Education, Office of Fiscal Accountability and Compliance (OFAC), and the Board of Trustees of the Passaic County Elks Cerebral Palsy Center's (CP Center) reply thereto.

In this matter, petitioner CP Center, an approved private school for students with disabilities (PSSD), challenges OFAC's determination that the costs of two four-day/three night out-of-state field trips (Spring Trips) to Baltimore Maryland and Hershey, Pennsylvania cannot be included in the school's calculation of the tuition rate for the 2009-2010 school year. OFAC conducted a fiscal audit of the business services and tuition charges of the CP Center covering the period between July 1, 2009 and June 30, 2010. During that audit, OFAC determined that the expenses associated with the Spring Trips were non-allowable costs under *N.J.A.C.* 6A:23-18.5(a)(68) because they were excessive and patently unreasonable. The Administrative Law Judge (ALJ) found that the OFAC's decision was arbitrary, capricious and unreasonable. The ALJ determined that the costs of the Spring Trips should be included in the tuition costs for the

2009-2010 school year because the costs were reasonable in that they were ordinary and necessary and not in excess of the cost which would be incurred by an ordinary prudent person in the administration of public funds.

In its exceptions, OFAC stresses that a finding by OFAC that certain costs are non-allowable in the calculation of the tuition rate cannot be overturned unless it can be characterized as arbitrary, capricious or unreasonable. OFAC maintains that despite the ALJ's assertion to the contrary, prior decisions of the Commissioner set forth the requirement that the CP Center bears the burden of establishing that the OFAC's determination was arbitrary, capricious or unreasonable. Therefore, OFAC states that the Initial Decision should be modified to set forth the appropriate standard of review to be applied to appeals of OFAC non-allowable cost determinations.

Additionally, OFAC contends that the ALJ erroneously found that the expenses for the Spring Trips were not patently unreasonable. OFAC points out that, given the Legislature's expressed concern for not only the quality of education for handicapped pupils, but the overall cost to the public of such education, tuition rates that PSSDs may charge to sending public school districts are strictly regulated. OFAC's decision to disallow the costs of the Spring Trips was reasonable because the Spring Trips were not required by the IEPs of the students who participated in the trips as none of their IEPs required that the transition plans or goals and objectives be accomplished within the context of a four-day field trip. Further, OFAC asserts that the Spring Trips were not necessary to implement the students' IEPs and that the CP Center – who has the burden of proof – failed to identify an educational benefit or IEP goal that could only be accomplished through a four-night, out-of-state trip. OFAC argues that every one of the educational benefits and IEP goals identified by the CP Center could have been achieved through

any number of different types of trips, social events, or in-school activities. Moreover, it is irrelevant whether or not each expense was the least expensive alternative in the context of the particular trip because the trips as a whole were unnecessary and excessive. Therefore, the OFAC requests that the Initial Decision be rejected.

In reply, the CP Center reaffirmed its position presented at the OAL, arguing that the ALJ properly determined that the costs of the Spring Trips were reasonable and should be included in the tuition cost for the 2009-2010 school year. With respect to OFAC's argument concerning the applicable standard of review, the CP Center maintains that the ALJ properly noted that the correct legal standard for an appeal of an OFAC determination is the traditional preponderance of the evidence standard that applies to administrative agency matters. Since OFAC is a subordinate office of the Department of Education (Department), the agency head is not legally required to give any deference to the staff of the agency, but instead may decide the matter as the agency head deems legally appropriate.

The CP Center argues that in its exceptions, OFAC recast and restated its arguments below to wrongfully compare a field trip to a Broadway play for a music class or a trip to Spain for a Spanish class to the Spring Trips in this case. See, *The Forum School v. New Jersey Dept. of Educ., Office of Compliance Investigation*, EDU 3879-05, Initial Decision (March 31, 2006), aff'd., Comm'r (May 4, 2006); *Bergen Center for Child Development, Inc. v. New Jersey Dept. of Educ., Office of Compliance Investigation*, EDU 1807-05, Initial Decision (Aug. 31, 2005), aff'd, Comm'r (Oct. 17, 2005). The CP Center stresses that after a review of the joint stipulation of facts, CP Center's undisputed facts, and the testimony of all the witnesses, the ALJ found that those cases were distinguishable from the case herein, and that the instant field trip expenses were reasonable. Notably, the CP Center's Executive Director credibly

testified that the Spring Trips were less expensive than the OFAC expert's recommendations for implementing the students' IEPs. Although there may have been alternative ways to achieve the goals addressed by the Spring Trips, the trips actually afforded the CP Center the opportunity to address numerous objectives for 17 different students in a less costly manner than espoused by OFAC's expert. Therefore, the CP Center requests that the Initial Decision be adopted as the final decision in this matter.

As a threshold matter, the Commissioner agrees with the ALJ that, when there is a challenge to a finding by OFAC, the Commissioner is not legally mandated to give deference to his staff but instead determines whether the finding was legally appropriate.[1] A decision by OFAC is not akin to appellate review of a final agency decision that is entitled to an arbitrary, capricious or unreasonable standard of review. As the ALJ pointed out, where the Department of Education has limited the scope of review of a subordinate office or division, it has done so by regulation, i.e. appeals from decisions of the State Board of Examiners, School Ethics Commission and the New Jersey State Interscholastic Athletic Association.

The Commissioner is also in accord with the ALJ's determination – for the reasons outlined in the Initial Decision – that the expenses for the Spring Trips are allowable costs under *N.J.A.C.* 6A:23A-18.2(a)(1). As a PSSD, the CP Center is required to set its tuition rate annually in accordance with the Department's regulations. Pursuant to *N.J.S.A.* 18A:46-21, the tuition rate may not exceed the actual cost per pupil, as determined in accordance with *N.J.A.C.* 6A:23A-18.1 *et seq.* Those regulations specify that certain enumerated costs are not

[1] Prior decisions of the Commissioner have utilized the arbitrary, capricious or unreasonable terminology to indicate that a finding of a subordinate office was appropriate; but those decisions did not establish that the Commissioner was legally required to give deference to staff decisions that are the subject of contested cases before the agency head.

allowable in the calculation of the tuition rate, including "costs found to be patently unreasonable by the Commissioner or his or her representative(s)." *N.J.A.C.* 6A:23-18.5(a)(68).

> When determining the actual allowable costs for the program, the board of directors shall ensure that such costs are:
>
> i. Based on all costs required for student instruction from July 1 through June 30;
>
> ii. Consistent with the students' individualized education program (IEP);
>
> iii. Inclusive of all costs required to implement all students' IEPs and related services;
>
> iv. Reasonable, that is, ordinary and necessary and not in excess of the cost which would be incurred by an ordinarily prudent person in the administration of public funds; and
>
> v. Based on goods actually received and placed in service in the fiscal year they are expended. [*N.J.A.C.* 6A:23A-18.2(a)(1)(i)-(v)].

In this case, the parties stipulated that the Spring Trips were consistent with the students' IEPs as mandated by *N.J.A.C.* 6A:23-4.2(a)(1)(ii), and it is also undisputed that the CP Center complied with *N.J.A.C.* 6A:23-4.2(a)(1)(i)(ii) and (v). Therefore, the only relevant inquiry is whether the cost of the Spring Trips were "ordinary and necessary and not in excess of the cost which would be incurred by an ordinarily prudent person in the administration of public funds." *N.J.A.C.* 6A:23-4.2(a)(1)(iv).

Many of the students who attend the CP Center are multiply disabled and require wheelchair accessible transportation and 24 hour nursing care. The students who participated in the Spring Trips are all part of a life skills program with IEPs that included goals and objectives that address independent daily living skills through community experiences. The Spring Trips were designed to meet the transitional goals of students who are learning how to accomplish daily living skills, including interacting in the community, ordering and paying for food at a

restaurant and maneuvering their wheel chairs in different terrain. The testimony revealed that the CP Center students have the types of medical conditions that make it more challenging to take day trips, and that there is a real benefit to being able to get to a destination and then move from place to place within that community to practice certain life skills. As a result, the medical conditions of the CP Center students and the goals and objectives of their IEPs in this matter are completely different from those in *The Forum School, supra,* where it was determined that the costs for a class to attended a Broadway production of a musical performance in New York were non-allowable because they were patently unreasonable. In *The Forum School, supra,* the school arranged the field trip in order to satisfy the core curriculum standards for Visual and Performing Arts, which undoubtedly could have been achieved in a more cost effective manner by simply attending a local theatrical production or movie.

At the hearing in this matter, OFAC's expert – Robert Haugh – opined that the goals of the students' IEPs could be better achieved by repetitive one-on-one exposure in each student's respective community. (T1 at 121-131, 148). Mr. Haugh, however, further testified that he was not aware of the cost of the Spring Trips, and he was not able to estimate how much it would cost for the CP Center to implement the IEPs through the alternative that he recommended. (T1 at 148). The fact that there are various ways to meet the goals and objectives of an IEP does not automatically make one alternative patently unreasonable from a cost perspective.

It is undisputed that these students, in particular, need to be out in the community and exposed to certain experiences in order to meet their transitional needs. As the ALJ thoroughly outlined in the Initial Decision, the CP Center established that each aspect of the Spring Trips was carefully calculated and accomplished in a cost efficient manner. Moreover,

there is no evidence in the record that another alternative to attaining the life skill goals and objectives that were accomplished through the Spring Trips would have been more cost effective.[2] Therefore, the Commissioner finds that expenses associated with the Spring Trips were not patently unreasonable.[3]

Accordingly, the expenses associated with the Spring Trips are allowable costs under *N.J.A.C.* 6A:23A-18.2(a)(1) and *N.J.A.C.* 6A:23-18.5(a)(68), and the costs shall be included in the tuition rate for the 2009-2010 school year.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/14/14
Date of Mailing: 8/15/14

[2] Dr. Weiss, the Director of the CP Center, testified that it was his opinion that the cost of having individual repetitive exposure to each student's community would far exceed the costs of the Spring Trips. (T1 at 166-168).

[3] Further, the Spring Trips were not isolated excursions but rather the students did fundraising to raise money as part of the whole experience. To that end, the admission fees for the educational and recreational venues visited during the trips (i.e. the Whitaker Science Center, the National Aquarium, the Maryland Science Center and tickets to a baseball game) were covered by money raised for that purpose, and by donations -- not tuition.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 16074-12
AGENCY REF. NO. 327-11/12

BOARD OF TRUSTEES OF THE PASSAIC COUNTY ELKS CEREBRAL PALSY CENTER,

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE,

Respondent.

Stacey Therese Cherry, Esq., for petitioner (Fogarty & Hara, attorneys)

Lauren A. Jensen, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

BEFORE **JESSE H. STRAUSS**, ALJ:

Record Closed: April 24, 2014 Decided: July 1, 2014

STATEMENT OF THE CASE

Respondent New Jersey Department of Education, Office of Fiscal Accountability and Compliance (OFAC or Department) has determined that the costs of two field trips

for students of the Passaic County Elks Cerebral Palsy Center (CP Center) in 2010 were non-allowable for the computation of a tuition rate. The CP Center contends that, as a result of the students' physical disabilities and limitations, a multi-day field trip provided the most efficient means to ensure that the students could hone in and develop their daily living skills, while having sufficient time to also practice their social skills, budgeting skills, mobility, and transitioning skills, which were required by their Individualized Education Plans (IEPs).

PROCEDURAL HISTORY

On November 13, 2012, the CP Center filed a petition with the Department of Education appealing the determination of OFAC regarding field trip expenses. OFAC filed an Answer on December 5, 2012. The Department's Office of Controversies and Disputes transmitted the matter to the Office of Administrative Law (OAL), which filed it for hearing and determination as a contested case on December 6, 2012. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. As a result of several conferences, I deferred scheduling hearing dates because the parties believed that they could stipulate to all of the facts after the completion of discovery. A further delay occurred regarding an issue of releasing redacted IEPs. The CP Center filed a Cross-Motion for Summary Decision on October 15, 2013, and OFAC did the same on October 31, 2013. The parties filed replies on November 19, 2013. I denied the Cross-Motions for Summary Decision on December 2, 2013, and scheduled the matter for a plenary hearing because of issues of material fact regarding the observations of OFAC's expert. I held a hearing on February 12, 2014, and closed the record on April 24, 2014, upon the receipt of briefs from both parties. A June 3, 2014, Order of Extension for the Initial Decision was issued due to a heavy caseload.

FACTUAL DISCUSSION

Joint Statement of Undisputed Facts

The parties filed the following Joint Statement of Undisputed **FACTS** and Joint Evidence set forth in the Appendix:

1. Petitioner operates the Passaic County Elks Cerebral Palsy Center (CP Center).

2. The CP Center is an approved private school for students with disabilities (PSSD).

3. The CP Center is a non-profit institution that provides educational and related services to pupils with disabilities placed at the CP Center by various public school districts.

4. The CP Center is subject to N.J.A.C. 6A:23A-18.1 to -18.16.

5. During the 2009-2010 school year, every student who attended the CP Center received services through an Individualized Education Program (IEP).

6. The IEPs identify, inter alia, the participants at the IEP meeting, the student's individual needs, the goals and objectives for the upcoming year, and the student's transition plan.

7. The following students attended the CP Center during the 2009-2010 school year: P.B., C.P., C.K., A.K., A.D. (Paterson),[1] D.Z., Z.D., M.M., S.M., N.K., S.D., K.P., Z.P., E.N., D.C., V.L., and A.D. (Lakeland). (Exhibits J-1 through J-17.)

8. During the 2009-2010 school year, every student who attended the CP Center was sent by a public school district.

9. During the 2009-2010 school year, the CP Center had an average daily enrollment of public school placement students of 90.4703 and an actual enrollment of 96. (Exhibit J-18.).

[1] Individual students are referred to by initials. Where two students share the same initials, the sending school district is identified.

10. During the 2009-2010 school year, the CP Center received students from nineteen public school districts. (Exhibit J-18.).

11. Each sending public school district was charged tuition for the student(s) it placed at the CP Center. (Exhibit J-19.)

12. Pursuant to N.J.A.C. 6A:23A-18.2, the tuition charged to each sending public school district is determined by the Certified Actual Cost Per Student (CACPS), as defined in N.J.A.C. 6A:23A-18.1.

13. For the 2009-2010 school year, the CP Center calculated the CACPS as $59,806.73. (Exhibit J-20.)

14. N.J.A.C. 6A:23A-18.5(a)(1) to (68) set forth costs that are not allowable in the calculation of the CACPS.

15. OFAC conducted a fiscal audit of the business services and tuition charges of the CP Center covering the period July 1, 2009, through June 30, 2010.

16. OFAC issued a Report on Examination by letter dated March 19, 2012. (Exhibit J-21.)

17. Pursuant to N.J.A.C. 6A:23A-18.2(a)(1) and 6A:23A-18.5(a)(68), OFAC found that the expenses for two field trips represented non-allowable costs of $30,232.14. (Exhibit J-21.)

18. By letter dated May 9, 2012, the CP Center submitted a Corrective Action Plan to OFAC with an appeal of the disallowed field trip expenses. (Exhibit J-22.)

19. By letter date May 31, 2012, William G. Weiss, Ed.D., executive director of the CP Center, submitted to OFAC a letter dated February 23, 2009, from Beth Brooks to Kenneth M. Van Deventer. (Exhibit J-23.)

20. By letter dated August 16, 2012, OFAC denied the CP Center's appeal of the disallowed field trip expenses. (Exhibit J-24.)

21. On November 13, 2012, the Board of Trustees filed a Verified Petition of Appeal with the Commissioner of Education. (Exhibit J-25)

22. On December 5, 2012, OFAC filed an Answer to the Verified Petition of Appeal. (Exhibit J-26.)

23. On December 19, 2012, I held a conference call with the undersigned attorneys and the parties agreed to submit a joint statement of material facts.

Baltimore, Maryland, Field Trip

24. The first field trip was to Baltimore, Maryland from May 25, 2010, through May 28, 2010 (Baltimore Trip).

25. Nine students attended the Baltimore Trip: P.B., C.P., C.K., A.K., A.D. (Paterson), D.Z., Z.D., M.M., and S.M.

26. The following teachers and staff attended the Baltimore Trip: Angela DeFilippo; Linda Lakner, special education teacher; Kerry Lewer, 1:1 teacher aide to C.K.; Bernadette Lancaster, physical therapist assistant; Suzanne Gargiulo, occupational therapist; Lauren Postma, therapy aide; Gerard Booker, teacher aide; and Jamie Sabatino, therapy aide.

27. OFAC found the following expenses for the Baltimore Trip to be disallowable:

    a. Transportation (Bus): $5,559.96
    b. Hotel: $3,891.00[2]
    c. Cash for Meals: $1,000[3]

[2] The OFAC report incorrectly indicates the Hotel costs as $3,891. The Hotel costs were $3,276. The total ($14,323.91) in the OFAC report was calculated utilizing the correct Hotel costs. (Exhibits J-21, J-27, J-28, J-29.)

d. Activities: $454.95; and
e. Nursing Services (24 Hours): $4,033

[Exhibit J-21.]

28. Transportation to and from Baltimore, Maryland, as well as throughout the trip, was provided by TheBusBank for a total cost of $5,559.95. (Exhibits J-30, J-31, J-32, J-33, J-34.)

29. On March 1, 2010, TheBusBank submitted a proposal to the CP Center to provide transportation for the trip at a cost of $5,054.50, with a recommended gratuity of $505.45. (Exhibit J-32.)

30. On March 3, 2010, the CP Center submitted a Requisition for Purchase Order based upon TheBusBank's proposal. (Exhibit J-33.)

31. On March 5, 2010, the Board of Trustees approved the expenditure for TheBusBank. (Exhibit J-34.)

32. Students and staff stayed at the Staybridge Suites in Columbia, Maryland, for a total cost of $3,276. (Exhibit J-35, J-36, J-37, J-38.)

33. On April 9, 2010, Staybridge Suites completed a room rate request form. (Exhibit J-36.)

34. On April 19, 2010, the CP Center submitted a Requisition for Purchase Order based upon the room rate request form. (Exhibit J-37.)

35. On April 26, 2010, the Board of Trustees approved the expenditure for Staybridge Suites. (Exhibit J-38.)

[3] While this cost was designated as "Cash for Meals" by OFAC, the money was used to cover any additional expenses during the trip that were not prepaid by the CP Center, paid through fundraising, paid by students, or paid by the chaperones.

36. The CP Center paid $1,000 to Angela DeFilippo, special education teacher, to cover the Baltimore Trip expenses. Receipts for said expenses were submitted after the Baltimore Trip. (Exhibits J-39, J-40, J-41, J-42.)

37. Expenses paid from the $1,000 included $360 for twenty tickets for the Urban Pirates cruise on May 28, 2010; Dinner at Shucker's Restaurant for $403.41; and lunch at various food vendors in Harborplace for a total cost of $238.66. (Exhibits J-41, J-42.)

38. The CP Center paid $454.95 to the ESPN Zone for reservations for May 25, 2010, for twenty guests, including eight students in wheelchairs. (Exhibits J-43, J-44, J-45.)

39. The CP Center paid $4,033 to Emerald Health Care Services for Donna Allen to provide 24-hour nursing care during the trip: $50 per hour during the day and $42 per hour over night. (Exhibits J-46, J-47, J-48.).

40. The total amount disallowed by OFAC for the Baltimore Trip was $14,323.91. (Exhibit J-21.)

Hershey Park, Pennsylvania, Field Trip

41. The second field trip was to Hershey Park, Pennsylvania from June 8, 2010, through June 11, 2010 (Hershey Trip).

42. Eight students attended the Hershey Trip: N.K., S.D., K.O., Z.P., E.N., D.C., V.L., and A.D. (Lakeland).

43. The following teachers and staff attended to Hershey Trip: Angela DeFilippo; Linda Lakner; Amy Hammond, special education teacher; Danielle Svec, classroom assistant; Lauren Postma, therapy aide; Gerard Booker, teacher aide; and Matthew Creange, therapy aide.

44. OFAC found the following expenses for the Hershey Trip to be disallowed:

a. Transportation (Bus): $5,559.96
b. Hotel: $4,475.52
c. Cash for Meals: $1,000
d. Activities: $851.25; and
e. Nursing Services (24 Hours): $4,021.50

[Exhibit J-21.]

45. Transportation to and from Hershey, Pennsylvania, as well as throughout the trip, was provided by TheBusBank for a total cost of $5,559.95. (Exhibits J-30, J-31, J-32, J-33, J-34.)

46. On March 1, 2013, TheBusBank submitted a proposal to the CP Center to provide transportation for the trip at a cost of $5,054.50, with a recommended gratuity of $505.45. (Exhibit J-32.)

47. On March 3, 2010, the CP Center submitted a Requisition for Purchase Order based upon TheBusBank's proposal. (Exhibit J-33.)

48. On March 5, 2010, the Board of Trustees approved the expenditure. (Exhibit J-34.)

49. Students and staff stayed at the Homewood Suites in Harrisburg, Pennsylvania for a total cost of $4,475.52. (Exhibits J-49, J-50, J-51, J-52.)

50. On April 8, 2010, the CP Center received email confirmation of reservations at the Homewood Suites for June 8, 2013, to June 11, 2013. (Exhibit J-50.)

51. On April 21, 2010, the CP Center submitted a Requisition of Purchase Order based upon the reservation confirmation. (Exhibit J-51.)

52. On April 26, 2013, the Board of Trustees approved the expenditure for Homewood Suites. (Exhibit J-52.)

53. The CP Center paid $1,000 to Angela DeFilippo, special education teacher, to cover Hershey Trip expenses. Receipts for said expenses were submitted after the Hershey Trip. (Exhibits J-39, J-40, J-53, J-54)

54. Expenses paid from the $1,000 included $255 for dinner at the Good and Plenty Restaurant on June 8, 2010; $306.08 for reservations at the Laserdome for June 8, 2010, and $192 for admission to the Whitaker Center for Science and the Arts on June 10, 2010. (Exhibits J-53, J-54.)

55. The CP Center paid $851.25 for twenty-two tickets, including two complimentary tickets, to Hershey Park for June 9, 2010. (Exhibits J-55 through J-58.)

56. The CP Center paid $4,020.50 to Emerald Health Care Services for Donna Allen to provide 24-hour nursing care during the trip: $50 per hour from 7:00 a.m. to 11:00 p.m. and $42 per hour from 11:00 p.m. to 7:00 a.m. (Exhibits J-59, J-60.)

57. The total amount disallowed by OFAC for the Hershey Trip was $15,908.23. (Exhibit J-21.)

ADDITIONAL UNDISPUTED FACTS

The CP Center has provided the following additional **FACTS** which OFAC does not dispute but rather contends are immaterial. I **FIND** them to be material **FACTS** in this matter.

1. The CP Center is a private, non-profit school for disabled students, which provides educational and related services to pupils with disabilities sent by various public school districts that are not able to meet the educational needs of these pupils in a less-restrictive setting.

2. All students who attend the CP Center receive services through an IEP, which is developed on an annual basis with the input of the sending public school district,

CP Center staff, parents of the student and, where appropriate, the student pursuant to N.J.A.C. 6A:14 et seq.

3. Students who attend the CP Center's high school typically face challenges related to mobility, and often utilize a wheelchair; fine motor skills; life skills; and cognition. The students' needs are generally multi-faceted and require the supports of special education teachers and related service providers. Many of the students also have challenging medical needs.

4. The CP Center is prohibited from charging parents of special education students for the costs of field trips.

Planning for the Spring Trips

5. In selecting a destination, the CP Center considered the educational benefits, distance, available accommodations, attractions related to the students' IEPs and curriculum, the students' interests, and costs. The CP Center considered how the students' IEP's could be implemented at the most reasonable cost.

6. Students who attended the Spring Trips were selected in accordance with their IEP to implement their academic and therapeutic goals, as well as their transition plans. In addition, every student was chosen based on being trustworthy, reliable, responsible, and cognitively capable of understanding the educational experiences of the Spring Trips. Moreover, every student that was chosen was able to meet socially appropriate expectations for behavior and social skills while in a group setting and traveling. Finally, each student had medical needs which could be met while on an overnight trip.

7. Students N.K., S.D., K.P., Z.P., E.N., D.C., V.L., A.D. (Paterson), C.P., C.K., A.K., A.D. (Lakeland), D.Z., Z.D., M.M., and S.M. were specifically chosen because of their participation in a life skills class during the 2009-2010 school year or because they were scheduled for a life skills class in the upcoming year. P.B. was chosen because she was transitioning with students C.P., C.K., and

A.K. the following year and the trip provided an opportunity to assist in the transition and to socially adjust to the students that she would be with for the upcoming school year.

8. The Spring Trips were planned for four (4) days and three (3) nights to allow sufficient time for students to practice daily living skills over three (3) mornings and three (3) evenings. Each day the students were able to practice showering, dressing, toileting and transfers, while still having sufficient time to visit educationally significant locations where they addressed skills such as social skills, budgeting, mobility, and transitioning. The CP Center did organize day trips to address some of the goals and objectives of their IEPs, but these trips were deemed insufficient to meet all of the students' goals and objectives and transition plans.

9. Further, multi-day field trips were necessary due to the special physical needs of the students; significantly more time and practice is required to prepare for their day than non-disabled students. More local trips such as to New York or Liberty State Science Center are impractical because of the number of times on and off a vehicle.

10. Trips which general education students might be able to accomplish as "day" trips, can only be accomplished as "overnight" trips for these students because the students' wheelchairs require a significant amount of time to load and unload at both departure and arrival from each destination. Furthermore, it was necessary to schedule activities across multiple days to accommodate the students' physical limitations in terms of both time to travel between activities and stamina required to participate in an activity. It would have been impossible for these students to visit the varied historic, scientific, and cultural locations on a day trip. They are not medically or physically able to travel back and forth to the Spring Trips' locations in a day.

11. In addition, with regard to students' needs, day trips would not address the functional daily living skills of independently caring for personal hygiene,

including showering, dressing, and grooming. Day trips would not have addressed social skills necessary for sharing a room/cohabitating, the nutrition skills required to plan for multi-day trips, nor planning for multiple days of recreation. Finally, even multi-day trips would not have allowed students to increase their independence from family members, improve their ability to navigate through unfamiliar surroundings and activities appropriately, and engage and interact with peers and other new individuals encountered on a trip.

12. With regard to cost, day trips would still have required the use of a handicap-accessible bus, a nurse, and staff. Unlike the Spring Trips, which staff volunteered to attend, the CP Center would have been responsible for paying staff on day trips. In addition, multi-day trips to different locations would have to be arranged to address the skills covered by one of the Spring Trips.

13. Further, day trip costs would not be offset by fundraising and donations.

14. Students participated in budgeting for the Spring Trips by first developing a plan of what they wanted to do on the Spring Trips, determining the cost of these activities, and then estimating the overall budget. After reviewing the budget, they adjusted the Spring Trips to meet a more reasonable budget. .

15. The staff members who accompanied the students on the Spring Trips did so voluntarily. The CP Center ensured that there were a sufficient number of males and females available to attend to the students' personal-care needs, including all activities of daily living: feeding, toileting, showering, and mobility. In addition, the staff members ensured that the purpose of the trip was implemented throughout the students' experience, including the integration of academic, social and daily living skills, such as budgeting and accessing the community.

16. As part of this process, students reviewed sample menus from chain restaurants and estimated reasonable costs for lunch and dinner. Students practiced organization skills, planning, and time management as they considered what

activities they could complete within the time allotted. The final reservations were made by the teachers in coordination with the administration.

17. Students and staff members also participated in fundraisers and collected donations to offset the costs of the Spring Trips. The fundraisers included a baked stuff potato sale on St. Patrick's Day, in which the students shopped for the ingredients, prepared the potatoes in an assembly-line fashion, and made and sold other baked goods. This fundraising event raised approximately $1,000. Other fundraising activities included a poinsettia sale during the holiday season; a bulb and flower sale in the spring; and the sale of hot chocolate, hot dogs, and pretzels at the football games.

18. In addition, to fundraising events, the CP Center collected donations. The Passaic County Elks donated $1,000 toward the costs of the Spring Trips and each student was asked to donate $125 toward the cost of the Spring Trips. Where a student was unable to make a donation, they were sponsored by donations from staff members.

19. The students also participated in classroom discussions about the social components of the Spring Trips, such as how to choose a roommate. Upon returning from the Spring Trips, the students were able to use the experiences as they related to their classes. As examples, students wrote journals about the Spring Trips and compared their hands-on experience at the Titanic Exhibit to their social studies lessons on the same topic. The Spring Trips extended the comprehensive instruction that is provided throughout the year such that the students were able to generalize skills in new, real-life settings with hands-on concrete experiences.

20. At the time of the Spring Trips, there were only two bus companies with buses of sufficient size to transport the number of students in wheelchairs attending the trips that also had access to a "back-up" bus. Because of the numerous students with wheelchairs, the CP Center required an accessible bus with a lift and sufficient "tie downs" (i.e., straps to hold the wheelchairs securely in place).

Further, a "back-up bus" was necessary if the original assigned bus were to break down. The CP Center could not utilize its own buses and staff to provide transportation for the Spring Trips because its buses were too small and would therefore require the use of two buses and additional staff. In addition, if CP Center teachers drive the buses, they are not available to interact with the students at educational activities.

21. The CP Center considered the services of multiple bus companies including: Academy Buses, TheBusBank, and Vanderhoof. An additional company, Trailways, had been used in the past; however, the company no longer had available a bus with sufficient "tie downs." As a result, Trailways was not considered for the Spring Trips.

22. TheBusBank is part of a consortium and, therefore, has access to a larger fleet of buses with the necessary equipment. The CP Center also considered their previous positive experience with TheBusBank. As a result, on February 24, 2010, the CP Center requested a tentative quote from TheBusBank with regard to transportation for the Spring Trips.

23. On March 1, 2010, TheBusBank submitted a proposal that each of the Spring Trips would be $5,054.50 with a recommended gratuity of $505.45. The total cost was therefore $5,559.95 per Spring Trip. Weiss received the proposal, considered it, and found it to be consistent with or better than the cost of other bus companies.

24. On March 3, 2010, the CP Center submitted a Requisition for Purchase Order based upon TheBusBank's proposal and on March 5, 2010, the Board of Trustees approved the expenditure.

25. The CP Center made an initial deposit of $1,667.99 on March 3, 2010, and paid the balance $9,451.91 on April 21, 2010.

26. In addition, to meet the medical needs of students on the Spring Trips, the CP Center contracted with a nurse, who has to be available twenty-four hours per day on the Spring Trips. The CP Center considered the services of Donna Allen, a nurse who had previously worked at the CP Center as a one-to-one nurse. A significant consideration in choosing the nurse was the nurse's ability to meet the needs of the students on the Spring Trips. On previous trips, nurses from other agencies or with less experience were unable or unwilling to perform the services needed by the students. Ms. Allen had attended previous field trips and was competent, willing, and able to perform all of the services necessary to meet the students' needs.

27. The CP Center negotiated with the agency to obtain a competitive rate for the nursing service, including a reduced rate for overnight care. The cost of a nurse is consistent across agencies and the rate charged by Ms. Allen, $50 per hour during the day and $42 per hour overnight, was comparable to the rates charged by other agencies and nurses.

28. The nursing services were approved by the Board of Trustees. The CP Center paid 4,033 for the Baltimore Trip $4,020.50 for the Hershey Trip for her twenty-four-hour service.

29. In considering hotel accommodations for the Spring Trips, numerous factors were taken into account including availability of a sufficient number of handicap-accessible suites, the location of rooms within the hotel (e.g., chaperones' rooms would be located on the same floor and near the students' rooms), included breakfast, distance from the locations visited during the trip, and costs.

30. Furthermore, the Spring Trips required the use of hotels with suites. By rooming students in suites, a sofa-bed was available for staff (i.e., chaperone or nurse) to sleep in the living room should students' medical or other needs require their presence. In addition, the suites included two bedrooms and two bathrooms, which were necessary to complete evening hygiene and daily living activities in a

reasonable period of time. The use of suites also allowed multiple students to share a room and thus, reduce the costs.

31. The CP Center also considered whether the hotel included breakfast. This was important to help reduce the cost for food on the trip and eliminated the need to load the bus, travel to a restaurant for breakfast, unload the bus, eat, and re-load the bus to the next activity. This significantly increased the time available to schedule activities during the day.

32. In booking the hotels, the CP Center utilized internet research, AAA guides, the Children's Travel Guide, and personal phone calls to the hotels. Research was conducted by both students and staff.

33. On April 19, 2010, the CP Center obtained a group room block request from Staybridge Suites in Columbia, Maryland for the Baltimore Trip, which offered one studio hotel room for $99 per night, two one-bedroom suites for $99 per night, and five two-bedroom suites for $159 per night. The costs of the hotel included breakfast daily.

34. On April 19, 2010, Weiss approved the Baltimore Trip hotel rates and a Requisition for Purchase Order was issued. The Board of Trustees approved the Purchase Order on April 26, 2010.

35. On April 26, 2010, the CP Center paid a deposit of $1,818. The balance of $1,458 was paid on April 30, 2010.

36. The total average hotel rate per person, per night, for the Baltimore Trip was approximately $57.47.[4] This cost was significantly below the $123 per night set in the 2010 Federal Per Diem Rates for Lodging for Columbia, Maryland.

[4] The calculation is as follows: Total cost of the hotel: $3,276 / three nights = $1,092 / nineteen persons [nine students + eight staff members + one nurse + one bus driver] = $57.47.

37. For the Hershey Trip, the CP Center reserved five two- bedroom suites at a cost of $239 per night plus tax for a total of $3,979.35. In addition, the CP Center reserved one studio suite at a cost of $149 per night plus tax for a total cost of $496.17.

38. On April 8, 2010, the CP Center received confirmation that reservations were made for hotel rooms at the Homewood Suites in Harrisburg, Pennsylvania. On April 21, 2010, the CP Center requested a requisition for hotel rooms at the Homewood Suites. On that same date, a Purchase Order was issued and the Board approved the Purchase Order for the hotel on April 26, 2010.

39. The total average hotel rate per person, per night, for the Hersey Trip was approximately $87.76,[5] far below the $103 per night set in the 2010 Federal Per Diem Rates for Lodging in Harrisburg, Pennsylvania.

Baltimore Trip

40. The Baltimore, Maryland location was chosen based on its unique value as a historic city and because it is within a small, manageable area for students with disabilities. The proximity of the sites addressed the students' limited physical stamina while allowing them sufficient time to observe, learn, and appreciate the educational value to the sites.

41. Further, because it was time-consuming to load and unload wheelchairs from the bus, the proximity of sights in Baltimore allowed students who would otherwise be unable to visit so many areas of interest to maximize their time to learn about Baltimore's historic value, explore locations of interest, and experience travel away from home.

42. In particular, Baltimore's Inner Harbor was of interest to the students and was central to the Baltimore Trip; the Inner Harbor has been one of the major

[5] The calculation is as follows: Total cost of the hotel: $4,475.52 / three nights = $1,491.84 / seventeen persons [eight students + seven staff members + one nurse + one bus driver] = $87.76.

seaports of the United States since the 1700s and became the cultural center of Baltimore in the 1970s. All activities centered around the Inner Harbor to limit the number of time-consuming transfers.

43. Nine students attended the Baltimore Trip: P.B., C.P., C.K., A.D. (Paterson) A.K., D.Z., Z.D., M.M., and S.M.

44. In addition, the following teachers and staff attended the Baltimore Trip, at no cost to the CP Center: Angela DeFilippo; Linda Lakner, special education teacher; Kerry Lewer, one-to-one (1:1) teacher aide to C.K.; Bernadette Lancaster, PTA (Physical Therapist Assistant); Suzanne Gargiulo, OTR (occupational therapist); Lauren Postma, therapy aide; Gerard Booker, teacher aide; and Jamie Sabatino, therapy aide.

45. On the first day, May 25, 2010, students traveled from the CP Center to Ladew Topiary Gardens where they ate lunch and toured the gardens. The approximate cost was $100, paid for through fundraising and donations. The educational benefits included science, social studies, math, social skills, mobility skills, fine and gross motor skills, recreation, behavior management, time management, and nutrition.

46. After settling into the hotel, on the evening of May 25, 2010, students had dinner at ESPN Zone. The cost for the dinner tickets was $344.95. Students were also able to play games at a cost of $110. The total cost of ESPN Zone was $454.95. At the ESPN Zone, students were able to practice appropriate social and leisure skills in a "real world" setting. They were able to compete with peers and work as teams. The educational benefits also included mobility skills, fine and gross motor skills, behavior management, time management, and nutrition.

47. The following day, May 26, 2010, after having breakfast at the hotel, the students visited the Inner Harbor for a morning tour. This tour allowed the students to experience the culturally unique area while practicing mobility skills, social skills, and behavioral skills.

48. On that same date, the students also visited the National Aquarium where they enjoyed a dolphin show and lunch. The National Aquarium includes a life-size model of the Humpback whale; the concepts of surviving through adaptation; a coral reef; and has many species displayed in their natural habitats, including stingrays, sharks, sea turtles, bull frogs, phytoplankton, monkeys, sloths, iguanas, puffins, and more. The educational benefits of this experience included science, language arts, math, social skills, mobility skills, fine and gross motor skills, recreation, behavior management, time management, and nutrition. The aquarium tickets included lunch, admission and the show, and cost approximately $27 per person. This cost was paid for through fundraising and donations.

49. In the early evening, after the aquarium, the students went souvenir shopping at Harborplace with their own spending money. The educational benefits included mobility skills, including, but not limited to, crossing streets, entering stores and navigating aisles; making purchases, including, but not limited to, budgeting, talking to sales associates and checking out at a register; time management; and social skills. The students were also able to further develop their math, social skills, fine and gross motor, recreation and behavior management.

50. For dinner that evening, the group ate at Shucker's Restaurant at a cost of $403.41. Payment for this meal was included in the $1,000 reimbursement received by Ms. DeFilippo. At the restaurant, students practiced educational skills, including, but not limited to, reading a menu, ordering, social skills, appropriate behavior skills in a restaurant and mobility skills, including, but not limited to, navigating through a restaurant and seating at a table.

51. On May 27, 2010, after having breakfast at the hotel, students and staff traveled to Inner Harbor to tour the Maryland Science Center, had lunch at Beakers Cafe, and viewed a Planetarium show. The educational benefits of the Maryland Science Center, including the Planetarium show and lunch, were science,

language arts, math, social skills, mobility skills, fine and gross motor skills, recreation, behavior management, time management, and nutrition.

52. The cost for the Maryland Science Center, which included the Planetarium show, was approximately $16. Lunch at Beakers Café, located within the Maryland Science Center, was approximately $10 per person. All expenditures were covered by fundraising and donations.

53. That evening, the students attended an Orioles baseball game and had dinner at Camden Yards. The cost of the game was approximately $22 per person. The cost of dinner was approximately $20 per person. This expenditure was covered by fundraising and donations. The educational benefits of this experience included, but were not limited to, math, language arts, social skills, mobility skills, recreation, behavior management, budgeting, and nutrition.

54. On the final day of the trip, May 28, 2010, and again after having breakfast at the hotel, the students traveled to Fells Point where they completed the Urban Pirates Tour at the harbor. The total cost of the Urban Pirates Tour was $360. The payment of this tour was included in the $1,000 reimbursement received by Ms. DeFilippo. The Urban Pirates Tour included an hour and a half aboard the *Fearless* a "pirate ship" that tours the Inner Harbor. This experience provided educational benefits that included, but were not limited to, science, math, social studies, language arts, mobility skills, social skills, recreation and behavior management.

55. After the tour, the students and staff had lunch and shopped at Harborplace. The costs of food included the following: $2.65 Brick Oven Pizza; $51.50 Unknown Food Court Vendor; and $184.51 Panera Bread. The total cost of lunch was $238.66. The cost of food was included in the $1,000 reimbursement received by Ms. DeFilippo. In addition, at Harborplace the students also shopped and paid for souvenirs with their own spending money. The educational benefits of shopping at Harborplace and purchasing lunch included mobility skills, including, but not limited to, crossing streets, entering stores and navigating aisles; making

purchases, including, but not limited to, budgeting, talking to sales associates and checking out at a register; time management; and social skills. The educational benefits also included math, social skills, fine and gross motor skills, recreation, and behavior management.

56. The total average spent by the CP Center on food per person, per day, was approximately $13.71,[6] far below the 2010 Federal Per Diem Rates for Meals and Incidentals, in the Columbia/Baltimore, Maryland area, which ranged $61 and $71 per person, per day.

57. Thereafter, the students returned home by bus with a stop for dinner, which was paid for by fundraisers.

Hershey Trip

58. The Hershey Trip was chosen for the unique opportunities offered in a small historic area. The Hershey/Harrisburg/Lancaster area offers a variety of "real world" experiences within a small, manageable area. As in Baltimore, the proximity of the sites permitted students sufficient time, even with their limited physical stamina, to observe, learn, and appreciate the educational value of the sites. The destination also allows for visits to Hersey, Harrisburg, and Lancaster within one trip. Combined, these locations provided valuable culminating lessons about our nation's history—from the Revolutionary War, through the Civil War, and beyond and the ability to visit and tour a working Amish farm.

59. Eight students attended the Hershey Trip: N.K., S.D., K.P., Z.P., E.N., D.C., V.L. and A.D. (Lakeland), were in attendance.

60. In addition, the following teachers and staff attended the Hershey Trip at no cost to the CP Center: Angela DeFilippo; Linda Lakner, special education teacher;

[6] $403.41 at Shucker's Restaurant + $238.66 for lunch at Harborplace + $344.95 spent on food at ESPN Zone = $987.02 / four days = $246.76 / eighteen persons [nine students + eight staff + one nurse] = $13.71 per day.

Amy Hammond, special education teacher; Danielle Svec, classroom assistant; Lauren Postma, therapy aide; Gerard Booker, teacher aide; and Matthew Creange, class aide.

61. On the first day of the trip, June 8, 2010, the students visited an Amish farm where they had a picnic lunch and toured an Amish farm and house and rode in an Amish buggy. The approximate cost was $100 for the Amish farm and $160 for lunch. These expenses were paid for through fundraising and donations. The educational benefits, included science, social studies, math, social skills, mobility skills, fine and gross motor skills, recreation, behavior management, time management, and nutrition.

62. That night, the students had dinner at the Good and Plenty Restaurant. The cost for dinner was $225 and was included in the $1,000 reimbursement received by Ms. DeFilippo. At the restaurant, students practiced educational skills, including, but not limited to, reading a menu, ordering, social skills, appropriate behavior skills in a restaurant and mobility skills, such as, navigating through a restaurant and seating at a table. The benefit also included fine motor skills and nutrition.

63. After dinner, the students visited Laserdome where they played laser tag and video games. This experience allowed the students to further develop their fine and gross motor skills, social skills, behavior management, time management, and leisure skills. The cost was $306.08 and was included in the $1,000 reimbursement received by Ms. DeFilippo.

64. The following day, June 9, 2010, the students ate breakfast at the hotel and then headed to Hershey Park for the entire day. The cost $660 for entry to the park and $191.25 for dinner. While at the park, the students also had lunch, which was paid for by donations and fundraising at a cost of approximately $240. The educational benefits of said day included social skills, leisure skills, mobility skills, nutrition, behavior management, time management, and fine and gross motor skills.

65. On the third day of the trip, June 10, 2010, the students again had breakfast at the hotel and then traveled to Whitaker Science Center. The cost was $12 per person for a total cost of $192 and was included in the $1,000 reimbursement received by Ms. DeFilippo.

66. While at Whitaker Science Center, the students visited the Titanic Exhibit. The Titanic Exhibit featured one hundred fifty artifacts, recreations of first and third class cabins, the famous iceberg wall, and authentic personal items recovered after eighty years on the ocean floor. The students had studied the Titanic in their social studies class and the trip provided the opportunity to see real life artifacts and recreated cabins. The other major exhibits included physical science, natural science, life science, technology, and mathematics. The flagship exhibit linked science and the arts (Bodies in Motion: The Physics of Dance). The educational benefits from this experience included social studies, science, math, arts, language arts, social skills, behavior management, mobility skills, recreation, fine and gross motor skills, and time management.

67. For lunch that day, students ate at Strawberry Square, a food court at Whitaker Science Center. The costs were paid through fundraising and donations at a cost of approximately $192. The educational benefits included mobility skills, such as crossing streets, entering stores and navigating aisles; making purchases, such as, budgeting, talking to sales associates and checking out at a register, time management, and social skills. The educational benefits also included math, social skills, fine and gross motor skills, recreation, and behavior management.

68. While at the Whitaker Science Center, the students were able to shop at Wonders at Whitaker which offers unique toys, semi-precious stones, jewelry, books, space food, candy, science kits, and games. Students were responsible for their own spending money. The educational benefits included decision making, budgeting, time management and social skills, demonstrating and practicing appropriate behavior in a store, mobility, and math.

69. That evening, the students walked to Raspberries Restaurant for dinner. The cost was $298.80 and was included in the $1,000 reimbursement received by Ms. DeFilippo. The educational benefits included mobility skills, including navigating through a neighborhood and a restaurant, nutrition, social skills, ordering in a restaurant, reading a menu, behavior management, and decision-making skills.

70. After dinner, the students walked to a live show of "Bye, Bye, Birdie." The cost was approximately $15 per person and was paid by donations and fundraisers. The educational benefits included language arts, performance arts, theatre, social studies, social skills, recreation, mobility skills, and behavior management.

71. On the last day of the trip, June 11, 2010, after eating breakfast at the hotel, the student departed for the Antique Auto Mall Museum. The cost was approximately $7.50 per person and was paid for by fundraisers and donations. At the museum, students were able to see vehicles dating from 1895 to present day and buses that follow the history of bus transportation. This experience provided educational benefits that included science, social studies, language arts, social skills, recreation, mobility skills, and behavior management.

72. On the way home, the students stopped at the Outlets at Hershey. While shopping with their own spending money, the students were able to practice mobility skills, including navigating through stores, math, budgeting, purchasing, social skills, behavior management, and time management.

73. As a final educational experience, the students stopped at Red Robin for lunch. Lunch was paid for by donations and fundraising at a cost of approximately $240. This again allowed the students to practice menu reading, budgeting, nutrition, fine and gross motor skills, social skills, mobility skills, recreation, time management, and behavior management.

74. The total average spent on food by the CP Center per person, per day, was approximately, $11.17,[7] far below the 2010 Federal Per Diem Rates for Meals and Incidentals, in the Hershey/Harrisburg/Lancaster area, which ranged between $51 and $56 per day.

75. After lunch, the students and staff boarded the bus and returned to the CP Center.

IEP Goals and Objectives

The following is a sampling from the goals and objectives and transition plans in the IEPs of the students that petitioner contends supports its claim for inclusion of the costs of the Spring Trips:

- Goals: To Increase Prevocational Skills. Objectives: . . . Will participate in community based instruction by traveling to local businesses to obtain goods and services[.] (See Exhibits J-1, J-2, J-8, J-10, J-11, J-12, J-14, J-15, J-16 J-17.)

- Goals: Social Studies Objectives: [explore a variety of cultures (personal and otherwise) – dress, music, food, celebrations, etc. of people throughout the world. (See Exhibits J-1, J-2, J-7, J-11, J-12, J-14, J-15, J-16.).

- Goals: Comprehensive Health and Adaptive Physical Education Goals/Objectives: Obj. 2: Will demonstrate characteristics of good sportsmanship[.] (See Exhibits J-1, J-2, J-3, J-5, J-7, J-8, J-10, J-11, J-14, J-16, J-17.)

- Goals: Self-Help/Critical Skills: 6. Increase independent choices and movements with peers in social settings using accurate communication. (Exhibit J-1.)

- Goals: Self-Help/Critical Skills: 7. Plan with peers for a trip, activity, party, or picnic. (See Exhibit J-1.)

- Statement of Transition Planning: Appropriate Measurable Post Secondary Goals – Community Participation: school socials, school

[7] $191.25 spent at Hershey Park for food + $225 spent at the Good and Plenty restaurant + $298.80 spent at Raspberries restaurant = $715.05 / four days = $178.76 / sixteen persons [eight students + seven staff + one nurse] = $11.17.

trips; Independent Living: live independently in the future. (See Exhibits J-2, J-5.)

- Goals: Mathematics - Objective #2: Will continue to budget money to purchase items with a given amount of money . . . . (See Exhibit J-2.)

- Goals: Critical Life Skills – Recreation/Leisure: Will participate in school functions for enjoyment and socialization skills. (See Exhibits J-2, J-3, J-7, J-8, J-10, J-11, J-12, J-14, J-15, J-16.)

- Goal: Develop self-help and critical skills in the areas of . . . 4. Engage in social activities within [the] community, i.e. recreation programs, Special Olympics, Spring Trip, sleepovers, camp; 5. Establish friendship groups and plan activities to do together, i.e. go to movies, visit each other's homes, go shopping. (See Exhibits J-2, J-12.)

- To Increase Life Skills Within a Variety of Everyday Adult Situations to Provide Greater Independence in Home and Community Environments.

  - Will demonstrate safety awareness when propelling her power wheelchair out in the community, crossing streets, in parking lots, driveways, etc., with close supervision.

  - Will negotiate her wheelchair in the community through crowded aisles, congested/narrow spaces or in line without bumping into obstacles with close supervision 60% of time. (See Exhibit J-3.)

- To Increase Life Skills Within a Variety of Everyday Adult Situations to Provide Greater Independence in Home and Community Environments – Will continue to move around areas surround the school/community, including crossing traffic areas, parking lots, driveways with min.-mod verbal cuing. (See Exhibit J-7.)

- Goal: To Increase Prevocational Skills - Objectives: . . . . 2. Will participate in all businesses and fund raisers run through class by performing all jobs as independently as possible[.] (See Exhibit J-8.)

- Goals: To Improve Self-Help and Critical Skills: Will greet and initiate a conversation with friends. (See Exhibits J-5, J-10, J-11.)

- Goal: Develop Self-Help and Critical Skills in the Areas of: 7. Initiate conversations with . . . peers, acknowledge compliments, invite others to join in an activity. (See Exhibit J-12.)

- Goals: Mathematics – Objective No. 2: Will continue to estimate if items can be purchased with a given amount of money[.] (See Exhibits J-7, J-10.)

- Goals: Will be Independent in the Area of Activities of Daily Living (ADLs) with the Use of Adaptive Equipment in Order to Increase . . . Independence and Participation in the School Environment – A) Will don/doff a t-shirt with minimal assistance; B) Will don/doff his sneakers with minimal assistance; C)Will don/doff his socks with minimal assistance. (See Exhibit J-8.)

- Goals: Will improve language skills for academic and social purposes. [W]ill: a) Participate in conversations with peers and adults. (See Exhibit J-8.)

- Goals: Will improve expressive language skills for academic and social purposes - Will: . . . b) share in conversations with others. (See Exhibit J-8.)

- Goals: To Increase Prevocational Skills - Objectives: . . . 3. Will participate in community based instruction by traveling to local businesses to obtain goods and services: a) follow safety rules by stopping at all corners before crossing, through observation . . .; b) read price of item with minimum verbal assist and count out money to the next dollar . . .; c) complete transactions at the register independently with 75% accuracy. (Exhibit J-10); (see also Exhibit J-7) (does not include subsection c).)

- Goal: Increase functional mobility throughout the school and community to enhance educational learning experience - A. Will be able to walk twice around the block with no rests within a 15 minute time period with supervision only; B. Will demonstrate ability to negotiate outdoor surfaces, including ramps, curbs, uneven surfaces, and stairs. (See Exhibits. J-10, J-11.)

- Transition Planning: Appropriate Measurable Postsecondary Goals – Community Participation: Skills and Interest will be further developed and opportunities to enjoy community outings will be provided through . . . high school setting at the Elks CP High School. (See Exhibit J-11.)

- Goal: Develop self-help and critical skills . . . E. Participate in social opportunities outside of school F. Demonstrate proactive behaviors when a different caregiver is present. (See Exhibit J-11.)

- Mathematics Goals/Objectives . . . Objective 4: Will continue to use money in real life activities and situations when problem solving with 80% accuracy independently. (See Exhibit J-12.)

- Transition Planning: Postsecondary Goals – Community Participation: Will participate in the community as his current program so affords him the opportunity to do. (See Exhibit J-13.)

- Goal: To improve self-help skills. Objective 5: Will participate in social opportunities outside of school to develop peer support. (See Exhibit J-15.)

The parties further stipulated that the above Spring Trips were consistent with the IEPs of the student-participants and I so **FIND**. The issue in dispute is whether the trips were necessary to fulfill the goals and objectives of the IEPs.

TESTIMONY

Robert J. Haugh appeared on behalf of OFAC. He is an education program development specialist for special education with the New Jersey Department of Education, Office of Special Education Programs (OSEP). At OSEP he is responsible for secondary transition for youths, ages fourteen to twenty-one with IEPs. He reviews IEPs including those sections involving transition. He reviewed the IEPs of the students involved in the two Spring Trips. Haugh qualified as an expert in the area of special education for secondary students including transition.

Haugh explained that an IEP's Statement of Transition is required to set forth a formal process of cooperative planning that will assist students with disabilities to move from school into the adult world. Transition plans traditionally include community participation, participation in social activities, and development of independent living skills such as grooming skills, budgeting assistance, and promoting travel. Transition plans must be accomplished through actions that are consistent and on a regular basis in the community where the student resides. For instance, a student should repetitively be taken to a supermarket in his own home community to practice independent living skills as opposed to an alien city or even in the town where the school is located.

Cerebral palsy is considered to be a developmental disability. According to Haugh, youth with intellectual and developmental disabilities (IDD) typically do not learn

at the same rate as their same-age peers. These students benefit most from repetitive, direct instruction provided in the context of performing functional activities.

In consideration of the fact that students with IDD have difficulty in transferring skills from one situation to another, the instruction should take place in the environments where the student will be spending time in the future. Therefore, in Haugh's opinion, in recognition of the limited time and resources, instruction required to achieve the transition plans in a student's IEP should be provided in the student's home community. Transition plans in student IEPs will not be accomplished through field trips because such trips are not consistent and on a regular basis. More specifically, Haugh contends that a four-day/three-night field trip does not involve sustained and repetitive activities and is not reasonably designed to achieve the post-school goals listed in a student's IEP. Instead, students with the developmental disabilities present here need continuous instruction over three to four months.

Student IEPs will also contain specific goals and objectives for the particular student for that school year. These goals should be directly related to the student's post- school outcomes. IEP goals and objectives will frequently require that students participate in Community-Based Instruction (CBI) to prepare each individual student to live, work, and recreate independently in the community in which he or she lives upon leaving school. It is an instructional method involving the use of sustained and repeated instructional activities that take place outside the school environment in order to facilitate skill development and generalization. CBI goals are directly related to objectives written in the students' IEPs, and therefore reflect the individual needs of each student. The IEP does not have to recite every activity that will occur in achieving goals and objectives. Instead, it provides a framework. CBI is designed for students that need systematic instruction in functional and daily living skills. In order to achieve CBI goals, the school must provide real experiences in the environment in which the student will be living. CBI is not group instruction, as each student's IEP would have individual goals and objectives. Haugh contends that the Department of Education, Office of Special Education Programs, expressly distinguishes CBI from field trips. For example, a field trip is typically for a larger group of students, while CBI requires individualized instruction. CBI and other IEP goals will not be accomplished through

field trips because such trips are not sustained and repetitive. Basically, Haugh contends that a four-day/three-night out-of-state field trip will not achieve the goals and objectives in student IEPs because it is not sustained and repetitive; it is not individualized for each student; and it does not take place in the community where the student needs to generalize his or her independent living skills. Although the trips are consistent with the IEPs, Hough considered them to be excessive or extravagant or beyond "appropriate" within the meaning of the special education statute. In his opinion, the trips were unnecessary to achieve the goals of the IEP. He contended that it would take an entire summer rather than four days to master a skill. He did acknowledge that the teaching of life skills in the environment of the trips was more beneficial than simulating skills such as shopping in the classroom. He also co-authored a publication for OSEP with sample activities and strategies for transition services. (P-23.) One of Haugh's examples under the category "Post School Adult Living" is "Plan for vacations/leisure activities." He agreed that participating in leisure activities is an appropriate component of a transition plan; that learning leisure skills is an educational need; and it is appropriate for a school addressing transition issues to work on leisure skills. Hough's publication also includes as an example, "learn[ing] about expectations for eating in restaurants." The student needs to practice restaurant skills in the classroom and then actually go out to restaurants in the home community to practice ordering, eating in a public environment and paying a bill. These exercises should be in multiple environments such as a restaurant, a fast-food place, and a walk-up counter. Haugh also opined that the implementation of such restaurant skills in the student's home community should occur several times a week depending on the age of the student. Since the IEPs are individualized, students should ideally visit these restaurants on a one-to-one basis. These are, however, the same restaurant skills implemented on the trips to Baltimore and Hershey. Hough agreed that the seventeen students who went on the two trips were from nine different communities. For his testimony to maintain consistency, Haugh seemed to be recommending separate multiple trips per week for each student into nine different communities. He conceded that, for each of these trips from the school in Clifton to the home community, the school would have to provide transportation, a teacher, and, where appropriate, a nurse for each trip while continuing to fully staff the school itself. All of these costs would be charged back to the sending district just as were the Baltimore and Hershey trips.

Haugh creates an inconsistent construct. He ignores the fact that the real-life-environment skills practiced on the trips have been developed and sustained and repeated at school over a much longer time. He considered the multi-day trips to be extravagant cost-wise. Yet, he argues for a process where the life skills are repetitively practiced in each student's community and on an individualized basis. There was no dispute that important life skills implemented during the trip were repeated constantly over the four-day three-night period albeit during a concentrated period of time rather than spread out through a school year. Additionally, although Haugh was espousing individual ventures into the community rather than group ventures, the parties stipulated that the Spring Trips were consistent with the various IEPs.

The CP Center witnesses denied that all students with IDD benefit most from repetitive, direct instruction provided in the context of performing functional activities; all students with IDD have difficulty generalizing from one situation to another; all youth with IDD would have difficulty transferring skills learned in the classroom compared to learning those same skills in a natural or community setting; and the natural cues and consequence provided in the community, combined with on-site systematic instruction provided by teachers, are essential for all students with IDD to learn new skills, such as using public transportation, working in a community business, shopping at the grocery store and mall, and using the post office. The CP Center further disputed OFAC's assertion that the field trips did not involve sustained and repetitive activities.

The CP Center's Executive Director and Chief School Administrator William Weiss testified that, although the Department reviews the School's expenses every year, it had never disallowed the expenses associated with overnight field trips in twenty years before 2010. There was no contradictory testimony in this regard.

Weiss further testified credibly that, to implement the day trips recommended by Haugh (multiple times a week on a one-to-one basis for each student into the various home communities), the CP Center would have to purchase an additional van, which is approximately $50,000 to $60,000 per year, exceeding the cost of the Spring Trips. The Center would also need an additional nurse as well as paying additional expenses to

travel and engage in activities in each student's own town. None of these costs would be partially offset by fundraising and donations as were much of the costs for the trips.

LEGAL DISCUSSION AND CONCLUSION

The Individuals with Disabilities Education Act (IDEA or the Act), 20 U.S.C. §§ 1400 et seq., requires New Jersey to effectuate procedures that ensure that all children with disabilities residing in the state have available to them a Free Appropriate public education (FAPE) consisting of special education and related services provided in conformity with an IEP. 20 U.S.C. §§ 1401(9), 1412(a)(1). A purpose of the IDEA is

> to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.
>
> [20 U.S.C. § 1400(d)(1)(A).]

Under 20 U.S.C. § 1412(a)(1), any state qualifying for federal assistance under the IDEA must adopt a policy that assures all children with disabilities the right to a free appropriate public education. Hendrick Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 180–81, 102 S. Ct. 3034, 3037, 73 L. Ed. 2d 690, 696 (1982); also see N.J.S.A. 18A:46-1 et seq. State regulations track this requirement that a local school district must provide FAPE as that standard is set under the IDEA. N.J.A.C. 6A:14-1.1. New Jersey follows the federal standard requiring such entitlement to be "sufficient to confer some educational benefit," although the State is not required to maximize the potential of handicapped children. Lascari v. Ramapo Indian Hills Reg. High Sch. Dist., 116 N.J. 30, 47 (1989) (citing Rowley, supra, 458 U.S. at 200, 102 S. Ct. at 3048, 73 L. Ed. 2d at 708). Third Circuit decisions have further refined that standard to clarify that such educational benefit must be "meaningful," "achieve significant learning," and confer "more than merely trivial benefit." T.R. v. Kingwood Tp. Bd. of Educ., 205 F.3d 572 (3d Cir. 2000); Ridgewood Bd. of Educ. v. N.E. for M.E., 172 F.3d 238 (3d Cir. 1999); Polk v. Cent. Susquehanna Intermediate Unit 16, 853 F.2d 171, 183–84 (3d Cir. 1988), cert. den. sub. nom., Cent. Columbia Sch. Dist. v. Polk, 488 U.S. 1030, 109 S. Ct. 838, 102

L. Ed. 2d 970 (1989). The Third Circuit has reemphasized the importance of the inquiry into whether the placement proposed by a district will provide the student with a "meaningful educational benefit." S.H. v. State-Operated Sch. Dist. of Newark, 336 F.3d 260 (3d Cir. 2003). The quantum of educational benefit necessary to satisfy the IDEA varies with the potential of each pupil. N.E., supra, 172 F.3d at 247.

The IDEA mandates that FAPE be tailored "to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction." Rowley, supra 458 at 203-04. A district implements this mandate through the creation of a separate IEP for each classified student. N.J.A.C. 6A:14-3.7. Each IEP should set forth a statement of the present levels of academic achievement and functional performance and must include measurable annual academic and functional goals and short term objectives which meet the student's needs. N.J.A.C. 6A:14-3.7(e). Further, each IEP must also include special education and related services that shall be provided to the student to advance appropriately toward meeting their individual goals and objectives. N.J.A.C. 6A:14-3.7(e)(4). Additionally, by the time a student turns sixteen, the IEP must include a statement with appropriate measurable postsecondary goals based upon age-appropriate transition related to training education, employment and, if appropriate, independent living and the transition services including a course of study needed to assist the child in reaching those goals. N.J.A.C. 6A:14-3.7(e)(12). This provision further requires:

> i. The transition services as defined in IDEA shall consist of a coordinated set of activities for a student with a disability that is designed within a results-oriented process, that is focused on improving the academic and functional achievement of the student with a disability to facilitate the student's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation, and be based on the individual student's needs, taking into account the student's strengths, preferences and interests. In addition to the above, transition services shall include:
>
> (1) Instruction;
> (2) Related services;

(3) Community experiences;
(4) The development of employment and other post-school adult living objectives; and
(5) If appropriate, acquisition of daily living skills and functional vocational evaluation.

[N.J.A.C. 6A:14-3.7(e)(12)(i).]

Education is about much more than simply rendering academic instruction. Babb v. Knox County Sch. Sys., 965 F.2d 104, 109 (6th Cir. 1992). Education includes academic, emotional, social, communication, health, physical, and vocational needs. Seattle Sch. Dist., No. 1 v. B.S., 82 F.3d 1493, 1500 (9th Cir. 1996).

A district that lacks the ability to deliver the necessary special education services may satisfy its obligation by sending special needs students to a State-approved facility or program (PSSD). N.J.S.A. 18A:46-14(g). A PSSD may charge its sending districts tuition for its services. However, given the Legislature's expressed concern for not only the quality of education for handicapped pupils, but the overall cost to the public of such education, tuition rates that PSSDs may charge to sending public school districts are strictly regulated. Windsor Learning Ctr. v. N.J. State Dep't of Educ., Office of Compliance, EDU 5979-04 (Consolidated), Initial Decision (February 28, 2006), <http://njlaw.rutgers.edu/collections/oal/> (citing Council of Private Schools for Children with Special Needs v. Cooperman, 205 N.J. Super. 544 (App. Div. 1985)).

The tuition that a PSSD such as the CP Center is permitted to charge its sending public school districts may not "exceed the actual cost per pupil as determined under the rules prescribed by the Commissioner and approved by the State Board of Education." N.J.S.A. 18A:46-21. The rules prescribed by the Commissioner reiterate that "[t]he board of directors of an approved private school for students with disabilities located in New Jersey shall determine the final tuition rate charged to be an amount less than or equal to the certified actual cost per student." N.J.A.C. 6A:23A-18.2(a). The certified actual cost per student (CACPS) is defined as "the actual allowable cost for the entire school year . . . ." N.J.A.C. 6A:23A-18.1. Accordingly, N.J.A.C. 6A:23A-18.5(a) identifies "[c]osts that are not allowable in the calculation of the certified actual

cost per student." Pursuant to the regulations, "[c]osts found to be patently unreasonable" are non-allowable costs. N.J.A.C. 6A:23A-18.5(a)(68).

The regulations further provide:

> When determining the actual allowable costs for the program, the board of directors shall ensure that such costs are:
>
> i. Based on all costs required for student instruction from July 1 through June 30;
>
> ii. Consistent with the students' individualized education programs (IEP);
>
> iii. Inclusive of all costs required to implement all students' IEPs and all related services;
>
> iv. Reasonable, that is, ordinary and necessary and not in excess of the cost which would be incurred by an ordinarily prudent person in the administration of public funds; and
>
> v. Based on all goods actually received and placed in service in the fiscal year they are expensed.
>
> [N.J.A.C. 6A:23A-18.2(a)(1).]

Each fiscal year, a PSSD is required to submit audited financial statements to the Department, which reviews them to ensure that non-allowable expenses are not being charged to the sending public school districts. N.J.A.C. 6A:14-7.4(a).

The Department argues that OFAC's finding that certain costs are non-allowable under the above regulations should not be overturned by the Commissioner unless the appealing school demonstrates that the finding was arbitrary, capricious, or unreasonable. This is not the appropriate standard of review. Ordinarily, that very limited standard is applied in an appellate review of a final agency decision. In re Carter, 191 N.J. 474, 482 (2007). This is not an appeal from a final agency decision, but rather a petition seeking that the Commissioner review a determination of a

subordinate office within the Department of Education. Judge Jeff Masin has very thoroughly explained, as follows, the review standard that should be used by an ALJ in a matter such as this one, which has been transmitted to the OAL by an agency:

> [i]nitially, it is necessary to address a legal misconception apparent in the DHSS's [Department of Health and Senior Services] brief. Counsel, incorrectly citing review standards applicable at the appellate-court level, argues that the scope of review of the DHSS's decision is "narrow" and that the administrative law judge must grant a "strong presumption of reasonableness" to the DHSS's action. He then contends that as the agency's action was not "arbitrary, capricious or unreasonable," it must be affirmed. However, despite some occasional confusion perhaps attributable to the nomenclature sometimes used to identify a consideration by the head of an administrative agency of a decision made by that agency's staff, an administrative hearing in the Office of Administrative Law (OAL) is not an appellate hearing. It is instead a hearing at the agency-head level, with the administrative law judge sitting in the place of the agency head. The agency head is not legally required to give any deference to the staff of the agency, but as the head of an administrative agency is instead required to decide the matter as the agency head deems legally appropriate. The administrative law judge bears the same responsibility. Legal strictures on an appellate, judicial-branch court's interference in the actions of an executive-branch administrative agency do not apply in OAL hearings. Similarly, as this is not an appeal, but is instead an initial review of the matter by the agency head, the standard is not whether the staff of the DHSS made an arbitrary or capricious decision, but whether it made the legally correct decision in view of the applicable statutes and regulations.
>
> [Liberty House Nursing Home v. Dep't of Health and Senior Servs., HLT 7275-09, Initial Decision (May 27, 2010) at 7, adopted, Comm'r (September 23, 2010), <http://njlaw.rutgers.edu/collections/oal/>, aff'd, A-1069-10 (App. Div. March 5, 2012) (slip op.), certif. denied, 210 N.J. 478 (2012).[8]]

"In the absence of any administrative rule or regulation to the contrary, the traditional preponderance of the evidence standard applies to administrative agency

[8] The Initial Decision in Liberty House Nursing Home is unavailable on the Rutgers website, but is available on Lexis at 2010 N.J. AGEN LEXIS 261.

matters." SSI Med. Serv. v. Div. of Med. Assistance and Health Servs., 146 N.J. 614, 622 (1996); see also In re Polk, 90 N.J. 550, 560 (1982). The Commissioner is vested with authority by N.J.S.A. 18A:6-9 to hear and determine controversies such as this one under the school laws of the State of New Jersey. Where the Department of Education has determined to limit the Commissioner's scope of review of a subordinate division or office, it has expressed that limitation by regulation. For example, the Commissioner shall not disturb a decision of the State Board of Examiners or the School Ethics Commission unless there is a demonstration that the Board or the Commission acted in a manner that was arbitrary, capricious or contrary to law. N.J.A.C. 6A:4-4.1. In determining appeals from decisions of the New Jersey State Interscholastic Athletic Association (NJSIAA), the Commissioner's scope of review is appellate in nature and the Commissioner shall not overturn an NJSIAA decision absent a demonstration that the NJSIAA applied its rules in an arbitrary, capricious, or unreasonable manner. N.J.A.C. 6A:3-7.5(a)(1)-(2). No such regulation has been cited that similarly restricts the scope of review from an OFAC finding.

In any event, I **CONCLUDE** that OFAC's determination that the costs associated with the Spring Trips are non-allowable is arbitrary, capricious, and unreasonable.

OFAC had determined that the Spring Trips, although consistent with the IEPs of the participating students, were not required to implement the IEPs and that the average cost of $1,700 per student for the Spring Trips was excessive and patently unreasonable. OFAC therefore determined that the Spring Trips represented non-allowable costs.

In support of this determination, the Department relies primarily on The Forum School v. Dep't of Educ., EDU 3879-05, Initial Decision (March 31, 2006), adopted, Comm'r (May 4, 2006), <http://njlaw.rutgers.edu/collections/oal/>.

In Forum School the Department disallowed the $2,635 cost of a student trip for thirty-four students to a Broadway play in its final approved tuition rate. The trip was part of the School's music program to satisfy the core curriculum standards. The students engaged in various learning activities in preparation for viewing the show. In

previous years students had attended Broadway shows without associated costs disallowed by the Department. The ALJ rejected the Department's claim that the trip should have been laid out in the IEPs because the regulation requires only that they be consistent with the IEP rather than require that it be specifically mentioned in the IEP. That is a non-issue here, since the Department acknowledges that the Spring Trips were consistent with the IEPs of the participating students. Relying on the Commissioner's position in Bergen Center For Child Behavior v. N.J. Department of Education, Office of Compliance Investigation, EDU 1807-05, Initial Decision (August 31, 2005), affirmed, Commissioner (October 17, 2005), <http://njlaw.rutgers.edu/collections/oal/>, the ALJ recognized that a determination of the reasonableness of a field trip is a subjective one where one would be hard-pressed to establish the reasonableness of a Spanish class trip to Madrid or the purchase of front row seats to a top Broadway musical. An evaluation of the costs associated with the Spring Trips at the CP Center, however, tilts in favor of the reasonableness of the CP Center's action and against an appearance of unnecessary extravagance. The CP Center has made a compelling and comprehensive case that the costs of each component of each trip were carefully vetted to avoid extravagance. The meals and lodgings were arranged to minimize the costs. The CP Center considered several bus companies for transportation by specially equipped handicap-accessible buses before determining the most appropriate one. The admission fees for the educational and recreational venues on the trips were covered by donated and fund-raised money rather than with tuition. That was not the case in Forum School. Nothing in the costs that the CP Center would attribute to tuition is unusual or extraordinary. Instead, both Spring Trips were executed in the most cost-effective manner possible.

As in Forum School, the inquiry subsequently turns to whether there existed less costly alternatives to achieve the desired educational benefits than in providing the Spring Trips. The ALJ in Forum School in upholding the disallowance of the costs, concluded that the core curriculum concepts of aesthetic awareness and critique associated with attendance at a Broadway show could have been imparted just as well in more modest surroundings such as going to a nearby professional theater or watching a Hollywood movie in the classroom. Such is not the case here. The "bargain" of the Spring Trips was that it provided a vehicle for nineteen students to each

engage in and repeat the execution of many transition skills multiple times over four days including those associated with ten separate meals and three nights of hotel living.[9] These activities, in the setting of the Spring Trips, allowed for an economy of transportation, nursing coverage, and chaperone/teacher personnel. Haugh, who testified for the Department, presented the best evidence that the Spring Trips presented many repetitive opportunities to address IEP goals and objectives for transition skills more economically than his suggested ideal alternatives. Although, as stressed by Haugh, a four-day, three-night trip does not sustain a goal and objective over a long period, it does, however, represent a year-end real-life opportunity to use life skills that had been taught and sustained throughout the school year in a simulated setting. Haugh opined that, **ideally**, each student should be given the opportunity to practice transition skills repetitively in his home town on an individual basis several times a week. That would suggest a total of fifty-one individual trips for seventeen students each week, not even in the town in which the CP Center is located, but in each student's home town. The CP Center would have to purchase at least one new bus at a cost of approximately $50,000 (far in excess of the $11,119.92 bus cost for the Spring Trips); hire a new teacher with an estimated annual salary between $50,000 and $60,000; contract with additional nurses to accompany students on the individual field trips to each town[10]; and pay the actual activity fees and traveling costs. Despite his espousal for individual treatment, Haugh agreed that students with similar needs could be grouped together as was done on the Spring Trips and that restaurant skills could be taught anywhere.

In summary, the Spring Trips at first blush might appear to be an extravagant vacation because of their respective locations, and because they were designed to be enjoyable. Yet, a careful analysis of the specifics of the Spring Trips, based on undisputed facts, leads to an unalterable conclusion that the Spring Trips abound with

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[9] The Spring Trips imbedded many of the IEP goals and objectives including but not limited to traveling to local businesses to obtain goods and services; exploring a variety of cultures; demonstrating good sportsmanship; increase independent choices and movements with peers in social settings and in the community; living independently regarding activities of daily living and grooming; budgeting money to purchase items; and safely negotiating wheelchairs.

[10] The CP Center spent $8,054 for twenty-four-hour coverage for the two trips for a nurse especially experienced with the unique needs of these students undoubtedly less than the cost for nursing coverage for Haugh's suggested multiple individual trips.

relevant and necessary educational and transitional opportunities[11] to generalize from classroom exercises consistent with the various IEP's at a carefully calculated cost, which is far less than that of the ideal format suggested by Haugh. It is of no moment that the trips were overnight rather than day trips because that format gave opportunities to practice skills not reasonably available in a day trip. Although the Department argues that the CP Center has failed to identify even one educational benefit or IEP goal that could only be achieved through the Spring Trips, the more appropriate point is that the benefits and goals could not only be achieved in this format but in a more economically efficient manner as well. Haugh conceded that he never made a comparative analysis of the Spring Trip costs against his idea of the repetitive and individual field trips. Accordingly, the Spring Trip costs were not "patently unreasonable." Instead, they were reasonable in that they were ordinary and necessary and not in excess of the cost which would be incurred by an ordinarily prudent person in the administration of public funds, and I so **CONCLUDE**.

ORDER

It is **ORDERED** that the determination of OFAC be **REVERSED**.

It is further **ORDERED** that tuition rates be recalculated to reflect that the Spring Trips were allowable costs pursuant to N.J.A.C. 6A:23A-18.2(a)(1).

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless

[11] It arguably would be inappropriate to send all of the CP Center's students on the Spring Trips. Instead the invitees were limited to those students in the transition stages of their schooling where there should be an emphasis on field/community experiences rather than simulated classroom activities.

such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 1, 2014
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Date Received at Agency: 7/1/14

Date Mailed to Parties: 7/1/14

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APPENDIX

LIST OF WITNESSES

For Petitioner:

Angela DeFilippo

William Weiss

For Department:

Robert Haugh

LIST OF EXHIBITS IN EVIDENCE

Joint:

Exhibit	Doc #'s	Description
J-1	001-048	IEP of P.B.
J-2	049-094	IEP of C.P.
J-3	095-123	IEP of C.K.
J-4	124-146	IEP of A.K.
J-5	147-162	Goals and Objectives of A.D. (Paterson)
J-6	163-182	IEP of D.Z.
J-7	183-219	IEP of Z.D.
J-8	220-262	IEP of M.M.
J-9	263-280	IEP of S.M.
J-10	281-337	IEP of N.K.
J-11	338-382	IEP of S.D.
J-12	383-424	IEP of K.P.
J-13	425-468	IEP of Z.P.
J-14	469-508	IEP of E.N.
J-15	509-560	IEP of D.C.
J-16	561-600	IEP of V.L.
J-17	601-644	IEP of A.D. (Lakeland)
J-18	645	CP Center's Statement of Enrollment

J-19	646-650	CP Center's Statement of Billing Adjustments
J-20	651-653	CP Center's Statement of Tuition Rate Computation
J-21	654-665	March 19, 2012, Letter to Weiss from OFAC and attached Report on Examination
J-22	666-671	May 9, 2012, Letter to OFAC from Weiss with attached Corrective Action Plan
J-23	672-673	May 31, 2012, Letter to OFAC from Weiss with attachment
J-24	674-684	August 16, 2012, letter from OFAC to CP Center
J-25	685-701	Verified Petition on behalf of petitioner
J-26	702-714	Answer on behalf of respondent
J-27	715-772	CP Center general ledger
J-28	773	OFAC analysis of overnight field trips costs
J-29	774	OFAC analysis of unallowable costs and cost percentages
J-30	775-776	April 17, 2010, receipts for payment to TheBusBank
J-31	777	CP Center ledger entries re: TheBusBank
J-32	778-783	March 1, 2010, quote from TheBusBank
J-33	784	March 3, 2010, requisition for purchase order no. 14268
J-34	785	March 3, 2010, purchase order no. 30694
J-35	786	CP Center ledger entry re: Staybridge Suites
J-36	787-788	April 9, 2010, Staybridge Suites room rate request form
J-37	789	April 19, 2010, requisition for purchase order no. 14012
J-38	790	April 19, 2010, purchase order no. 30927
J-39	791	Requisition of purchase order no. 13260
J-40	792	Purchase order no. 30967
J-41	793-797	Receipts for food (Shucker's Restaurant and Food Court Vendors)
J-42	798	May 28, 2010, receipt for Urban Pirates Tour
J-43	799	April 28, 2010, receipt for ESPN Zone
J-44	800	April 28, 2010, purchase order no. 30968
J-45	801	CP Center ledger entry for ESPN Zone
J-46	802	Purchase order no. 31189
J-47	803	CP Center ledger entry for Emerald Health Care
J-48	804-805	Receipt and invoice from Emerald Health Care

J-49	806	CP Center ledger entry re: Homewood Suites
J-50	807	April 8, 2010, email confirmation of reservation
J-51	808	Requisition of purchase order no. 13255
J-52	809	Purchase order no.30935
J-53	810-812	Receipts for food and expenses (Good and Plenty Restaurant, Whitaker Science Center, and Raspberries Restaurant)
J-54	813	April 28, 2010, Laserdome Receipt
J-55	814	CP Center ledger entry for Hershey Park
J-56	815	Requisition of purchase order no. 13269
J-57	816	Purchase order no. 31136
J-58	817	May 3, 2010, Hershey Park invoice
J-59	818	Purchase order no. 31274
J-60	819-820	Receipt and invoice from Emerald Health Care

For Petitioner:

P-1	May 25-28, 2010, Baltimore Trip Itinerary
P-2	June 8-11, 2010, Hershey Trip Itinerary
P-3	February 24, 2010, e-mail, Lakner to TheBusBank
P-4	March, 2010, facsimile to Weiss re: Bus Quote
P-5	May 30, 2010, requisition for nursing services
P-6	May 28, 2010, Staybridge Suites Hotel receipt
P-7	Weiss request for approval of hotel rates
P-8	April 28, 2010, general ledger entry for reimbursement to DeFilippo
P-9	Total of receipts for DeFilippo reimbursement
P-10	Baltimore Trip list of students
P-11	Hershey Trip preliminary budget
P-12	April 19, 2010, e-mail, DeFilippo to ESPN Zone
P-13	April 15, 2010, Hershey Park ticket information
P-14	Photographs of students on Baltimore Trip
P-15	Photographs of students on Hershey Trip
P-16	Circular No. 08-19-OMB

P-17	Circular No 11-05 OMB
P-18	Fiscal Year 2010 Per Diem Rates for Lodging and Meals and Incidentals
P-19	Fiscal Year 2010 Per Diem Rates for Lodging in Maryland
P-20	Fiscal year 2010 Per Diem Rates for Lodging in Pennsylvania
P-21	Certification, Weiss
P-22	Certification, DeFilippo
P-23	NJDOE Office of Special Education, memo re: Transition Services

For Respondent:

R-1	October 15, 2013, Certification of Haugh

335-14

335-14

OAL DKT. NO. EDU 878-14
AGENCY DKT. NO. 314-12/13

A.M. on behalf of minor child, R.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed Settlement Agreement and General Release (Agreement) and the Initial Decision of the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case, with the following observation. Sections 3, 4 and 5 of the Agreement make reference to actions intended to be taken on or before July 21, 2014, which date has preceded consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves same.

In addition, Section 6 recites that "if, at any time prior to the date that R.M. reaches the age of majority (eighteen (18) years of age), petitioner attempts to re-enroll R.M. in the Board's schools, the tuition referenced in Paragraph 2 above shall become immediately due and payable, plus interest." The Commissioner concludes that the quoted provision would not apply if R.M. became domiciled in Moorestown.

In sum, the Commissioner adopts the Initial Decision as the final decision in this case, providing that 1) the intended meaning of Section 6 is as the Commissioner concludes it to be, and 2) the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of same. Assuming the foregoing, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/15/14

Date of Mailing: 8/19/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 878-14

AGENCY DKT. NO. 314-12/13

A.M. ON BEHALF OF MINOR CHILD, R.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MOORESTOWN, BURLINGTON COUNTY,

Respondent.

A.M., petitioner pro se

Kathryn H. Acosta, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: June 30, 2014 Decided: June 30, 2014

BEFORE **JOHN F. RUSSO, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 23, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

June 30, 2014
DATE

JOHN F. RUSSO, JR., ALJ

Date Received at Agency: _____

Date Mailed to Parties: July 1, 2014
/bdt

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
P: (856).234-4114
F: (856) 234-4262
Attorneys for Respondent, Moorestown Township Board of Education

BY: ARTHUR F. RISDEN, ESQUIRE
KATHRYN H. ACOSTA, ESQUIRE

2014 JUN 30 P 1:27

A.M. o/b/o R.M. Petitioner, v. MOORESTOWN TOWNSHIP BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION DOCKET NO.: EDU 00878 2014 S AGENCY REF: 314-12/13 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This **SETTLEMENT AGREEMENT AND GENERAL RELEASE** (the "Agreement") is entered into by and between the Moorestown Township Board of Education (the "Respondent" or the "Board"), represented by the Comegno Law Group, P.C., Kathryn H. Acosta, Esquire appearing, and Amber Mitchell, on behalf of her daughter, R.M., ("Petitioner"), appearing pro se. Respondent and the Petitioner are collectively referred to as the "Parties."

WHEREAS, R.M. has been attending school in the Moorestown Township School District (the "District") since September, 2013; and

WHEREAS, in the Fall and Winter, 2013, a dispute arose as to R.M.'s eligibility to attend school in the District pursuant to N.J.S.A. 18A:38-1 et seq., and N.J.A.C. 6A:22 et seq., which is the basis of the above-captioned matter; and

WHEREAS, A.M. alleges that she and R.M. reside at 215 East Camden Avenue, Apt. L-4, Moorestown, New Jersey 08057; and

WHEREAS, the Board maintains that A.M. and R.M. reside at an address outside of the District, and that R.M. is, therefore, ineligible to attend the Board's schools; and

WHEREAS, following good faith negotiations, the Parties wish to amicably resolve their dispute and to settle claims relating to or regarding R.M.'s eligibility to attend school in the District; and

WHEREAS, the Parties enter into this Agreement to outline their agreement and to release claims and counterclaims filed in the above-captioned matter regarding R.M.'s eligibility to attend school in the District, without alleging or admitting deficiencies in their respective position.

THE PARTIES HEREBY AGREE THAT:

1. Petitioner admits that she and R.M. do not reside in the District, and that she and R.M. have not resided in the District since the start of the 2013-2014 school year.

2. As a result of her lack of residency in the District, Petitioner admits that she owes tuition to the Board in the amount of Ten Thousand Eight Hundred Sixty-Five Dollars ($10,865.00) for the 2013-2014 school year.

3. Petitioner agrees that, effective at the end of the 2013-2014 school year, R.M. will be withdrawn from the Board's schools, and enrolled in the appropriate school district.

4. Petitioner agrees that, simultaneous with the execution of this Agreement, she shall, on behalf of R.M., complete the "State of New Jersey - Department of Education Student Transfer Card," and any other documentation or form which may be reasonably required by the Board, affirming that, following the last day of the 2013-2014 school year, R.M. will no longer attend the Board's schools.

5. Petitioner shall effectuate R.M.'s withdrawal from the Board's schools, and enrollment in the appropriate school district, by no later than July 21, 2014.

6. In exchange for Petitioner's agreement to withdraw R.M. from the Board's schools, the Board agrees not to seek reimbursement for the tuition owed as set forth in Paragraph 2 above; however, if, at any time prior to the date that R.M. reaches the age of majority (eighteen (18) years of age), Petitioner attempts to re-enroll R.M. in the Board's schools, the tuition referenced in Paragraph 2 above shall become immediately due and payable, plus interest.

7. Except as specifically set forth herein, this Agreement shall not be construed as an admission of any wrongdoing of any kind whatsoever by either Party. The Board has specifically denied, and continues to deny, any wrongdoing as alleged by Petitioner.

8. Petitioner hereby agrees to dismiss her claims, with prejudice, in connection with the above-captioned matter.

9. The Board hereby agrees to dismiss its Counterclaim, with prejudice, in connection with the above-captioned matter.

10. **Petitioner, upon the execution of this Agreement, fully and completely releases the Board, its individual members, agents, employees, successors and assignments, from any and all claims that she and/or R.M. has or may have, of any kind, whether contractual, common law or statutory, including but not limited to, all claims for injunctive relief, for alleged discrimination in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.§ 794(a), §705(8), as well as recovery for damages, costs and attorney's fees under the Family Education Rights and Privacy Act, 20 U.S.C. §1232g, et seq., 29 U.S.C. §794(a), 42 U.S.C. §1983, 42 U.S.C. §1988, 29 U.S.C. §705(20), the Individuals with Disabilities In Education Act**

("IDEA"), 20 U.S.C. §1400, et seq., the Americans with Disabilities Act, 42 U.S.C. §12132, *et seq.*, the Rehabilitation Act of 1973, 20 U.S.C. §7801, Title II of the Americans with Disabilities Act, 42 U.S.C. §12132, et seq., N.J.A.C. 6A:14-1.1, et seq., N.J.A.C. 6A:14-3.7, Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000, et seq., the Americans with Disabilities Act, 42 U.S.C. §621, et seq., all as amended, any statutes of New Jersey including but not limited to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq., or any other claims which have been or could have been asserted by Petitioner, R.M., R.M.'s parents, and/or the behalf of R.M., in any forum arising out of or connected with R.M.'s education by the Board, and from all liability whatsoever, whether known or unknown, or to the extent permitted by applicable law through the date this Agreement is executed. Nothing in this Agreement shall preclude Petitioner and R.M. from asserting any claims against the Board that may arise in the future, after the date of this Agreement.

11. This Agreement is dispositive of all issues in dispute between the Parties hereto, and is intended to constitute a final resolution of the dispute between the Parties. Each party shall be responsible for her/its own fees and costs, including attorney's fees and costs, incurred in connection with this dispute, to the extent applicable.

12. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral, as well as all contemporaneous oral agreements, understandings, and negotiations.

13. The Parties fully understand, and freely and voluntarily accept the terms of this Agreement.

14. This Agreement shall be interpreted, enforced, and governed under the laws of the

State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties.

15. This Agreement may only be amended by a writing signed by all Parties, and her/its counsel if represented.

16. The Parties acknowledge that they have had the opportunity to review the terms of this Agreement, and to consult with counsel.

17. The Parties enter into this Agreement knowingly, voluntarily, and without coercion or other improper influence.

18. The terms of this Agreement shall remain confidential, and shall not be disclosed to anyone except as is required or permitted by law.

19. This Agreement is subject to the approval by the Board at its next regularly scheduled meeting.

20. By executing this Agreement, each signatory represents that he/she is a Party or has been duly authorized by a Party to sign on that Party's behalf, and to bind that Party to the terms of the Agreement.

21. By executing this Agreement, each signatory acknowledges that her/its Claim(s) and/or Counterclaim(s) will be dismissed.

AMBER MITCHELL,
PETITIONER

BY: _____
Amber Mitchell

Dated: 6/20/2014

THE MOORESTOWN TOWNSHIP BOARD OF EDUCATION, RESPONDENT

BY: _____
Lynn E. Shugars,
Business Administrator/Board Secretary

Dated: 6/24/14

MOORESTOWN TOWNSHIP PUBLIC SCHOOLS

Administration Building, 803 North Stanwick Road
Moorestown, New Jersey 08057
(856) 778-6600 Ext. 18150
Fax: (856) 235-0961
E-mail lshugars@mtps.com

Lynn E. Shugars
Business Administrator/Board Secretary

RECEIVED
2014 JUN 30 P 1:29

June 25, 2014

On June 24, 2014, the Moorestown Township Board of Education approved the following resolution:

19. Student Settlement Agreement

MOTION:

I recommend the Board approve the following resolution:

Resolved by the Moorestown Township Board of Education to adopt and approve the Settlement Agreement between Student #3001520 and the Moorestown Township Board of Education attached as Exhibit #14-358.

Moved by: Mr. Weinstein Second: Mr. Pugh Vote: All Ayes

This is a certified copy of the minutes of the Moorestown Township Board of Education meeting held on June 24, 2014.

Lynn E. Shugars

Lynn E. Shugars
Board Secretary

Moorestown Township Board of Education ("Board")
Resolution Approving Settlement Agreement

2014 JUN 30 P 1:27

WHEREAS, as a result of a residency investigation and hearing, conducted on December 10, 2013, it was determined that R.M. did not reside in Moorestown, New Jersey; and

WHEREAS, an order for removal was issued by the Board for R.M.'s removal from the Board's schools; and

WHEREAS, on December 31, 2013, an appeal of the Board's decision was filed by A.M. o/b/o R.M. with the Commissioner of Education, Docket No. EDU 00878-2014; and

WHEREAS, on June 20, 2014, the parties to the above referenced matter appeared at the Office of Administrative Law to put the terms of a settlement on the record; and

WHEREAS, the terms of the settlement are set forth in a certain Settlement Agreement and General Release which has been executed by the parties.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The Board hereby approves the terms of the Settlement Agreement and General Release referred to above;

2. Lynn E. Shugars, Business Administrator/Board Secretary, be, and is hereby authorized, to execute the Settlement Agreement and General Release referred to above on behalf of the Board; and

3. By executing the Settlement Agreement, the Board acknowledges that its Counterclaim filed in the above referenced matter will be dismissed.

This resolution will take effect immediately on this 24th day of June, 2014.

Motion by: Mr. Weinstein Seconded by: Mr. Pugh	Ayes: All No: 0 Abstentions: 0

This Resolution was adopted by the Board at a meeting on June 24, 2014.

Lynn E. Shugars

Lynn E. Shugars, School Business Administrator/Board Secretary

Dated: June 25, 2014

OAL DKT. NO. EDU 04972-14
AGENCY DKT. NO. 83-4/14

C.R. and C.R., on behalf of minor children, C.R. and C.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties'[1] proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement[2] and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/15/14
Date of Mailing: 8/19/14

[1] The Commissioner notes that one of the petitioners was erroneously left out of the caption on the Initial Decision.

[2] The parties are reminded that paragraph 3 of the Settlement Agreement is subject to the right to re-enroll C.R. and C.R. in the event that domicile in the district is established in the future.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04972-14

AGENCY DKT. NO. 83-4/14

C.R. ON BEHALF OF C.R. AND C.R.,

Petitioners,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK,

Respondent.

David W. Opderbeck, Esq., (The Opderbeck Law Firm), for petitioner

Janelle Edwards-Stewart, Associate Counsel, Office of the General Counsel State Operated School District of the City of Newark, for respondent

Record Closed: June 26, 2014 Decided: July 2, 2014

BEFORE **SANDRA ANN ROBINSON,** ALJ:

STATEMENT OF THE CASE

This residency matter was transmitted to the Office of Administrative Law on April 24, 2014 for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F1 to F-13. The undersigned assumed responsibility for the case on May 2, 2014 and scheduled a hearing date for May 20, 2014, which was converted to a

status conference. Between May 20, 2014 and June 2, 2014 the parties agreed on terms and conditions for a settlement. Attached is the fully executed Settlement Agreement signed dated on June 2 and 10, 2014 by petitioners and signed and dated on June 9, 2014 by the State District Superintendent who has final decision making authority on all matters involving the State-operated School District of the City of Newark, as opposed to the Board of Education of the District N.J.S.A. 18A:7A-35 and N.J.S.A. 18A-42 (b).

Having reviewed the attached Settlement Agreement, I **FIND:**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the attached document.

2. The settlement fully disposes of all issues in controversy between them and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 2, 2014
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Date Received at Agency: 7-7-14

Mailed to Parties:

JUL - 7 2014
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street, 10th Floor Newark, New Jersey 07102
(973) 733-7139 — Telephone
(973) 733-8771 — Facsimile Attorney for Respondent

C.R o/b/o C.R. and C.R	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
v.	:	OAL DKT. NOS. EDU 04972-20140N
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, Respondent	:	AGENCY REF NO. 83-4/14

SETTLEMENT AGREEMENT

The State-operated School District of the City of Newark (the "District" or "NPS"), with its principal place of business at 2 Cedar Street, Newark, New Jersey 07102 and Ms. Crystal Rogers and Mr. Cory Rogers (collectively referred to herein as "the Parents"), individually and on behalf of their minor children, C.R. (D.O.B. 2/1/2007) and C.R. (D.O.B. 11/27/2007), residing at 29 North 18th Street, East Orange, New Jersey 07017 hereby agree as follows:

1. The Parents admit and agree that during the 2012-13 and 2013-14 school years, C.R. and C.R. resided for a majority of the time with their primary parent, Crystal Rogers, in East Orange, New Jersey, while attending the Newark Public Schools and receiving the benefit of at least $86,788.80 in accrued educational expenses.

2. The Parents admit and agree that this sum ($86,788.80), which represents the cost of C.R. and C.R.'s special education programs and services during the 2012-13 and 2013-14 school years but does not include the cost of the students' participation in the Extended School Year ("ESY") program or attendance during the 21-day appeal period referenced in the parties' March 28, 2014 Final Notice of Ineligibility, is currently owing to the NPS.

3. The District agrees to forbear actions to seek and collect on a judgment against the Parents for sums owed, including but not limited to the cost of C.R. and C.R.'s regular attendance during the 2012-13 and 2013-14 school years, C.R. and C.R.'s attendance

during the ESY, C.R. and C.R.'s attendance during the 21-day appeal period, and any interest accrued, for so long as neither C.R. nor C.R. is enrolled or in attendance at a Newark Public School. The District reserves all rights to pursue all available penalties, all sums owed, and any additional sums that may be owing should C.R. and/or C.R. re-enroll in or resume attendance at any Newark Public School within the regulatory and/or statutory period for which a judgment in connection with the students' non-residency may be sought and executed.

4. The Parents acknowledge that this Agreement fully resolves all issues contained in the above-referenced petitions.

5. The Parents will immediately withdraw, with prejudice, all pending claims, actions, complaints, and any other such matters, against the District, its officials, officers, employees, and/or agents, in any and every forum. In addition, the Parents shall provide documentation of all such prejudiced withdrawals to the District within 10 days of the signing of this Agreement.

6. The Parents hereby waive any and all claims in any and every forum, which may have arisen up to the signing of this Agreement, including but not limited to any and all past and present claims for compensatory education and attorneys' fees, as well as any and all claims against the District, its officials, officers, employees, and/or agents under any State or Federal law, statute, rule, or regulation.

7. The Parents agree that all financial terms contained in this Agreement shall be kept confidential.

8. The Parents agree that this Agreement shall not constitute, be interpreted, construed or used as evidence of any admission of fact, law, responsibility, wrongdoing or liability on the part of the District and shall not be referred to in any subsequent proceeding by any party, other than to enforce the express terms contained herein.

9. The Parents acknowledge that they have been represented by legal counsel throughout the negotiation of this Agreement; they have discussed the contents of this Agreement at length with their legal counsel; they fully understand the requirements and limitations of this instrument; and they are fully satisfied with the legal representation provided to them.

10. The Parents acknowledge that they have carefully reviewed this Agreement and fully understand its contents, requirements, and limitations.

11. The Parents acknowledge that they are signing this Agreement freely and voluntarily, without duress or coercion.

12. This Agreement constitutes the full and complete Agreement of the parties with respect to its subject matter and supersedes any prior or contemporaneous representations, whether oral or written.

13. This Agreement may not be modified or amended except by a written instrument signed

by all parties hereto.

Dated: 6/2/14 CR

Crystal Rogers
CRYSTAL ROGERS

Dated: June 9, 2014

Cory Rogers
CORY ROGERS

STATE-OPERATED SCHOOL
DISTRICT OF THE CITY OF NEWARK

Dated: June 9, 2014

Cami Anderson
CAMI ANDERSON
STATE DISTRICT SUPERINTENDENT

CERTIFICATION

I, CRYSTAL ROGERS, hereby certify that I have reviewed this Settlement Agreement, fully understand its meaning and terms, and fully agree with its contents. I acknowledge that my legal counsel has questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation, and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 6/10/14

Crystal Rogers
CRYSTAL ROGERS
21 N 18th St
E Orange, NJ 07017

CERTIFICATION

I, CORY ROGERS, hereby certify that I have reviewed this Settlement Agreement, fully understand its meaning and terms, and fully agree with its contents. I acknowledge that my legal counsel has questioned my understanding and verified my acceptance of the terms of this Agreement. I am satisfied with my representation, and I enter into this Agreement voluntarily.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 6-10-14

CORY ROGERS

69-71 Tillinghast St
Newark, NJ 07108

340-14

KEITH ANDREWS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – who holds a standard instructional certificate with endorsements for Teacher of Students with Disabilities (TOSD) and Elementary School Teacher in Grades K-5 – was employed as a special education teacher at Indian Hills High School from 2005 until 2012; he worked as an in-class support teacher, supporting special education students in the regular classroom setting, and as a teacher in the resource center, where he taught in a variety of subject areas. Petitioner appealed the respondent Board's decision to terminate him in August 2012 on the grounds that he was not properly certified to teach the high school subject area courses he had been teaching. Petitioner asserted, *inter alia*, that he was properly certified for the job and that the Board violated his tenure and seniority rights by terminating his employment. The Board contended that petitioner never earned tenure in its district because he does not hold the endorsement required for the courses he was teaching at the high school level.

The ALJ found, *inter alia*, that: the critical issue in this matter is whether or not petitioner held the appropriate certification for his position; tenure is achieved only be satisfying precise statutory and regulatory requirements; in November 2005, petitioner was issued standard certificates with endorsements as a TOSD and as an Elementary School Teacher, grades K-5; the TOSD endorsement authorizes teaching students with disabilities, but – unlike the former Teacher of the Handicapped (TOH) endorsement – is not a stand-alone certificate; rather, TOSD teachers must hold an instructional certificate with the corresponding endorsement for the grade level or subject area in which they are assigned to teach; based on stipulated facts and joint exhibits, it appears that the Board believed at the time petitioner was hired that he was in the process of getting his TOH certification, and may not have been aware until a QSAC analysis in 2012 that petitioner obtained the TOSD rather than the TOH; this does not alter the fact that petitioner did not meet the statutory requirements for tenure as a TOH; petitioner was primarily responsible for ensuring that he possessed the certification required for his position. The ALJ concluded that, inasmuch as petitioner was not properly certified to teach the subject matter areas that he taught at the high school level, he did not earn time toward tenure in respondent's district. The ALJ recommended dismissal of the petition.

Upon a comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ, and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 8/21/14

OAL DKT. NO. EDU 16365-12
AGENCY DKT. NO. 348-11/12

KEITH ANDREWS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner and the Board of Education's reply thereto. This matter involves a determination as to whether the petitioner, Keith Andrews, achieved tenure with the Ramapo Hills Regional High School District (District). The petitioner holds a standard instructional certificate with endorsements as a Teacher of Students with Disabilities and as an Elementary School Teacher in Grades K-5. The Administrative Law Judge (ALJ) determined that the petitioner did not obtain tenure with the District because he was not properly certified to teach the subject matter areas that he taught at a high school level, and that the District's decision to terminate the petitioner was not a violation of his tenure/seniority rights.[1]

Upon a comprehensive review of the record in this matter,[2] the Commissioner is in accord with the ALJ's finding – for the reasons stated in the Initial Decision – that the

[1] The petitioner's exceptions and the District's reply thereto recited the arguments made below, which were fully addressed by the ALJ in the Initial Decision and do not need to be repeated here.

[2] The file did not include a transcript from the hearing conducted at the Office of Administrative Law on March 19, 2014.

petitioner did not acquire tenure in the District because he had not satisfied the criteria for obtaining tenure pursuant to *N.J.S.A.* 18A:28-5. The Commissioner also agrees with the ALJ's determination that the petitioner's reliance upon the District's actions does not excuse his failure to acquire the appropriate certifications.

It is well settled that under *N.J.S.A.* 18A:28-5, "an employee of a board of education is entitled to tenure if (1) she works in a position for which a teaching certificate is required; (2) she holds the appropriate certificate; and (3) she has served the requisite period of time." *Spiewak v. Summit Bd. of Educ.*, 90 *N.J.* 63, 74 (1992). Although the petitioner in this case was employed as a teacher with the District from 2005 until 2012, it is undisputed that he did not possess the content area endorsement necessary to teach the subject matter high school courses that he taught. Therefore, in the absence of holding the appropriate certificate, the petitioner did not meet the statutory requirements for obtaining tenure, and the fact that the District mistakenly assigned the petitioner to teach classes that he was not properly certified to teach does not negate those requirements.

Accordingly the Initial Decision is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/21/14

Date of Mailing: 8/22/14

[3] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 16365-12
AGENCY DKT. NO. 348-11/12

KEITH ANDREWS,
Petitioner,
v.
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

Gregory T. Syrek, Esq., for petitioner (Bucceri & Pincus, attorneys)

Danielle H. Bohlen, Esq., for respondent (Purcell, Mulcahy, Hawkins, Flanagan & Lawless, attorneys)

Record Closed: May 21, 2014 Decided: July 7, 2014

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE

Petitioner Keith Andrews claims that respondent Board of Education of the Ramapo Indian Hills Regional High School District (the Board) violated his tenure and

seniority rights by terminating his employment as a special education teacher at Indian Hills High School. The Board controverts petitioner's tenure claim.

PROCEDURAL HISTORY

Petitioner filed a Verified Petition with the Commissioner of Education contesting the termination of his employment. Petitioner asserts that the Board's actions in eliminating his employment, while maintaining non-tenured and/or less senior teachers in a position for which petitioner is qualified, constitute a violation of his tenure and seniority rights as provided by N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-9 et seq. The Board filed an Answer and Affirmative Defenses, and the Department of Education transmitted the contested case to the Office of Administrative Law for a hearing. Following prior adjournments of the hearing, the hearing was held on March 19, 2014. The parties also submitted an Amended Joint Stipulation of Facts and Exhibits, along with briefs in support of their respective positions. Neither party submitted a reply brief by the required deadline, on which date the record closed.

FINDINGS OF FACT

The pertinent facts surrounding this matter are not in dispute. Based upon a review of the testimony and the documentary evidence presented, including the parties' Amended Joint Stipulation of Facts (Stip.), I **FIND** the following undisputed **FACTS**:

1. On May 15, 2001, petitioner obtained his Bachelor of Arts degree from Thomas A. Edison State College in New Jersey. (Stip. at ¶1; see J-1, J-5.)

2. Effective January 2003, petitioner obtained a Professional Certificate to teach Special Education, N-12, in the State of Pennsylvania. (Stip. at ¶2; see J-2.)

3. On March 22, 2004, the New Jersey Department of Education (the Department) received an application from petitioner for the Standard Certificate for the Teacher of Students with Disabilities (TOSD). (Stip. at ¶3; see J-3.) Petitioner

applied for this certificate more than one year before his application for employment in the Ramapo Indian Hills Regional High School District (the District).

4. On May 21, 2005, petitioner obtained a Master's of Education degree in special education from DeSales University. (Stip. at ¶4; see J-4, J-5.)

5. By correspondence dated August 1, 2005, petitioner forwarded his resume and supporting documentation to Ann Joosten (Joosten) with the District's superintendent's office, and requested employment as a special education teacher. (See Stip. at ¶6; J-6.)

6. By August 15, 2005, petitioner had completed the application form for the District, and noted that as of January 2003, he was certified to teach special education to students in grade kindergarten through grade 12 in the State of Pennsylvania. (Stip. at ¶7; see J-7.) Petitioner's application indicates that he was applying for the position of resource center special education teacher and sought to teach Social Studies, Science and English/Language Arts. (J-7.)

7. In a Candidate Recommendation Credential Form signed by Linda Bergrin (Bergrin), supervisor for special education, dated August 16, 2005, she noted that petitioner's New Jersey teacher certification was pending. (See Stip. at ¶8; J-8.)

8. On August 19, 2005, Bergrin completed a Candidate Interview Form which notes that petitioner's Teacher of the Handicap (TOH) Certification was pending. (Stip. at ¶9; see J-9.)

9. In an August 19, 2005, memo from Bergrin to Principal Al Evangelista (Evangelista), Bergrin recommended petitioner for the resource center teaching position. She advised that petitioner was scheduled to take the September

PRAXIS exam and expected to receive his teaching certification by the end of October 2005. (Stip. at ¶10; see J-10.)

10. On August 19, 2005, petitioner e-mailed Harold Lee (Lee) of the Department requesting information on the TOH Certification. (See Stip. at ¶11; J-11.)

11. In a responsive e-mail from Lee to petitioner on August 20, 2005, Lee advised that the TOH certification no longer existed and the certification petitioner would receive would be the TOSD, which Lee stated is not a standalone certificate. Lee further advised that petitioner would also need to obtain the elementary kindergarten through grade 5 certification and pass the PRAXIS test to be eligible to teach in the State of New Jersey. (See Stip. at ¶12; J-11.)

12. In an August 23, 2005, memo from Principal Evangelista to Superintendent Paul Saxton, Evangelista recommended petitioner for the position of resource center teacher as a long-term substitute. He noted that petitioner was scheduled to take the PRAXIS exam in September for his TOH Certification, and petitioner agreed to accept the position as a long-term substitute until he received his certification by the end of October 2005. (See Stip. at ¶13; J-12.)

13. The PRAXIS Examining School Report indicates that petitioner passed the September 17, 2005, Elementary Education exam. (See Stip. at ¶14; J-13.)

14. By correspondence dated September 21, 2005, petitioner was advised that the Board met on September 12, 2005, and moved to approve his employment as a long-term substitute pending New Jersey Certification. (Stip. at ¶15; see J-14.)

15. In October 27, 2005, handwritten notes, believed to be written by Joosten, she states: "They might issue a standard Teacher of the Handicapped and Elementary CEAS." (Stip. at ¶16; see J-15.)

16. In a letter from Joosten to the Department dated October 28, 2005, Joosten enclosed documentation from petitioner, who was seeking a standard certificate for Elementary Education. The letter further stated that petitioner applied for TOSD certification but was required to take the PRAXIS exam for Elementary Education and apply for the certificate before the TOSD could be issued. (See Stip. at ¶17; J-16.)

17. In November 2005, petitioner was issued a provisional Certificate of Eligibility (CE) for Elementary School Teacher in Grades K-5. A Standard Certificate was issued thereafter. (Stip. at ¶18; see J-17.)

18. In November 2005, petitioner was issued a provisional Certificate of Eligibility with Advanced Standing (CEAS) for TOSD, which is not a standalone certificate. A Standard Certificate was issued thereafter. (Stip. at ¶19; see J-18.)

19. By correspondence dated December 16, 2005, petitioner was advised that on December 5, 2005, the Board moved to approve his salary guide adjustment as a long-term substitute from BA, Step 1, to MA, Step 9, and enclosed a contract of the same date. (Stip. at ¶22; see J-21.)

20. On January 3, 2006, Joosten provided petitioner with a list of regional training centers for the provisional teacher program. (Stip. at ¶23; see J-22.)

21. A January 8, 2006, memo to the file from Joosten recorded her conversation with the County Education Office that petitioner was not eligible for the Standard Certificate for TOSD, and petitioner is only eligible for a CE in Elementary Education because his program at DeSales University was only for special education. (See Stip. at ¶24; J-23.)

22. On January 22, 2006, Joosten wrote to the Department enclosing a Statement of Assurance of Position to Teach under the TOSD, Elementary School Teacher

Grades K-5 certification, under the Provisional Teacher Program. (Stip. at ¶25; see J-24.)

23. Various Observation-Performance Reports were issued regarding petitioner during the 2005-2006 school year. Observation-Performance Reports were issued on November 14, 2005 (by Gregg J. Desiderio), December 13, 2005 (by Bergrin), February 6, 2006 (by Bergrin), March 26, 2006 (by Bergrin), and April 6, 2006 (by Evangelista). (Stip. at ¶¶20, 21, 27, 29, 30; see J-19, J-20, J-26, J-29, J-30.) A "Satisfactory" Interim Summary Report (ISR) dated January 26, 2006, was issued by Bergrin which stated: "[Petitioner] has been working to resolve issues involving his transfer of certification from Pennsylvania to New Jersey." (Stip. at ¶26; see J-25.)

24. On February 22, 2006, Lakeland Regional High School in Wanaque, New Jersey, verified the employment of petitioner within their school district for the September 2004 – June 2005 school year, as a full-time Teacher of Special Services. (Stip. at ¶28; see J-27.)

25. In a letter from Joosten to Laurie Hoffman of the Department dated March 6, 2006, Joosten stated that petitioner recently received a CEAS for TOSD and a CE for Elementary School Teacher in Grades K-5. She also noted that petitioner was appealing his CE for the Elementary School Teacher and the CEAS for TOSD with the hopes of obtaining two standard certificates or at least a CEAS in Elementary K-5. (Stip. at ¶28; see J-28.)

26. An Annual Summary Report (ASR) was issued on April 17, 2006, by Bergrin, who stated: "[Petitioner] has resolved all issues involving his transfer of certification from Pennsylvania to New Jersey, and now holds all appropriate special education credentials and highly qualified status." Petitioner was recommended for continued employment within the District. (Stip. at ¶31; see J-31.) Petitioner completed a Professional Improvement Plan. (Stip. at ¶31; see J-32.)

27. Various Observation-Performance Reports were issued regarding petitioner during the 2006-2007 school year. Observation-Performance Reports were issued on October 11, 2006 (by Bergrin), November 2, 2006 (by Desiderio), December 12, 2006 (by Bergrin), and May 22, 2007 (by Evangelista). (Stip. at ¶¶32, 33, 34, 37; see J-33, J-34, J-35, J-39.) A "Satisfactory" ISR dated January 20, 2007, was issued by Bergrin. (Stip. at ¶35; see J-36.) An ASR dated April 17, 2007, was issued by Bergrin which recommended petitioner's continued employment with the District. (Stip. at ¶36; see J-37.) Petitioner completed a Professional Improvement Plan. (Stip. at ¶36; see J-38.)

28. Various Observation-Performance Reports regarding petitioner were issued during the 2007-2008 school year. An Observation-Performance Report was issued on December 18, 2007 (by Evangelista), and "Satisfactory" Observation-Performance Reports were issued by Bergrin on October 19, 2007, January 23, 2008, and April 2, 2008. (Stip. at ¶¶38, 39, 40 and 41; see J-40, J-41, J-42, J-43.) A "Satisfactory" ASR dated April 13, 2008, was issued by Bergrin which recommended petitioner's continued employment with the District. (Stip. at ¶42; see J-44.) Petitioner completed a Professional Learning Plan. (Stip. at ¶42; see J-45.)

29. During the 2008-2009 school year, a "Satisfactory" Observation-Performance Report was issued by Bergrin on December 9, 2008. At this time it was believed that based upon the length of time petitioner had taught in the District, he had become a tenured employee, and the Report notes same. (Stip. at ¶43; see J-46.) A "Satisfactory" ASR dated May 18, 2009, was issued by Bergrin which recommended petitioner's continued employment with the District. (Stip. at ¶44; see J-47.) Petitioner completed a Professional Development Plan. (Stip. at ¶44; see J-48.)

30. During the 2009-2010 school year, a "Satisfactory" Observation-Performance Report was issued by Bergrin on December 9, 2009. (Stip. at ¶45; see J-49.) A "Satisfactory" ASR dated April 24, 2010, was issued by Bergrin which

recommended petitioner's continued employment with the District. (Stip. at ¶46; see J-50.) Petitioner completed a Professional Development Plan. (Stip. at ¶46; see J-51.)

31. During the 2010-2011 school year, a "Satisfactory" Observation-Performance Report was issued by Bergrin on December 6, 2010, and an Observation-Performance Report was issued by Joseph P. Collins on March 25, 2011. (Stip. at ¶¶47, 48; see J-52, J-53.) A "Satisfactory" ASR dated May 9, 2011, was issued by Bergrin which recommended petitioner's continued employment with the District. (Stip. at ¶49; see J-54.) Petitioner completed a Professional Development Plan. (Stip. at ¶49; see J-55.)

32. By correspondence dated June 7, 2011, the Board advised petitioner that at its June 6, 2011, Action Work Session, the Board reappointed petitioner as teacher for the 2011-2012 school year. Petitioner accepted the position. (Stip. at ¶50; see J-56.)

33. During the 2011-2012 school year, a "Satisfactory" Observation-Performance Report was issued by Bergrin on November 22, 2011. (Stip. at ¶51; see J-57.)

34. In the Action/Work Session Minutes for the Board's January 9, 2012, meeting, it is noted that Beverly MacKay (MacKay), District Director of Curriculum, presented an overview of the New Jersey Quality Single Accountability Continuum Monitoring Process (QSAC). MacKay discussed the five indicators that the Department would be monitoring. She reported that the District had submitted its self-study to the County Office and is scheduled for on-site monitoring on April 2012. The Board then discussed the requirements for the New Jersey QSAC monitoring process. It was during this QSAC process that petitioner's lack of proper certification to teach high school students with special educational needs was discovered. (See Stip. at ¶52; J-58.)

35. On April 6, 2012, petitioner wrote a memo to Joseph Tondi, field representative of NJEA, Region 25, outlining the issues with his certification, and that he would be unemployed as a result. (Stip. at ¶53; see J-59.) Petitioner stated in the memorandum that, when he applied for the TOH Certification in August 2005, "the State Examiner, Mr. Harold Lee, noted that the TOH certificate . . . no longer exists" and that the TOSD "certificate in conjunction with the Elementary K–5 Certification would be required." Petitioner further indicated that "[b]ased on Mr. Lee's recommendation as State Examiner" he completed the above, including having DeSales University complete the New Jersey Education Matrix, and he was awarded the TOSD Certificate and the Elementary K–5 Certificate in November 2005. Petitioner stated in the letter that he was advised that, according to the QSAC Report, he needed to hold a TOH Certificate and that the certification issue needed to be resolved prior to the 2012-2013 school year. (See Stip. at ¶53; J-59.)

36. A "Satisfactory" ASR dated May 16, 2012, was issued by Bergrin which recommended petitioner's continued employment with the District. However, Bergrin further stated: "The recommendation for reemployment is based on [petitioner's] superior performance as a special education teacher. However, at this time [petitioner] is unfortunately faced with a recently discovered discrepancy in his certification credentials. His reemployment is dependent on a resolution that will provide him with the certification required to teach special education classes at the high school level." (Stip. at ¶54; see J-60.) Petitioner acknowledged receipt of this ASR, but noted that he objected to the non-certification comment. Petitioner completed a Professional Development Plan. (Stip. at ¶54; see J-61.)

37. By letter to the superintendent dated June 11, 2012, petitioner waived his right to a forty-eight-hour notification and allowed a discussion by the Board pertaining to his certification at its June 11, 2012, executive session. (Stip. at ¶55; see J-62.)

38. Petitioner informed Bergrin in a June 27, 2012, e-mail that the NJEA's attorney contacted him with news from the NJEA Certification Specialist, along with the advice conveyed that he must present his certification issue to the Department and that he needed to file an appeal to the State Board of Examiners requesting the issuance of a TOH endorsement. (See Stip. at ¶56; J-63.) Petitioner further advised Bergrin that he believed that both the District and he have followed the correct path to this point to successfully acquire his certification. (See Stip. at ¶56.)

39. Petitioner drafted a Request an Appeal of Issued Endorsement with the State Board of Examiners in which he appealed the Standard TOSD endorsement issued in November 2005 and requested issuance of a Standard TOH endorsement. (See Stip. at ¶57; J-64.) Petitioner stated that he "followed [Mr. Lee's] advice" and "re-applied and took the required steps to acquire the TOSD and the Elementary K–5 Certification." (J-64.)

40. By e-mail dated June 29, 2012, from Evangelista to Bergrin, Evangelista inquired as to the status of petitioner's certification. (See Stip. at ¶58; J-65.)

41. By e-mail dated August 16, 2012, from Evangelista to interested parties, Evangelista advised that petitioner had not been reappointed as a teacher due to certification issues involving the State of New Jersey, petitioner was asked to provide the required paperwork prior to the Board's August 27, 2012, meeting and, as of August 16, 2012, petitioner had not produced the required paperwork confirming a resolution of the issue of his certification. (See Stip. at ¶59; J-66.)

42. In an August 24, 2012, letter from the superintendent, Dr. Lauren Schoen, to petitioner, Schoen advised that on August 27, 2012, the Board was scheduled for a closed executive session meeting to discuss his certification and continued employment. (Stip. at ¶60; see J-67.) At its August 27, 2012, meeting, the Board moved to terminate the employment of an employee who "was found not

to hold the appropriate certification to teach in a public high school district." (See Stip. at ¶61; J-68.)

43. Petitioner applied for unemployment compensation. In the September 14, 2012, unemployment compensation response completed by Schoen, it is indicated that "[petitioner] holds the NJ Teacher of Students with Disabilities (which is not a stand-alone certification) and the NJ Elementary School Teacher K-5 certification. The appropriate certifications needed for [petitioner's] teaching assignment in the Ramapo Indian Hills Regional School District are the Teacher of Students with Disabilities and the appropriate content subject area certification for a high school district." (Stip. at ¶62; see J-69.)

44. In the response provided by petitioner in connection with his unemployment application, petitioner admitted that he was terminated for lack of proper certification for special education stating that he was advised on March 15, 2012, that the certification that he was hired with did not fulfill the new requirement imposed by the State of New Jersey, and he was given to August 27, 2012, to obtain the required certifications. (See Stip. at ¶63; J-69.) Petitioner further noted that he now needs a TOH certification, which has not been offered by the State since 2010, and he was advised at the time of his hiring that the TOSD was replacing the TOH certification. Petitioner further claimed that he made every attempt to resolve this situation by having the State try and recognize his existing certifications. He stated that he was a resource center teacher for special needs students and that in order to get a certification in each subject area that he teaches, it would take a minimum of 18 months for each subject. (See Stip. at ¶64; J-69, J-70.)

45. On December 11, 2012, the Department corresponded with petitioner and advised him of the procedures to request a credential review by the State Board of Examiners. (Stip. at ¶65; see J-71.) On December 17, 2012, the Department corresponded with petitioner and provided him with the procedures for review of

alternative education and/or experience to complete the requirements for certification as a TOH. (Stip. at ¶66; see J-72.)

46. On November 1, 2013, the Department of Education, State Board of Examiners, issued its Decision denying petitioner's application for the issuance of the TOH Certificate. (Stip. at ¶67; see J-73.)

47. Petitioner worked for the Board during the 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, and the 2011-2012 school years.

48. During his employment with the Board, petitioner worked as an in-class support teacher and as a teacher in the resource center. With regard to his in-class support assignment, petitioner provided support to special education students in the regular education setting and the class included a regular education teacher. Petitioner was the sole teacher responsible for the class in the resource center. (See J-70.)

49. During the 2005-2006 school year, petitioner provided in-class support in Biology and Fundamentals Algebra 1 and 2. He taught World Civilization in the resource center. (See J-70.)

50. During the 2006-2007 school year, petitioner provided in-class support in Biology. He taught U.S. History I and II, English IV, and Transition English in the resource center. (See J-70.)

51. During the 2007-2008 school year, petitioner provided in-class support in Physical Science and Chemistry. He taught U.S. History I and II, English IV, and Transition English in the resource center. (See J-70.)

52. During the 2008-2009, 2009-2010, 2010-2011, and the 2011-2012 school years, petitioner was assigned to the resource center, where he taught several high school level courses including Biology (2008-2012); Transition English (2008-2010); Transition Science and Transition Earth Science (2008-2010 and 2011-

2012); Physical Science (2011-2012); Chemistry (2011-2012); and Transition Horticulture (2010-2011). He also taught Study Skills (2010-2012), Study and Organization (2010-2011) and Adult Living (2009-2011). (See J-70.)

53. During the period that petitioner was employed by the Board, he held a TOSD certificate and an Elementary School Teacher, K-5, certificate. Petitioner did not hold endorsements in the subject matter content areas as to the above academic high school level courses that he taught.

LEGAL DISCUSSION AND CONCLUSIONS

The tenure laws, N.J.S.A. 18A:28-1 to -18, define the conditions under which teaching staff members are entitled to the security of tenure. Tenure has been described as a "statutory right" imposed upon a teaching staff member's contractual employment status. Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d. 502 (1963). The statutory provisions supersede contractual terms. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 72 (1982). The objective of the tenure statutes is to protect competent and qualified teaching staff members, after a probationary period, from removal for "unfounded, flimsy, or political reasons." Zimmerman, supra, 38 N.J. at 71. They are "designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service." Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

It is well-settled that the "right to tenure is created and governed entirely by statute," Breitwieser v. State-Operated School District of Jersey City, 286 N.J. Super. 633, 637 (App. Div. 1996), and tenure "arises only by passage of the time fixed by the statute," Canfield v. Pine Hill Board of Education, 51 N.J. 400 (1968), rev'g on dissent, 97 N.J. Super. 483, 490 (App. Div. 1967). In order to acquire the security of tenure, the precise requirements set forth in the statute must be met. Picogna v. Cherry Hill Bd. of Educ., 143 N.J. 391, 400 (1996); Kletzkin v. Spotswood Bd. of Educ., 136 N.J. 275, 278

(1994); Spiewak, supra, 90 N.J. at 72; Zimmerman, supra, 38 N.J. at 72; Ahrensfield v. State Bd. of Educ., 126 N.J.L. 543, 544 (E. & A. 1941). The employee shoulders the burden of proving an entitlement to tenure protection, which ordinarily must be clearly proven. Canfield, supra, 97 N.J. Super. at 493.

N.J.S.A. 18A:28-5 governs the tenure requirements for teaching staff members. A "teaching staff member" is defined as "a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners and includes a school nurse and a school athletic trainer." N.J.S.A. 18A:1-1 (emphasis added). As to the statutory requirements that must be met in order to acquire tenure, N.J.S.A. 18A:28-5 directs in pertinent part:

> The services of all teaching staff members employed in the positions of teacher, principal, . . . assistant principal, vice-principal, assistant superintendent, and all school nurses . . . , school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect . . . , shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause . . . after employment in such district or by such board for:
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> (a) Three consecutive calendar years . . . ; or
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> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.
>
> [Emphasis added.]

Accordingly, in order to gain tenure a teaching staff member must: (1) work in a position for which a teaching certificate is required; (2) hold the appropriate certificate; and (3) serve the requisite period of time. Spiewak, supra, 90 N.J. at 74.

Pursuant to N.J.S.A. 18A:26-2, "[n]o teaching staff member shall be employed in the public schools by any board of education unless he is the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of, or to render or administer, direct or supervise the rendering of nursing service to, pupils in such public schools and of such other certificate, if any, as may be required by law." (Emphasis added.) See also N.J.A.C. 6A:9-5.1(a) ("any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate"). In this regard, "[t]he services of any teaching staff member who is not the holder of an appropriate certificate, in full force and effect, issued by the state board of examiners under rules and regulations prescribed by the state board of education may be terminated without charge or trial . . . ." N.J.S.A. 18A:28-14. N.J.S.A. 18A:28-4 further unambiguously directs that "[n]o teaching staff member shall acquire tenure in any position in the public schools in any school district or under any board of education, who is not the holder of an appropriate certificate for such position, issued by the State Board of Examiners, in full force and effect . . . ." Similarly, N.J.S.A. 18A:28-5 expressly excludes from tenure protection teaching staff members "who are not the holders of proper certificates in full force and effect."

Turning to the within matter, the parties do not contest petitioner's assignments as a teacher at the District's high school, petitioner's length of service with the District, and the endorsements that he possessed. There is no dispute that petitioner worked for the Board in a position that fell within the ambit of N.J.S.A. 18A:28-5 (i.e., a teacher) and worked for the requisite period of time necessary to accrue tenure. Equally undisputed is petitioner's overall satisfactory performance throughout his career in the District. The parties' paths diverge, however, concerning whether petitioner's service should be counted as time toward tenure. Specifically, the critical issue is whether or not petitioner held the appropriate certification for his position. In this regard, it is

undisputed that in November 2005 petitioner was issued standard certificates with endorsements as a TOSD and an Elementary School Teacher, Grades K-5.

Petitioner maintains that he was "properly certified" for the job for which he was employed. He notes that "the statement of employment assurance issued by the district to the State [dated January 6, 2006] . . . expressly stated that [petitioner] would be employed in a position that only required his [TOSD] endorsement" (J-24), and his supervisor also stated in his Annual Summary Report dated April 17, 2006, that petitioner "holds all appropriate special education credentials . . . ." (J-31.) Petitioner further contends that "throughout his employment [he] did what he was told"; he "initially sought certification as a Teacher of the Handicapped"; "[w]hen incorrectly told that the certificate was no longer issued, he applied for Teacher of Students with Disabilities"; and "[w]hen told that he also needed to apply for the Elementary (K-5) endorsement, he did so." Petitioner avers that "[h]e taught the classes his employer gave him" and "was given no real indication that his certificate/endorsements were thought to be inappropriate" until approximately March 2012.

The Board of Examiners is entrusted with the responsibility of issuing certificates to permit an individual to serve as a teaching staff member. See N.J.S.A. 18A:6-38; N.J.A.C. 6A:9-4.2. The regulations address various certificates that may be issued, describe the requirements for obtaining a particular certificate, and designate which certificates are required for which positions. N.J.A.C. 6A:9-1.1 et seq. The Board of Examiners issues three categories of educational certificates: instructional, administrative, and educational services. N.J.A.C. 6A:9-5.2(a). The regulations further designate endorsements under each type of certificate, which identify the specific area in which a certificate holder is authorized to serve. Employment in a specific assignment requires that the educator hold the appropriate endorsement. Nelson v. Old Bridge Bd. of Educ., 148 N.J. 358, 363 (1997).

The TOSD endorsement authorizes teaching students with disabilities. N.J.A.C. 6A:9-11.3(a)(1). However, unlike the former TOH endorsement, the TOSD endorsement is not a standalone certificate. Rather, special education teachers are

required to hold an instructional certificate with the corresponding endorsement for the grade level or subject area that they are assigned to teach. See N.J.A.C. 6A:9-9.2(b)(6); N.J.A.C. 6A:9-11.3; see also 35 N.J.R. 4352(a).

Based upon the stipulated facts and joint exhibits, it appears that the District believed at the time of petitioner's hiring that he was obtaining TOH certification. (See J-6 (resume submitted by petitioner under letter dated August 1, 2005 states "NJ SpEd Teacher of the Handicapped Certification (Pending)")); (J-9 (Candidate Interview Form dated on August 19, 2005 notes that petitioner's TOH certification was pending)); (J-12 (August 23, 2005, memo from Principal Evangelista to Superintendent Paul Saxton recommending petitioner for the position of Resource Center Teacher and noting that petitioner was scheduled to take the PRAXIS exam in September for his TOH Certification and he agreed to accept the position as a long-term substitute until he received his certification by the end of October 2005)). In short, petitioner did not obtain TOH certification and did not hold endorsements for the grade and subject matter high school courses that he taught. That the District may have mistakenly believed that petitioner was properly certified prior to its QSAC analysis in 2012, does not alter the fact that petitioner did not meet the statutory requirements for tenure as a result of his failure to hold the endorsements necessary for his position. Plainly, petitioner was primarily responsible for ensuring that he possessed the certification necessary for the position in which he served. See Jennings v. Bd. of Educ. of Highland Park, 1989 S.L.D. 1085, 1100-01. And, petitioner benefited from any mistakes that may have been made on the part of the District by being employed in assignments for which he failed to possess the appropriate endorsement.

In sum, I **CONCLUDE** that, inasmuch as petitioner was not properly certified to teach the subject matter areas that he taught at the high school level during his service with the District, he did not earn time toward tenure. Tenure is achieved only by satisfying the precise statutory and regulatory requirements. Tenure protection in a position is limited to teaching staff members who hold an appropriate certificate for that position issued by the Board of Examiners. N.J.S.A. 18A:28-4, -5. This certificate requirement is mandated by the tenure statutes and is a necessary prerequisite to achieve tenure. I am not persuaded by petitioner's alternative contention that he was

properly certified for many of the assignments he was given (i.e., in-class support classes, Study Skills, Study and Organization, Adult Living and the various Transition courses), and this provides "sufficient seamless service to acquire tenure." Simply put, even if petitioner could be said to have been properly certified in his in-class support assignment, he was not properly certified in the resource assignments during that same period, and his in-class support assignment was for only three academic years, a portion of which petitioner appears to have been serving as a substitute teacher. Petitioner has offered no support for his assertion that he was properly certified for the required probationary period necessary to attain tenure or that being certified to teach a few courses that were part of his assignment is sufficient to accrue tenure. Accordingly, I **CONCLUDE** that the District acted consistent with the tenure/seniority requirements when it terminated petitioner's employment.

ORDER

I **ORDER** that petitioner's Petition of Appeal be and hereby is **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 7, 2014
DATE

MARGARET M. MONACO, ALJ

Date Received at Agency: July 7, 2014

Date Mailed to Parties: July 7, 2014

jb

APPENDIX

List of Witnesses

For Petitioner:

Keith Andrews

For Respondent:

None

List of Exhibits in Evidence

Joint:

J-1 Diploma from Thomas A. Edison State College

J-2 Professional Certificate from the Commonwealth of Pennsylvania

J-3 Application Status Check-Result

J-4 Diploma from DeSales University

J-5 Transcripts

J-6 Letter from Keith Andrews to Ann Joosten and Vitae

J-7 Application Form

J-8 Candidate Recommendation Credentials Form

J-9 Candidate Interview Form

J-10 Memorandum from Linda Bergrin to Al Evangelista dated August 19, 2005

J-11 E-mails dated August 19 and 20, 2005

J-12 Memo from Al Evangelista to Paul Saxton dated August 23, 2005

J-13 PRAXIS Examinee Score Report

J-14 Letter from Frank Ceurvels to Keith Andrews dated September 21, 2005

J-15 E-mails and handwritten notes

J-16 Letter from Ann Joosten to Laurie Hoffman dated October 28, 2005

J-17 Certificate of Eligibility, Provisional Certificate, and Standard Certificate

J-18 Standard Certificate, Certificate of Eligibility with Advanced Standing, and Provisional Certificate

J-19 Observation-Performance Report dated November 14, 2005
J-20 Observation-Performance Report dated December 13, 2005
J-21 Letter from Frank Ceurvels to Keith Andrews dated December 16, 2005
J-22 Handwritten Memo from Ann Joosten to Keith Andrews dated January 3, 2006
J-23 Handwritten Memo from Ann Joosten to Note to File dated January 8, 2006
J-24 Letter from Ann Joosten to the Department of Education dated January 22, 2006 with enclosure
J-25 Interim Summary Report dated January 26, 2006
J-26 Observation-Performance Report dated February 6, 2006
J-27 Letter from Paul Saxton to Human Resources Director dated February 16, 2006
J-28 Letter from Ann Joosten to Laurie Hoffman dated March 6, 2006, with enclosures
J-29 Observation-Performance Report dated March 23, 2006
J-30 Observation-Performance Report dated April 6, 2006
J-31 Annual Summary Report dated April 17, 2006
J-32 Professional Improvement Plan dated April 19, 2006
J-33 Observation-Performance Report dated October 11, 2006
J-34 Observation-Performance Report dated November 2, 2006
J-35 Observation-Performance Report dated December 12, 2006
J-36 Interim Summary Report dated January 20, 2007
J-37 Annual Summary Report dated April 17, 2007
J-38 Professional Improvement Plan dated May 2, 2007
J-39 Observation-Performance Report dated May 22, 2007
J-40 Observation-Performance Report dated October 19, 2007
J-41 Observation-Performance Report dated December 18, 2007
J-42 Observation-Performance Report dated January 23, 2008
J-43 Observation-Performance Report dated April 2, 2008
J-44 Annual Summary Report dated April 13, 2008
J-45 Professional Learning Plan
J-46 Observation-Performance Report dated December 9, 2008
J-47 Annual Summary Report dated May 18, 2009
J-48 Professional Development Plan
J-49 Observation-Performance Report dated December 9, 2009

J-50 Annual Summary Report dated April 24, 2010
J-51 Professional Development Plan
J-52 Observation-Performance Report dated December 6, 2010
J-53 Observation-Performance Report dated March 25, 2011
J-54 Annual Summary Report dated May 9, 2011
J-55 Professional Development Plan
J-56 Letter from C. Lauren Schoen, Ed.D., to Keith Andrews dated June 7, 2011
J-57 Observation-Performance Report dated November 22, 2011
J-58 Action/Work Session Minutes
J-59 Memorandum from Keith Andrews to Joseph Tondi dated April 6, 2012
J-60 Annual Summary Report dated May 16, 2012
J-61 Professional Development Plan
J-62 Letter from Keith Andrews to C. Lauren Schoen, Ed.D., dated June 11, 2012
J-63 E-mails dated June 27 and 28, 2012
J-64 Memo from Keith Andrews to State Board of Examiners dated June 27, 2012
J-65 E-mails dated June 27 and 29, 2012
J-66 E-mail dated August 16, 2012
J-67 Letter from C. Lauren Schoen, Ed.D., to Keith Andrews dated August 24, 2012
J-68 Work Session/Regular Public Meeting Minutes
J-69 Fax Transmittal from New Jersey Department of Labor and Workforce Development dated September 13, 2012, with enclosure
J-70 Teaching Chronology
J-71 Letter from Judith A. Cifone to Keith Andrews dated December 11, 2012
J-72 Letter from Robert Higgins, Ph.D., to Keith Andrews dated December 17, 2012, with enclosures
J-73 New Jersey Department of Education State Board of Examiners Decision
J-74 Amended Joint Stipulation of Facts and Exhibits

For Petitioner:

None

For Respondent:

None

341-14

341-14IM

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Acting Commissioner

August 21, 2014

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Re: *Kathleen Carew v. Board of Education of the Borough of Old Tappan, Bergen County. OAL Dkt. No. EDU 13462-13N, Agency Dkt. No. 201-8/13.*

Dear Parties,

I have reviewed the submissions filed in connection with Angela Maida's request for interlocutory review of Administrative Law Judge (ALJ) Joann Lasala Candido's July 17, 2014 Order denying Ms. Maida's motion to intervene in the above-captioned matter. Upon my review of the Order and filings in connection with this interlocutory review request, I have determined to set aside the ALJ's denial of intervenor status to Ms. Maida.

The underlying issue in the case involves a claim by the petitioner that the Old Tappan Board of Education (Board) violated her tenure and seniority rights by retaining non-tenured teachers or less-senior tenured teachers. The petitioner was the subject of a reduction in force which reduced her from full-time to part-time employment. Ms. Maida was identified by the petitioner as an individual who may hold a position to which she is entitled. As such, Ms. Maida will be substantially and directly affected by the outcome of this matter because her employment status with the Board may be changed if the petitioner prevails. Therefore, Ms. Maida has a protectable interest and she is entitled to full intervenor status. Finally, it is also noted that neither the Board nor the other parties objected to Ms. Maida's status as an intervenor.

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Accordingly, the July 17, 2014 Order of the ALJ is hereby set aside and Ms. Maida is hereby granted intervenor status.[1]

Sincerely,

David C. Hespe
Acting Commissioner

c: Honorable Joann Lasala Candido, A.L.J.
County Superintendent
State Law Library

DH/MKD/JKH

Via Facsimile and Regular Delivery

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

342-14L

342-14

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Acting Commissioner

August 21, 2014

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Terronie Ortiz, *pro se*
[redacted]
Willingboro, New Jersey 08046-2801

Re: *In the Matter of the Teaching Certificate of Terronie Ortiz, Garfield Park Academy, Burlington County. OAL Dkt. No. EDU 6996-14, Agency Dkt. No. 28-2/14.*

Dear Parties,

I have considered the papers filed in connection with Garfield Park Academy's request for interlocutory review of Administrative Law Judge Susan M. Scarola's August 1, 2014 Order denying its Motion for Summary Decision in the above-captioned matter. Upon full consideration of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, Garfield Park Academy's request for interlocutory review is hereby denied.[1]

Sincerely,

David C. Hespe
Acting Commissioner

c: Honorable Susan M. Scarola
County Superintendent
State Law Library

DCH/MKD/JKH
Via Facsimile and Regular Delivery

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

343-14L

344-14

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Acting Commissioner

August 21, 2014

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Re: *Board of Education of the Borough of Longport, Atlantic County v. Board of Education of the City of Atlantic City, Atlantic County and Board of Education of the City of Ocean City, Cape May County*, OAL Dkt. No. EDU 8152-12; Agency Dkt. No. 112-4/12

Dear Counsel:

I have reviewed the materials filed in connection with the Atlantic City Board of Education's (Board) Motion for a Stay pending appeal of my June 5, 2014 decision granting petitioner's application for severance.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that the movant has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, the movant must demonstrate that: a stay is necessary to prevent irreparable harm;

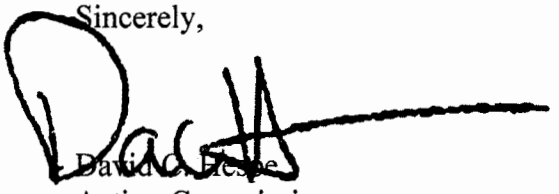
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the legal right underlying the movant's claim is settled; there is a likelihood of success on the merits of the underlying matter; and the relative hardship to the moving party favors granting such relief. *Id.* at 132-134.

Upon review of the parties' submissions, I find the Board has failed to meet the standard required for a stay of the June 5, 2014 decision. Most notably, the Board has failed to establish a likelihood of success on the merits. In its papers, the Board essentially recasts and reiterates the same arguments it presented for my consideration in its submission on exception. These arguments were fully considered and rejected by me in my June 5, 2014 decision. Therefore, the Commissioner finds that the Board has failed to demonstrate a likelihood of success on the merits.

Since all of the *Crowe* prongs must be met for issuance of a stay, it is not necessary to analyze the three remaining factors. Accordingly, the Board's request for a stay of the June 5, 2014 decision is hereby DENIED. *

Sincerely,



David C. Apy
Acting Commissioner

C: Hon. Bruce M. Gorman, ALJ

* Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

344-14

OAL DKT. NO. EDU 5753-12
AGENCY DKT. NO. 51-3/12

DAVID KELLY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY REVIEW UNIT and BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties' exceptions and reply exceptions – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

In this matter, petitioner challenges the determination of the New Jersey State Department of Education, Criminal History Review Unit (CHRU), that he is statutorily disqualified from school employment as a result of his having been convicted of certain crimes in the state of Pennsylvania. Petitioner contends that the criminal convictions on which CHRU based its disqualification determination, namely, recklessly endangering another person (REAP) in violation of 18 *Pa.C.S.A.* § 2705 and possessing instruments of crime in violation of 18 *Pa.C.S.A.* § 907, [1] do not constitute disqualifying convictions under the disqualification statute.

[1] Petitioner's criminal history record check also revealed convictions for disorderly conduct in violation of 18 *Pa.C.S.A.* § 5503 and simple assault in violation of 18 *Pa.C.S.A.* § 2701; however, neither of those convictions is cited by CHRU as a basis for disqualification.

Pursuant to *N.J.S.A.* 18A:6-7.1, an individual is permanently disqualified from employment with any facility under the supervision of the Department of Education if that individual's criminal history record check reveals a record of conviction for any of the crimes or offenses specified therein, including convictions for:

> [A]ny crime of the first or second degree; or
>
> a. An offense set forth in chapter 14 of Title 2C of the New Jersey Statutes, or as set forth in N.J.S. 2C:24-4 and 2C:24-7, or as set forth in R.S.9:6-1 et seq., or as set forth in N.J.S. 2C:29-2; or
>
> b. An offense involving the manufacture, transportation, sale, possession, distribution or habitual use of a "controlled dangerous substance" as defined in the "Comprehensive Drug Reform Act of 1987," N.J.S. 2C:35-1 et al. or "drug paraphernalia" as defined pursuant to N.J.S. 2C:36-1 et seq.; or
>
> c. (1) A crime involving the use of force or the threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder; or
>
> (2) A crime as set forth in chapter 39 of Title 2C of the New Jersey Statutes, a third degree crime as set forth in chapter 20 of Title 2C of the New Jersey Statutes, or a crime as listed below:
>
> | | |
> |---|---|
> | Recklessly endangering another person | N.J.S.2C:12-2 |
> | Terroristic Threats | N.J.S.2C:12-3 |
> | Criminal restraint | N.J.S.2C:13-2 |
> | Luring, enticing child into motor vehicle, structure or isolated area | P.L.1993, c.291 |
> | Causing or risking widespread injury or damage | N.J.S.2C:17-2 |
> | Criminal Mischief | N.J.S.2C:17-3 |
> | Burglary | N.J.S.2C:18-2 |
> | Usury | N.J.S.2C:21-19 |
> | Threats and other improper influence | N.J.S.2C:27-3 |
> | Perjury and false swearing | N.J.S.2C:28-3 |
> | Resisting arrest | N.J.S.2C:29-2 |
> | Escape | N.J.S.2C:29-5 |
> | Bias intimidation | N.J.S.2C:16-1 |
>
> or,
>
> (3) Conspiracy to commit or an attempt to commit any of the crimes described in this act.

For purposes of the disqualification statute, "a conviction exists if the individual has been convicted under the laws of this State or under any similar statutes of the United States or any other state for a substantially equivalent crime or other offense." *N.J.S.A.* 18A:6-7.1(d). Thus, petitioner is disqualified from public school employment in New Jersey if any one of his Pennsylvania convictions is for a crime or offense that is "substantially equivalent" to those referenced in the disqualification statute.

The central issue in this matter is whether petitioner's conviction for recklessly endangering another person, in violation of 18 *Pa.C.S.A.* § 2705, is the substantial equivalent of a "crime involving the use of force or the threat of force to or upon a person or property," as contemplated by *N.J.S.A.* 18A:6-7.1(c)(1). In analyzing that issue, the Administrative Law Judge (ALJ) concluded that the Pennsylvania REAP conviction could not be considered disqualifying unless its statutory elements and required *mens rea* were identical to those of a specific New Jersey criminal statute.

The Commissioner cannot adopt such a restrictive interpretation of *N.J.S.A.* 18A:6-7.1(c)(1). The disqualification statute was first enacted in 1986. Over the years, the Legislature has repeatedly amended that statute, broadening the scope of disqualifying offenses and precluding evidence of rehabilitation, to provide greater protection for children from those it deemed a danger to them. In 1989, the statute was amended to include crimes "involving the use of force or the threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder." Notably, although it did so in other sections of the disqualification statute, the Legislature did not specify an exhaustive list of individual criminal statutes in this section. Instead, it elected to use broad language describing a *category* of crimes, the nature of which

evidences the type of "behavior that could pose a threat to the safety of public school pupils." (Senate Education Committee Statement to S3513, May 22, 1989).

In light of the foregoing, the Commissioner finds that the appropriate analysis is not whether one can identify a New Jersey criminal statute with elements that are in every respect identical to those of Pennsylvania's REAP statute, but rather whether petitioner's conviction for REAP is a conviction for a crime that falls within that category of crimes described in *N.J.S.A.* 18A:6-7.1(c)(1), i.e., those crimes "involving the use of force or the threat of force to or upon a person or property." The Commissioner finds that it does.

Pennsylvania law states that, "[a] person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." 18 *Pa.C.S.* § 2705. In *Commonwealth v. Trowbridge*, 395 A.2d 1337, 1340 (1978), the Pennsylvania Supreme Court divided the offense of recklessly endangering another person into the following four elements: "(1) a *mens rea* – recklessness, (2) an *actus reus* – some 'conduct', (3) causation – 'which places', and (4) the achievement of a particular result – 'danger', to another person of death or serious bodily injury." Thus, the REAP statute may be violated in any number of ways. Since the *actus reus* underlying a conviction for REAP may or may not involve the "use of force or the threat of force to or upon a person or property," a review of the police reports comprising the foundation for the conviction is essential to determining whether the offense is disqualifying under *N.J.S.A.* 18A:6-7.1(c)(1). *Rixford v. New Jersey Department of Education*, 97 *N.J.A.R.*2d (EDU) 320, 321 (1997).

Here, the police report indicates that the officers responded to a dispatch call of an armed suspect. The victims, both minors, reported that while they walked along a property to go fishing at an adjacent creek, a white male screamed at them, told them he had a gun and told

them where to walk. The victims reported that the man appeared intoxicated. As the victims exited the property, they heard a gunshot and saw that the man held a rifle. Both victims positively identified petitioner as the person who shot at them. Officers located a .22mm rifle with scope, with one round in the chamber and one round in the magazine, in the basement of petitioner's home.

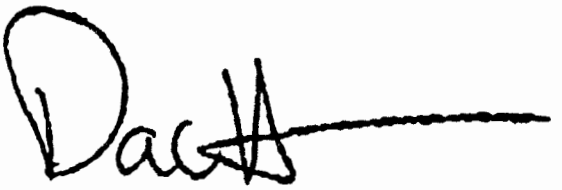
Petitioner was charged with, *inter alia*, "recklessly engag[ing] in conduct which placed or may have placed [the minor victims] in danger of death or serious bodily injury by firing a .22mm rifle at victims." In short, petitioner's conviction for REAP arose when he threatened two children with a rifle, which he eventually fired. In convicting petitioner of two counts of REAP, a jury determined that petitioner consciously disregarded a substantial and unjustifiable risk that his actions might place the minor victims in danger of death or serious bodily injury. 18 *Pa.C.S.* § 302(b)(3). Further, under Pennsylvania law, petitioner's conduct in disregarding the risk to the minor victims represents "a gross deviation from the standard of conduct that a reasonable person would observe" in the situation. *Id.*

Given these facts and circumstances, there can be no doubt that, in this case, petitioner's conviction for REAP is a crime "involving the use of force or threat of force to or upon a person or property," as contemplated by *N.J.S.A.* 18A:6-7.1(c)(1). It is equally clear that petitioner's conviction for REAP evidences the type of behavior that could pose a threat to the safety of public school pupils, and from which the Legislature sought to insulate the children of this State. Thus, CHRU properly disqualified petitioner from public school employment in the state of New Jersey based upon his Pennsylvania conviction for REAP.[2]

[2] In light of the Commissioner's determination on this issue, it is unnecessary to reach petitioner's conviction for possessing instruments of crime or petitioner's claim for backpay.

Accordingly, the Initial Decision of the OAL is rejected and the petition of appeal is hereby dismissed for the reasons set forth herein.

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/21/14

Date of Mailing: 8/22/14

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5753-12
AGENCY DKT. NO. 51-3/12

DAVID KELLY,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, CRIMINAL HISTORY UNIT AND BOARD OF EDUCATION OF THE TOWNSHIP OF LAWRENCE, MERCER COUNTY
Respondents.

Edward Cridge, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Angela J. Velez, Deputy Attorney General, for the Department of Education, respondent (John J. Hoffman, Attorney General of New Jersey, attorney)

Michael J. Maselli, Esq., for Lawrence Township Board of Education (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, attorneys)

Record Closed: April 4, 2014 Decided: May 23, 2014

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

Petitioner David Kelly challenges the determination by respondent New Jersey Department of Education (NJDOE), Criminal History Review Unit (CHRU), that he is disqualified from school employment pursuant to N.J.S.A. 18A: 6-7.1, due to his criminal convictions in Pennsylvania. Petitioner contends that he has been convicted of neither a disqualifying offense, nor its substantial equivalent.

Procedural History

On February 3, 2012, the CHRU notified petitioner that he was permanently disqualified from employment with any school under the supervision of the DOE based on his criminal convictions. On February 15, 2012, petitioner wrote to the CHRU challenging his disqualification on grounds that his Pennsylvania conviction was not substantially equivalent to any crime enumerated in N.J.S.A. 18A:6-7.1 and therefore not a disqualifying event. On February 21, 2012, the CHRU replied that the statute is clear in its preclusion and suggested that if petitioner were challenging the disqualification based on a legal issue, review of the determination could be sought by filing a formal appeal with the Commissioner of Education. On March 2, 2012, petitioner filed a verified petition of appeal with the New Jersey Department of Education, Bureau of Controversies and Disputes (Bureau). On April 2, 2012, the CHRU answered, and the Bureau transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on April 30, 2012. Petitioner filed a motion for summary decision and the CHRU filed an answer in opposition and cross-motion to compel discovery. Petitioner filed a response to respondent's answer, to which respondent then replied. Oral argument was held on the motions.

SUMMARY OF FACTS

Petitioner was a tenured teacher employed by the Board of Education of Lawrence Township, New Jersey (Lawrence). (Verified Pet. 1.) On January 24, 2012,

petitioner was found guilty by a jury verdict in the Bucks County, Pennsylvania Court of Common Pleas on two counts of recklessly endangering another person, a second degree misdemeanor under 18 Pa.C.S. § 2705; one count of possessing instruments of crime, a first degree misdemeanor under 18 Pa.C.S. § 907; one count of disorderly conduct, a third degree misdemeanor under 18 Pa.C.S. § 5503, and two counts of simple assault, a second degree misdemeanor under 18 Pa.C.S. § 2701. (Ex. P-C at 3-4.) These convictions resulted from a criminal complaint that petitioner fired a rifle towards two victims, R.B. and E.Q, on his property in Langhorne, Pennsylvania on August 21, 2011. (Ex. R-A at 1-9.) Based on the specific convictions for reckless endangerment and possessing an instrument of crime, respondent concluded that petitioner was disqualified from public school employment under N.J.S.A. 18A:6-7.1. (Ex. R-C.)

Petitioner was acquitted of Terroristic Threats with Intent to Terrorize Another in violation of 18 Pa.C.S.A. § 2706, based on the jury's determination that petitioner had unintentionally discharged a firearm while using it to scare two trespassing teenagers off of his property.

LEGAL ANALYSIS

SUMMARY DECISION

A motion for summary decision shall be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(a). If "a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

A motion for summary decision before the OAL must be analyzed "in accordance with the principles set forth by the New Jersey Supreme Court in Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)." Nat'l Transfer, Inc. v. New Jersey Dep't of

Envtl. Prot., 347 N.J. Super. 401, 408 (App. Div. 2002). The rule the Court announced was that a determination that there is a genuine issue of material fact:

> requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself (or herself) to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2. The import of our holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment. It is critical that a trial court ruling on a summary judgment motion not 'shut a deserving litigant from his [or her] trial.' . . . To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed 'worthless' and will 'serve no useful purpose.'
>
> [Brill, supra, 142 N.J. at 540-41 (emphasis added).]

In this matter no material fact is in dispute as petitioner's convictions are final adjudications. The underlying facts supporting petitioner's convictions are not at issue; otherwise, this appeal would constitute a collateral attack of petitioner's criminal convictions. Accordingly, the only issue in this proceeding is the legal question of the applicability of N.J.S.A. 18A:6-7.1 to petitioner's Pennsylvania convictions. Petitioner does not offer any disputed facts other than characterizing the circumstances surrounding his criminal conduct. However, the criminal case has been settled by a jury verdict and the record does not indicate any appeal is being sought. Thus the convictions speak for themselves.

Because the CHRU only cited two of petitioner's convictions as disqualifying crimes, this case is limited to determining whether petitioner's Pennsylvania convictions for (1) recklessly endangering another person (REAP) and (2) possessing instruments of a crime are substantially equivalent to an enumerated offense under N.J.S.A. 18A:6-

7.1. Lacking any genuine dispute of material facts necessary to resolve the issue in this matter, the case is ripe for summary decision. See Caucino v. NJDOE, Office of Criminal History, and Monmouth County Voc. Sch. Dist., EDU 6213-04, Initial Decision (March 11, 2005), adopted, Comm'r. (April 15, 2005) http://njlaw.rutgers.edu/collections/oal/> (summary decision adopted where the only issue was the legal question of the applicability of N.J.S.A. 18A:6-7.1 to petitioner's federal conviction); Markakis v. NJDOE, Office of Criminal History Review, EDU 13275-10, Initial Decision (July 25, 2011), adopted, Comm'r. (Sept. 1, 2011) <http://njlaw.rutgers.edu/collections/oal/> (stipulated facts unnecessary in making legal finding for summary decision as to substantial equivalency of assault by auto to aggravated assault).

Only where police records are absent, ambiguous, or the convictions are satisfied by multiple possible scenarios would a determination of the underlying facts be necessary. See Rixford v. NJDOE, 97 N.J.A.R.2d (EDU) 320, 321 (1997) (police reports comprising the foundation for foreign conviction were missing, thus factual findings were necessary to determine if vehicular homicide conviction in Massachusetts arose from reckless driving, negligent driving or driving under the influence); Taylor v. NJDOE, 97 N.J.A.R.2d (EDU) 350, 351 (1997) (criminal record check indicating a 20-year old conviction for "resisting arrest/assault on an officer" but not indicating if they were separate charges required factual determination to determine if any injury actually occurred in the absence of a police report or any other documentation).

Therefore, I **CONCLUDE** that the matter is appropriate for summary decision. Given that determination, respondent's motion to compel discovery is **DENIED.**

TEST FOR SUBSTANTIAL EQUIVALENCY

Under N.J.S.A. 18A:6-7.1, the presence of a conviction for an enumerated offense identified during a criminal history record check disqualifies one from employment with a board of education under the supervision of the Department of Education. Among the enumerated offenses is any "crime involving the use of force or the threat of force to or upon a person or property". N.J.S.A. 18A:6-7.1(c)(1). Additionally, "[a] crime as set forth in chapter 39 of Title 2C of the New Jersey Statutes"

(weapons offenses) also constitutes a disqualifying conviction. Id. at § (c)(2). Petitioner was found guilty in Pennsylvania of reckless endangerment and possessing an instrument of crime. Those convictions would have a disqualifying effect on school employment in New Jersey provided the convictions constitute a "substantially equivalent crime or other offense" to those enumerated in the New Jersey statute. N.J.S.A. 18A:6-7.1(d).

In the criminal sentencing context, the New Jersey Supreme Court has allowed the use of convictions outside the state as aggravating factors where the prosecution has shown that the statutory elements and required mens rea of the offenses are identical. See State v. Simon, 161 N.J. 416, 461-64 (1999). This approach also has been followed in the administrative context. Thus, in Brigham v. NJDOE, Office of Criminal History Review, EDU 3779-06, Initial Decision (March 30, 2007), adopted, Comm'r. (May 15, 2007) <http://njlaw.rutgers.edu/collections/oal/> a guilty plea to conspiracy to violate the Federal Food, Drug, and Cosmetic Act in relation to mislabeling GHB was not substantially equivalent to a state controlled dangerous substance violation because GHB was not a controlled dangerous substance at the time of the guilty plea. However in Markakis, supra, a comparison of third degree assault by auto, involving drunk driving and serious injury to other persons, was determined to fall within N.J.S.A. 18A:6-7.1(d) and its prohibition of crimes involving aggravated assault, as both involve recklessness as the required mens rea.

Petitioner contends that his convictions for reckless endangerment and possessing an instrument of crime are not disqualifying convictions within the intent of N.J.S.A. 18A:6-7.1 because he has not been convicted of any "crime", but was only convicted of "misdemeanors". (See Pet. Br. 8/22/2012 at 3.) However Pennsylvania law provides that "[a]n offense . . . for which a sentence of death or of imprisonment is authorized constitutes a crime." 18 Pa.C.S. § 106(a). Pennsylvania classifies crimes into three categories: felony, misdemeanor, and summary offense. Id. § 106(a)(1)-(7) and § 106(c). By contrast, New Jersey does not use the term felony or misdemeanor, but rather utilizes four degrees of criminal offenses, with first degree offenses carrying the most severe sentencing possibilities and fourth degree the least. See N.J.S.A.

2C:43-1 and N.J.S.A. 2C:43-6. See also Rodriguez v. Rosenblatt, 58 N.J. 281, 285 (1971) ("New Jersey has never utilized the traditional English felony-misdemeanor classification").

Under Pennsylvania law petitioner was found guilty of a first degree misdemeanor of possessing an instrument of crime with intent to employ it criminally, 18 Pa.C.S. § 907(a), which is punishable by up to two years imprisonment. 18 Pa.C.S. § 106(b)(7). He was also found guilty of a second degree misdemeanor of recklessly endangering another person 18 Pa.C.S. § 2705, which is punishable by up to five years imprisonment. Id. § 106(b)(6). Thus, both infractions constitute "crimes" in Pennsylvania, Id. § 106(a).

The reckless endangerment conviction

The issue then becomes whether either of his convictions is substantially equivalent to a New Jersey crime enumerated in N.J.S.A. 18A:6-7.1. With regard to the conviction on two counts of recklessly endangering another person, Pennsylvania law states that, "[a] person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." 18 Pa.C.S. § 2705. According to the Pennsylvania Superior Court, "the crime requires (1) a mens rea—recklessness, (2) an actus reus—some 'conduct,' (3) causation—'which places,' and (4) the achievement of a particular result—'danger,' to another person, of death or serious bodily injury." Commonwealth v. Trowbridge, 395 A.2d 1337, 1340 (Pa. Super. 1978). Notably absent from this statute is any requirement to cause actual bodily injury. The Pennsylvania statute is satisfied solely by the reckless creation of danger. Ibid.

As an initial matter, New Jersey does not have a reckless endangerment statute consisting of the exact elements of Pennsylvania Section 2705. (See Resp. Br. 9/11/2012 at 12.) While New Jersey does have a crime entitled "reckless endangerment" at N.J.S.A. 2C:12-2, it is clearly not applicable to this case. The statute only addresses conduct involving the loss or destruction of a vessel, the manufacture of

golf balls containing acid; or offering poisonous food or drink products. Ibid. None of the conduct addressed by N.J.S.A. 2C:12-2 is alleged to have occurred in this case.

However, respondent contends that the reckless endangerment conviction is substantially equivalent to N.J.S.A. 18A:6-7.1's prohibition on convictions substantially equivalent to a "crime involving the use of force or the threat of force to or upon a person or property including, but not limited to, robbery, aggravated assault, stalking, kidnapping, arson, manslaughter and murder". N.J.S.A. 18A:6-7.1(c)(1). The phrase "but not limited to" indicates this "is not an exhaustive list pursuant to the Statute, and these crimes are a sampling of the type of serious crimes the Legislature contemplated should act as automatic disqualifiers." Markakis, supra, Initial Decision at 10. Among the possible New Jersey crimes involving force or threat of force, the only potentially equivalent crimes to the facts of this case fall within N.J.S.A. 2C:12-1, which addresses both simple and aggravated assault.

SIMPLE ASSAULT

Simple assault is a disorderly persons offense. Id. § 2C:12-1(a). A person is guilty of the offense if he: (1) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (2) negligently causes bodily injury to another with a deadly weapon, or 3) attempts by physical menace to put another in fear of imminent serious bodily injury." As noted in the model jury charge under the New Jersey Standard Criminal Jury Instructions for N.J.S.A. 2C:12-1(a)3, the required mens rea is that the accused act purposely. "A defendant acts purposely with respect to the nature of (his/her) conduct or a result thereof if it is (his/her) conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to attendant circumstances if (he/she) is aware of the existence of such circumstances or (he/she) believes or hopes that they exist. NJ CR JI 2C:12-1a(3). Since the required mens rea of "purposeful" is higher than the reckless standard for reckless endangerment in Pennsylvania, the offenses are not substantially similar. Even if they were, simple assault in New Jersey is not a crime, as N.J.S.A. 2C:1-4 (b) states that disorderly persons offenses . . . are not crimes within the meaning of the Constitution of this State," and "Conviction of such offenses shall not give rise to any disability or legal

disadvantage based on conviction of a crime." Thus, disorderly persons are outside the scope of N.J.S.A. 18A-6- 7.1.

AGGRAVATED ASSAULT

Aggravated assault includes a long last of actions differentiated primarily by whether actual injury occurred, and the identity of the victim As no injury occurred, and the victims were not teachers, police, firefighters, or other members of specialized named groups under the statute, only those segments of the aggravated assault statute involving attempts on citizens are relevant. Respondent contends that N.J.S.A. 2C:12-1(b(4) applies here, because the action involved the use of force or the threat of force upon teenagers. N.J.S.A. 2C:12-1(b(4) states that a person is guilty of aggravated assault if he ". . . 4) Knowingly under circumstances manifesting extreme indifference to the value of human life points a firearm, as defined in section 2C:39-1f, at or in the direction of another, whether or not the actor believes it to be loaded . . . " Further, "[A] person can commit an aggravated assault within the meaning of N.J.S.A. 2C:12-1(b)(4) only if he or she is aware that it is practically certain that his or her conduct will result in the pointing of a firearm at or in the direction of another person." State v. Clausell, 121 N.J. 298, 316 (1990). Or, as the recommended model jury charge explains, in order to find someone guilty under that statute, the State move prove, "First: that the defendant knowingly pointed a firearm at or in the direction of another whether or not the defendant believed it to be loaded." Also, in New Jersey, "[r]eckless conduct 'manifesting extreme indifference to the value of human life,' an element of second [and fourth] degree aggravated assault, is significantly more serious than ordinary reckless conduct." State v. Farrell, 250 N.J. Super. 386, 390 (App. Div. 1991) (citations omitted). The New Jersey Appellate Division stated in Farrell that the "trial judge correctly instructed the jury that 'extreme indifference to human life' was 'conduct that indicates that life does not matter . . . a pronounced or unusual or violent failure to accord any importance or value to human life." Id. at 390-91 (citing Model Jury Charges (Title 2C), N.J.S.A. 2C:12-1). As the mens rea for this type of aggravated assault is "knowing," while the Pennsylvania conviction requires only reckless behavior, this charge is not substantially similar. Therefore, reckless endangerment is not a substantially similar crime falling within the disqualifying ambit of N.J.S.A. 18A:6-71.

Possession of an instrument of crime with intent to employ it criminally

Respondent contends that petitioner's conviction on possession of an instrument of crime as defined at 18 Pa.C.S. § 907(a) is substantially similar to New Jersey' s crime of possession of a weapon for an unlawful purpose. N.J.S.A. 2C:39-4(a)(1).

In Pennsylvania, "[a] person commits a misdemeanor of the first degree if he possesses any instrument of crime with intent to employ it criminally." 18 Pa.C.S. § 907(a). The defendant's criminal purpose "provides the touchstone of liability" for possessing an instrument of crime and this criminal intent may be inferred from the circumstances surrounding possession. Commonwealth v. Andrews, 564 Pa. 321, 337 (2001) (citing Model Penal Code § 5.06 comment). The elements necessary to support petitioner's conviction are that he "(1) possessed any instrument of crime and (2) with intent to employ it criminally." Commonwealth v. Robertson, 874 A.2d 1200, 1208 (Pa. Super. 2005 In general, the cases determine intent based on what the possessor did with the weapon. For example, the fact that a teenager carried an unsheathed hunting knife in his belt with the handle exposed while walking on a public street during daylight hours without making any particular gestures was not enough to establish criminal intent. Commonwealth v. Moore, 259 Pa. Super. 560 (1978). However, stabbing someone with any kind of knife will support criminal intent. Commonwealth v. Moore, 476 Pa. 19, 381 A.2d 845 (1978). Commonwealth v. Hardick, 475 Pa. 475, 380 A.2d 1235 (1977). Here, the petitioner possessed an instrument of crime, the .22mm rifle, and the intent was shown by the conviction for reckless endangerment, i.e. recklessly engaging in conduct which placed or may have placed another person in danger.

New Jersey does not have a statute with language precisely parallel to that of Section 907(a) of the Pennsylvania law. (See Resp. Br. 9/11/2012 at 14-15.) Instead, respondent suggests that the Pennsylvania crime is analogous to the New Jersey crime of possession of a weapon for an unlawful purpose, N.J.S.A. 2C:39-4, which states,

> a. Firearms. (1) Any person who has in his possession any firearm with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the second degree. . . .

As the New Jersey Supreme Court has explained, "There are four elements to that offense: (1) the object possessed was a firearm; (2) defendant possessed it; (3) the purpose of the possession was to use the firearm against another's property or person; and (4) defendant intended to use it in a manner that was unlawful." State v. Banko, 182 N.J. 44 (2003) State v. Brims, 168 N.J. 297, 303 (2001) (quoting State v. Diaz, 144 N.J. 628, 635 (1996)). "A person acts purposely with respect to attendant circumstances if he [or she] . . . believes or hopes that they exist." Brims at 304.

Looking at the level of mens rea required, the crimes are not identical, because the world "purposely" appears in the New Jersey statute but not in the Pennsylvania version. Further, the fact that the intended action was reckless, and not knowing or purposeful indicates that the Pennsylvania statute requires a lesser mens rea. One requires "intent to employ criminally", while the other requires intent to use in a manner that is unlawful." While the fourth prong—intended for use in the manner unlawful—is very similar to Pennsylvania's "intent to employ criminally," the third prong raises New Jersey's statute to a higher level.

The New Jersey statute requires that the possession occurred with a purpose to commit some version of a crime against someone's property or person. State v. Banko offers a window on how the purposeful element is construed. The case concerned an incident involving four charges—possession of a weapon (a BB gun) with criminal intent, aggravated assault, aggravated sexual assault, and kidnapping. During deliberations, the jury sought clarifications on what it was being asked. One conveyed the jury's understanding that Banko must be found guilty of either aggravated sexual assault or kidnapping if he was to be found guilty on the charge of possession of a weapon for an unlawful purpose. The trial court indicated that each charge was separate. The court instructed the jury that it was obligated to consider each offense separately and to render a verdict on each count. In response to another question, the trial judge instructed, "The State must prove beyond a reasonable doubt . . . that the defendant had a purpose to use the firearm in a manner that is prohibited by law. . . . This element provides that you find that the State has proven beyond a reasonable

doubt that the defendant possessed the firearm with the conscious objective, design or specific intent to use it against a person in an unlawful manner as charged in the indictment and not for some other purpose. In this case the State contends that the defendant's unlawful purpose in possessing the firearm was to unlawfully confine (the victim) with the purpose to commit the crime of aggravated sexual assault upon (her)." (Id. at 51.) The Supreme Court affirmed the verdict on possession of a weapon with criminal intent, concluding that the jury could have found that the purpose of the weapon was to unlawfully confine (the victim) and assault her sexually, even though the jury chose not to convict Banko of the more serious remaining charges.

The Pennsylvania crime involved was only reckless. It was not necessary for the Commonwealth to prove that petitioner possessed the firearm with a purpose of using the rifle against R.B. and E.Q or their property. The only intent established was that petitioner recklessly engaged in conduct which placed or may have placed R.B. and E.Q. in danger. There is no basis in New Jersey law for such reckless conduct alone to constitute the specific intent needed to prove that the purpose of the possession.

Petitioner's motion for summary decision that his Pennsylvania convictions for reckless endangerment and possessing an instrument of crime are not substantially equivalent to New Jersey disqualifying offenses is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Patricia M Kerins

May 23, 2014

DATE

PATRICIA M. KERINS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/lam

345-14

OAL DKT. NO. EDU 8063-14
AGENCY DKT. NO. 162-6/14

AAA SCHOOL LLC / EL ELDESOUKY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

The petitioner in this controversy moved for emergent relief after learning that it was not awarded the transportation contracts for which it bid. Upon review of the record, including a sound recording of the hearing in the Office of Administrative Law (OAL), and the recommended Order issued by the Administrative Law Judge (ALJ),[1] the Commissioner concludes that petitioner's application must be denied.

Pursuant to *N.J.A.C.* 6A:3-7.4, petitioners' application for emergent relief must conform to *N.J.A.C.* 6A:3-1.6(b) and meet the substantive standards – derived from *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) – articulated therein. Petitioner must show that:

1. it will suffer irreparable harm if the requested relief is not granted;
2. the legal right underlying petitioner's claim is settled;
3. the petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

(Emphasis added.)

[1] Exceptions to OAL orders regarding applications for emergent relief are not permitted by the relevant regulations. Consequently, none were considered by the Commissioner in adjudicating the instant matter.

Since the standards are conjunctive, petitioners must prevail on all four.

At the outset, petitioner has failed to show that the harm it suffered from respondent's rejection of its bids is irreparable. Petitioner's stated harm is loss of business and revenue. It is well settled that such pecuniary harm is not irreparable. *See, e.g. Virginia Petroleum Jobbers* v. *FPC*, 259 *F.*2d 921, 925 (1958) (the key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of [emergent relief], are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm).

As regards the second and third standards for emergent relief, the legal rights which petitioner contends underlie its claim are 1) the prohibition in *N.J.A.C.* 6A:27-9.3 against favoritism or discrimination in the creation of specifications and 2) the directives in *N.J.A.C.* 6A: 27-9.10 (a) and (e) that contracts must be awarded to the lowest bidder, and that bidders who are rejected as not responsible shall be given hearings on the facts. Petitioner claims that it was the low bidder on four routes, but was not awarded same because of discriminatory specifications, *i.e.,* specifications which required 16-passenger yellow school buses. Additionally, petitioner alleges that when he was not awarded the four contracts for which he was the lowest bidder, he should have been afforded a public hearing.

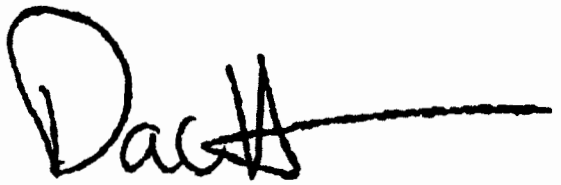
As to the former claim, the record contains evidence that it was the local districts which identified, through their input on information sheets, the type of vehicles that they needed for their transportation routes. (*See* Certification of Janette Silva, Para. 4, and Exhibit A to Respondent's Brief opposing Application for Emergent Relief) The specifications were formulated based upon that data, and decisions by public entities, with respect to the necessity of particular specifications, are entitled to a presumption of correctness unless these entities have acted arbitrarily, unreasonably or capriciously, *Palamar Construction, Inc. v. Pennsauken Tp.,* 196 *N.J. Super.* 241, 250 (App. Div.

1983). While petitioner alleged at the OAL hearing that unidentified district personnel told him that respondent selected the buses, the record does not support that contention. Nor is there support in the record for the allegation that the specifications were drawn up for discriminatory reasons.

Regarding the allegation that petitioner was entitled to a public hearing, it is not clear that *N.J.A.C.* 6A:27-9.10(e) pertains to entities whose bids have been deemed unresponsive after a bid opening. Moreover, since petitioner has conceded that it does not own qualifying 16-passenger buses, the Commissioner concurs that its bid was unresponsive. In sum, petitioner cannot establish that – under either of the legal authorities it has invoked – it can prevail when the invoked law is applied to the facts of this case.

Finally, since a decision in petitioner's favor would result in the provision of vans to districts which maintain that they need 16-passenger yellow buses, the Commissioner cannot conclude that a balancing of the equities would favor petitioner. Petitioner's motion for emergent relief is consequently denied.[2] [3]

IT IS SO ORDERED.[4]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/21/14

Date of Mailing: 8/22/14

[2] Petitioner also seeks a rebid of several transportation routes that were added or modified in a June 13, 2013 specification revision which was emailed to all potential bidders. Petitioner maintains that it never received the specification revision. However, respondent contends that it sent the revision to the email address on file for petitioner, and petitioner conceded at the OAL hearing both that said email address was formerly his main email address and also that said address is still extant, even though he appears to use it less. Thus, petitioner's demand for a rebid of the revised specifications, based upon his contention that the revision was not sent to him, is denied for purposes of this motion.

[3] Respondent's request for attorney fees is denied, as the Commissioner has no authority to award same.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36, *N.J.S.A.* 18A:6-9.1.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 08063-14
AGENCY DKT. NO. 162-6/14

AAA SCHOOL LLC / EL ELDESOUKY,
Petitioner,
v.
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION,
Respondent.

El Eldesouky, petitioner, pro se

Erin M. Callahan, Esq., for respondent (Adams, Gutierrez & Lattiboudere, LLC, attorneys)

BEFORE **JOANN LASALA CANDIDO,** ALJ:

Petitioner, the owner of a bus company, AAA School, brings this action seeking emergency relief on June 26, 2014 wherein the Commissioner of Education transmitted the matter to the Office of Administrative Law on June 27, 2014. On July 7, 2014, oral argument was presented before the undersigned. Petitioner challenges the decision of respondent, Passaic County Educational Services (PCESC), an educational services commission that provides coordinated transportation services to school districts, to not

accept his bids on four routes that he bid the lowest. Petitioner alleges that his company has suffered irreparable harm by not being approved and that he did not receive a public hearing after being denied the four routes that he was the lowest bidder for in violation of N.J.A.C. 6A:27-9.10, awarding contracts. He further contends in his request for emergent relief that he was not informed of added bus routes in violation of N.J.A.C. 6A:27-9.3 that outlines bid specifications.

PCESC sends a Coordinated Student Transportation Information Sheet to each district to be completed for each student in need of transportation and the request for a sixteen passenger bus or a seven passenger bus. If the district does not complete this section, a sixteen passenger bus will be provided. Bids were opened to the bus companies by respondent via emails on file scheduled to be received by June 19, 2014.

On June 11, 2014, petitioner submitted a bid specification and challenged respondent's sixteen passenger bus routes, requesting these routes to be modified to permit a seven passenger minivan. Petitioner does not own sixteen passenger buses. He owns seven passenger minivans. Although he was the lowest bidder on four of the school routes, those routes required a sixteen passenger bus, which he did not own.

Although Judge Barry Moscowitz decided this same issue on emergent relief on June 18, 2014, denying petitioner's request and finding that PCESC followed the applicable bidding requirements, I will nonetheless address the requirements needed to obtain emergent relief.

The standards to be met for emergent relief as set forth in NJAC 6A:3-1.6(b) and Crowe v. DeGioia, 90 N.J. 126 (1982), are:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying the petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

Petitioner must meet all four standards. In this matter, upon a consideration of the testimonial and documentary evidence presented at the hearing, I **FIND** that petitioner has failed to meet these standards and is not entitled to the emergent relief sought.

Based upon the testimony presented and documentary evidence provided, petitioner has failed to show irreparable harm when he failed to secure a bid for the lowest bidder on sixteen passenger buses that he did not own, nor did he show that he suffered a substantial harm by not being awarded the bids, assuming he could provide the required buses. The same holds true to his argument that he has a different email address and therefore did not receive notice of any revised or additional routes.

Petitioner has not shown legal right underlying his claim as settled. Petitioner argues that the district is not following State rules when requesting sixteen passenger buses for two or three students, thereby discriminating against bus owners such as him who own seven passenger minivans that can transport the two or three students. Petitioner cites no legal authority to show a legal right underlying the petitioner's claim is settled. He does not cite any legal authority that shows the bid specifications are unlawful or discriminatory.

Because petitioner is unable to prevail on the first two standards and all four standards must be met, the remaining two standards need not be addressed. This matter has also been decided on the same issues raised by emergent relief before Judge Barry Moscowitz to which I concur with his decision stated on the record on June 18, 2014 and further adopt hereto.

It is **ORDERED** that petitioner's application for emergency relief is **DENIED** for the reasons stated above.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

This order may be reviewed by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to N.J.A.C. 1:1-14.10 or at the end of the contested case, pursuant to N.J.A.C. 1:1-18.6.

July 7, 2014
DATE

JOANN LASALA CANDIDO, ALJ

/rr

347-14

AAA SCHOOL LLC / EL ELDESOUKY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner herein – AAA School, LLC (AAA), a company that provides transportation services to public schools – filed a petition of appeal, together with an application for emergent relief under *N.J.S.A.* 18A:18A-15 (Public School Contracts Law), seeking an immediate change of respondent's June 2014 bid specifications for various school bus routes, which petitioner alleged violated *N.J.A.C.* 6A:27-9.3 by discriminating against his company. Petitioner contended that the requirement in bid specifications that vendors provide 16-passenger yellow school buses showed prejudice against his company, which neither owns nor uses same, and sought a change in the specifications so that AAA could bid on the contract. Respondent argued that AAA failed to meet any of the standards for emergent relief. Additionally, respondent contended that *N.J.S.A.* 18A:18A-15 does not provide AAA with a cause of action against it on an emergency basis because no contract had been awarded under the specifications AAA challenged, and *N.J.S.A.* 18A:18A-15 simply serves to preserve a bid challenge and put the contracting entity on notice that an award may in fact be challenged.

The ALJ found, *inter alia,* that: in *Entech Corporation v. City of Newark,* 351 *N.J. Super.* 440 (Law Div. 2002), the court interpreted the meaning of *N.J.S.A.* 40A:11-13, which is the analog to *N.J.S.A.* 18A:18A-15 in the Local Public Contracts Law; in *Entech*, the court determined that the express purpose of *N.J.S.A.* 40A:11-13 is to require challenges to bid specifications to be presented at least three days before the opening of bids so the contracting authorities would have the opportunity to re-evaluate the specifications and either quickly respond to the challenge before the opening, postpone the bid opening to address the challenge and perhaps change the specifications, or proceed with the opening without addressing the challenge, but with knowledge that the award may be subject to a post-opening challenge; based on the foregoing – although the ultimate relief AAA sought could not be awarded on the return date of the application for emergency relief – the purpose of *N.J.S.A.* 18A:18A-15 had already been effectuated as AAA had clearly put the respondent on notice that any bid award would be subject to a post-opening challenge; additionally, petitioner failed to meet any of the standards for emergent relief contained in *Crowe v, DeGioia,* 90 *N.J.* 126 (1982). Accordingly, the ALJ concluded that since the application for emergent relief resolved all of the issues herein, the petition should be dismissed.

Upon comprehensive review, the Commissioner adopted the findings and conclusions of the ALJ, and determined that the only remedy available to petitioner in the instant matter is the right to challenge respondent's award of contracts based on the June 14 bid specifications; petitioner availed himself of that remedy subsequent to the pleadings herein, and accordingly any allegations concerning the legality of the bid specifications or contract awards will be addressed in that litigation. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

August 25, 2014

OAL DKT. NO. EDU 7495-14
AGENCY DKT. NO. 150-6/14

AAA SCHOOL LLC / EL ELDESOUKY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION,	:	
RESPONDENT.	:	

Before the Commissioner is a challenge to the specifications published by respondent in connection with its June 2014 invitation to school transportation vendors to bid on contracts for the conveyance of students in multiple municipalities within respondent's county. After respondent's invitation was published, but before the bid opening took place, petitioner appealed to the Commissioner, alleging that respondent's specifications violated *N.J.A.C.* 6A:27-9.3 by discriminating against his company. More specifically, petitioner contended that the requirement in the bid specifications – that vendors provide 16-passenger, yellow school buses – discriminated against his company, which neither owns nor uses same.[1] He demanded that the specifications be immediately changed so that he could submit a bid.

Respondent did not change the specifications. The bids were opened on June 19, 2014, and the contracts were awarded to other competing vendors. On June 26, 2014, petitioner challenged four of the contract awards – by way of a petition and application for

[1] Petitioner also maintained that only one or two students were transported on several of the routes calling for 16-passenger buses – constituting a waste of taxpayer money. However, he offered no credible evidence to support this assertion.

emergent relief bearing Agency Docket Number 162-6/14 and OAL Docket Number EDU 8063-14. That challenge is proceeding independently of the instant matter.

Since the present case was initiated prior to the date of the bid opening, respondent maintains that it is governed by *N.J.S.A.* 18A:18A-15, which states in its last paragraph:

> Any prospective bidder who wishes to challenge a bid specification shall file such challenges in writing with the purchasing agent no less than three business days prior to the opening of the bids.

Respondent urges that the foregoing provision does not bestow upon a challenging vendor the opportunity to obtain an order requiring changes in the specifications prior to the opening of the bids. Rather, it bestows upon the vendor the obligation to notify the contracting agency that it finds fault with the specifications, in order that the agency might reevaluate the specifications, delay the bid opening to make changes, or affirmatively proceed with the bid opening, knowing that the awards may be challenged.

Respondent further argues that the meaning of the last sentence of *N.J.S.A.* 18A:18A-15: "Challenges filed after that time shall be considered void and having no impact on the board of education or the award of a contract," is that vendors are barred from challenging awards on the basis of the specifications unless they have filed challenges to the specifications at least three business days before the opening of the bids. In sum, respondent contends that the sole remedy which *N.J.S.A.* 18A:18A-15 bestows upon petitioner as a result of the instant pre-bid opening challenge to the specifications is the right to challenge the contract awards after the bids are opened. This remedy, argues respondent, has been effectuated by petitioner's filing of the above-referenced June 26, 2014 petition challenging four of

respondent's contract awards and also complaining of respondent's alleged failure to provide him with a June 13, 2014 bid revision.

In the Office of Administrative Law's (OAL) Initial Decision in the instant matter – dated July 9, 2014 – the Administrative Law Judge (ALJ) agreed with respondent's legal analysis:

> [T]he Commission relied on *Entech Corporation v. City of Newark*, 351 *N.J. Super.* 440 (Law Div. 2002). In that case, the court interpreted the meaning of *N.J.S.A.* 40A:11-13, which is the analog to *N.J.S.A.* 18A:18A-15, in the Local Public Contracts Law. In short, the Commission argued that *N.J.S.A.* 18A:18A-15 simply serves to preserve a bid challenge and put the contracting entity on notice that an award may in fact be challenged.
>
> As the court wrote in *Entech*, the express purpose of *N.J.S.A.* 40A:11-13 is to require challenges to bid specifications to be presented to contract authorities at least three days before the opening of bids so the contracting authorities have the opportunity to re-evaluate the specifications and either quickly respond to the challenge before the opening, postpone the bid opening to address the challenge and perhaps change the specifications, or proceed with the opening without addressing the challenge but with the knowledge that the award may be subject to a post-opening challenge. *Entech, supra*, 351 *N.J. Super.* at 459-60.
>
> As the court also wrote, this provision also gives the contracting or public entity the assurance that the specifications cannot be attacked later if no challenge to the specifications is made within the statutory time frame. *Id.* at 460.
>
> Indeed, the court wrote that this interpretation is supported by the legislature's explicit statement that any challenges filed after the three-day period prior to bid opening are void and will not affect the award of the contract. *Ibid.*
>
> Given this discussion of the law, I CONCLUDED that . . . the purpose of *N.J.S.A.* 18A:18A-15 had already been effectuated as AAA had clearly put the Commission on notice that any award would be subject to a post-opening challenge.
>
> (Initial Decision at 5-6)

After consideration of the record, Initial Decision, exceptions thereto and replies to the exceptions, the Commissioner adopts the ALJ's findings and conclusions. The text of the last paragraph of *N.J.S.A.* 18A:18A-15 is the same as the language which appears in the last

paragraph of *N.J.S.A.* 40A:11-13, a "Local Public Contracts Law" provision which governs specifications utilized in competitive bid offerings by New Jersey municipalities and counties. There is no basis to believe that the legislative intentions behind the two provisions are not identical. Further, as was articulated in *Entech*, the last paragraph of *N.J.S.A.* 40A:11-13:

> is consistent with the judicial holding that unsuccessful bidders who bid on a contract without first objecting to the specifications lack standing to "challenge the award of the contract to a rival bidder or to attack allegedly illegal specifications." *Waszen v. Atlantic City*, 1 *N.J.* 272, 276 (1949). "The rationale of such a holding is that one cannot endeavor to take advantage of a contract to be awarded under illegal specifications and then, when unsuccessful, seek to have the contract set aside." *Id.* However, where an action challenging bid specifications is made prior to the bid submission date, that party has standing to challenge the specifications. *Sevell's Auto Body Co., Inc. v. N.J. Highway Authority*, 306 *N.J. Super.* 357, 369-70 (App. Div. 1997).
>
> *Entech, supra,* 351 *N.J. Super.* at 459

Accordingly, the Commissioner concludes that the only remedy available to petitioner regarding his pre-bid-opening litigation is the right to challenge respondent's contract awards. Subsequent to the institution of the pleadings in this case, petitioner did, in fact, avail himself of that remedy – via the above referenced petition filed on June 26, 2014 and assigned Agency Dkt. No. 162-6/14. Any allegations concerning the legality of the specifications or contract awards will be addressed in that litigation. The instant petition is therefore dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/25/14
Date of Mailing: 8/27/14

[2] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07495-14
AGENCY DKT. NO. 150-6/14

AAA SCHOOL LLC / EL ELDESOUKY,
Petitioner,
v.
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION,
Respondent.

El Eldesouky, petitioner, pro se

Erin M. Callahan, Esq., for respondent (Adams, Gutierrez & Lattiboudere, attorneys)

Record Closed: June 24, 2014 Decided: July 9, 2014

BEFORE **BARRY E. MOSCOWITZ**, ALJ:

STATEMENT OF THE CASE

On June 16, 2014, petitioner filed a petition of appeal together with an application for emergency relief under N.J.S.A. 18A:18A-15 seeking the immediate change of bid specifications. The relief sought in both the petition and the application was the same. Should the application have been denied and case dismissed? Yes. N.J.S.A. 18A:18A-

15 simply serves to preserve a bid challenge and put the contracting entity on notice that an award may in fact be challenged.

PROCEDURAL HISTORY

On June 16, 2014, AAA School, LLC (AAA) filed a petition of appeal with the Department of Education, Bureau of Controversies and Disputes, contesting bid specifications.

Included with its petition was an application for emergency relief.

On June 16, 2014, the Bureau transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17.

Jurisdiction is conferred under N.J.S.A. 18A:6-9.

On June 24, 2014, I denied the application for emergency relief and entered an order dismissing the petition of appeal.

On June 25, 2014, the Bureau remanded the case for an Initial Decision.

FINDINGS OF FACT

Based on the documents submitted in support of and in opposition to the application for emergency relief, I **FOUND** the following as **FACT**:

The Commission

Passaic County Educational Services Commission (the Commission) is an educational services commission as defined by N.J.S.A. 18A:6-51.

On April 1, 2014, the Commission began to prepare transportation services for its contracted school districts for the upcoming 2014-2015 school year and sent each of them a Coordinated Student Transportation Information sheet to complete and return.

Significantly, the final line item on the information sheet asked each school district for the type of vehicle it required, i.e., a "yellow school bus" or "minivan," and that it would provide a "16 passenger yellow school bus" if this line item was left blank.

The Commission received the completed information sheets in May 2014, and based on the information provided in them, drafted the bid specifications.

The Specifications

On June 6, 2014, the Commission submitted the bid specifications to the Passaic County Executive County Superintendent for his approval.

On June 9, 2014, the county superintendent approved the bid specifications, and the Commission scheduled the bid opening for June 19, 2014.

The Challenge

On June 16, 2014, AAA filed a petition of appeal with the Department of Education, Bureau of Controversies and Disputes, contesting the bid specifications. AAA asserted that the bid specifications were against the law because they asked for every route to be serviced by a school bus and that the bid specifications defied logic because the routes only had one or two students on them. More tellingly, AAA complained that he could not bid on the contract because his company did not own any school buses:

> I found that the specifications and route descriptions in [the bid specifications] don't follow the [S]tate laws. [T]hey design the specification[s] in [] favor[] of big yellow bus companies. [T]hey ask for every route to be a yellow bus [when] a lot of them have only one or two students on the route. Asking 16 passenger yellow school buses for rout[e]s hav[ing] only one or two students is not logic[al and] doesn't follow the common standards or the [S]tate law.
>
> By th[ese] specifications, [I] simply [] can't enter this bid because what I have are minivans 7 passengers and not yellow. [M]y company vehicles are registered and inspected by the state to be used for school students so I wonder how 7 passengers is not suitable for carrying one or two students.
>
> [Petition of Appeal.]

Ultimately, AAA sought a change in the specifications so he could bid on the contract.

On the return date, AAA provided no proof that the specifications asked for every route to be serviced by a school bus or that the routes only had one or two students on them.[1]

CONCLUSIONS OF LAW

I.

Where irreparable harm will result without an expedited decision prohibiting some action in a contested case, emergency relief pending a final decision on the whole contested case may be ordered upon application of a party. N.J.A.C. 1:1-12.6. The standards to be met for granting such relief are contained in Crowe v. DeGioia, 90 N.J. 126 (1982). They have since been codified for cases concerning an action by a district board of education or any other party subject to the jurisdiction of the Commissioner of Education:

[1] Even if the routes only had one or two students on them, AAA provided no proof that the routes would continue to have only one or two students on them throughout the remainder of the school year.

> 1 The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will not suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 6A:3-1.6(b).]

In this case, the Commission argued that AAA failed to meet any of these standards.

A.

Before addressing the merits of its argument, the Commission argued that neither the Public School Contracts Law, N.J.S.A. 18A:18A-1 et seq., nor any corresponding transportation regulation provided AAA with a cause of action against it on an emergency basis because no contract had yet been awarded under the specifications AAA challenged.

In support of its argument, the Commission relied on Entech Corporation v. City of Newark, 351 N.J. Super. 440 (Law Div. 2002). In that case, the court interpreted the meaning of N.J.S.A. 40A:11-13, which is the analog to N.J.S.A. 18A:18A-15, in the Local Public Contracts Law. In short, the Commission argued that N.J.S.A. 18A:18A-15 simply serves to preserve a bid challenge and put the contracting entity on notice that an award may in fact be challenged.

As the court wrote in Entech, the express purpose of N.J.S.A. 40A:11-13 is to require challenges to bid specifications to be presented to contract authorities at least three days before the opening of bids so the contracting authorities have the opportunity to re-evaluate the specifications so that the entity then has the opportunity to re-

evaluate the specifications and either quickly respond to the challenge before the opening, postpone the bid opening to address the challenge and perhaps change the specifications, or proceed with the opening without addressing the challenge but with the knowledge that the award may be subject to a post-opening challenge. Entech, supra, 351 N.J. Super. at 459-60.

As the court also wrote, this provision also gives the contracting or public entity the assurance that the specifications cannot be attacked later if no challenge to the specifications is made within the statutory time frame. Id. at 460.

Indeed, the court wrote that this interpretation is supported by the legislature's explicit statement that any challenges filed after the three-day period prior to bid opening are void and will not affect the award of the contract. Ibid.

Given this discussion of the law, I **CONCLUDED** that the ultimate relief AAA sought could not be awarded on the return date of the application for emergency relief but noted that the purpose of N.J.S.A. 18A:18A-15 had already been effectuated as AAA had clearly put the Commission on notice that any award would be subject to a post-opening challenge.

B.

Returning to the standards set forth in N.J.A.C. 6A:3-1.6(b) for emergency relief, the Commission argued that AAA had not established that it would suffer irreparable harm if the requested relief was not granted because the only harm AAA would have suffered would have been the failure to secure business. In support of that argument, the Commission relied on Stroh Association v. Board of Education Township of Hillsbourough, 95 N.J.A.R. (EDU) 235 (May 25, 1995). In that case, the administrative law judge wrote that the petitioner could not be said to have suffered irreparable harm where it simply lost out on an attempt to secure a contract—"a risk that it presumably takes as part of the routine functioning of its business." Id. at 237.

Second, the Commission argued that the legal right underlying AAA's claim was not settled and that AAA did not have a likelihood of prevailing on the merits of the underlying claim because the Commission's bid specifications were not discriminatory or otherwise illegal. More pointedly, the Commission argued that it is subject to the requirements contained in the Public Schools Contracts Law, that it had followed and met those requirements, and that AAA had not provided any reason in fact or in law to prove otherwise.[2]

Finally, the Commission argued that when the equities and interests of the parties are balanced, AAA would not suffer greater harm than the Commission would have suffered if the requested relief had not been granted.

In short, the Commission returned to its argument that the only harm AAA would have suffered is the failure to secure business while the Commission would have faced the disruption of its transportation services for its contracting school districts.

Given this discussion of the law, I **CONCLUDED** that AAA had not met any of the standards set forth in N.J.A.C. 6A:3-1.6(b) for emergency relief. As the Commission rightly argued, AAA had not established that it would suffer irreparable harm if the requested relief was not granted because the only harm AAA would have suffered is the failure to secure business. Toward this end, I noted that Stroh was right on point.

In addition, the Commission rightly argued that AAA did not have a likelihood of prevailing on the merits of the underlying claim because it had followed the requirements of the Public Schools Contact Law and that AAA had not provided any reason in fact or in law to prove otherwise.

Finally, the Commission rightly argued that when the equities and interests of the parties are balanced, AAA would not suffer greater harm than the Commission would have suffered if the requested relief had not been granted because the only harm AAA

[2] Indeed, AAA cited no authority for its implied argument that school districts cannot use school buses for only one or two students.

would have suffered is the failure to secure business while the Commission would have faced disruption of its transportation services for its contracting school districts.

ORDER

Since the application for emergency relief resolved all of the issues in the petition of appeal, I **ORDER** that the petition of appeal be **DISMISSED**.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

7/9/14
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: 7-9-14

Date Mailed to Parties: JUL 10 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

349-14

OAL DKT. NO. EDU 9869-14
AGENCY DKT. NO. 205-8/14

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF EARLY CHILDHOOD EDUCATION,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT,	:	
AND	:	
ACELERO LEARNING MONMOUTH / MIDDLESEX COUNTY, INC.,	:	
RESPONDENT-INTERVENOR.	:	

The petitioner in this controversy filed a petition of appeal and moved for emergent relief on August 5, 2014, after receiving respondent's June 19, 2014 decision reversing petitioner's non-renewal of respondent-intervenor's preschool program contract. Upon review of the record, including a sound recording of the hearing in the Office of Administrative Law (OAL), and the recommended Order issued by the Administrative Law Judge (ALJ),[1] the Commissioner concludes that petitioner's application must be denied.

Pursuant to *N.J.A.C.* 6A:3-7.4, petitioners' application for emergent relief must conform to *N.J.A.C.* 6A:3-1.6(b) and meet the substantive standards – derived from *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) – articulated therein. Petitioner must show that:

1. it will suffer irreparable harm if the requested relief is not granted;
2. the legal right underlying petitioner's claim is settled;

[1] Exceptions to OAL orders regarding applications for emergent relief are not permitted by the relevant regulations. Consequently, none were considered by the Commissioner in adjudicating the instant matter.

3. the petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

(Emphasis added.)

Since the standards are conjunctive, petitioners must prevail on all four.

The Commissioner agrees with the ALJ that petitioner has not demonstrated a likelihood of prevailing on the merits; petitioner's opinion certainly differs from that of the respondent concerning respondent-intervenor's performance as a preschool provider, but with so many facts in dispute, it cannot be said that petitioner will likely prevail.

Furthermore, to permit petitioner to terminate its relationship with respondent-interventor at this late date would leave many preschool students without placements for September 2. Accordingly, the balancing of the equities is not in favor of petitioner.

Since a petitioner must prevail on all four criteria in order to establish entitlement to emergent relief, it is unnecessary to discuss the remaining criteria. The motion for emergent relief is denied. This matter shall continue at the Office of Administrative Law for such proceedings as the ALJ and the parties deem necessary to bring it to conclusion.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/26/14
Date of Mailing: 8/26/14

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36, *N.J.S.A.* 18A:6-9.1.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF
OAL DKT. NO. EDU 09869-14
AGENCY DKT. NO. 205-8/14

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,

Petitioners,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF EARLY CHILDHOOD EDUCATION,

Respondents.

Anthony B. Vignuolo, Esq., representing petitioner, Board of Education of the City of New Brunswick (Hendricks & Hendricks, attorneys)

Angela L. Velez, Deputy Attorney General representing respondent, New Jersey Department of Education, Division of Early Childhood Education (John J. Hoffman, Acting Attorney General of New Jersey)

Brenda C. Liss, Esq., representing intervenor, Acelero Learning Monmouth/Middlesex County, Inc. (Riker Danzig Scherer Hyland Perretti, LLP, attorneys)

Record Closed: August 15, 2014 Decided: August 15, 2014

BEFORE **IMRE KARASZEGI, JR.**, ALJ:

As to background, Petitioner, Board of Education of the City of New Brunswick's most recent submission of its required Preschool Program Plan states that it provides preschool to 1440 children, with 240 children on a waiting list. Of those preschool children, 120 are enrolled with Acelero Learning Monmouth/Middlesex County (ALMMC).

On April 22, 2014, petitioner adopted a resolution for non-renewal of its preschool contract with ALMMC and on April 24, 2014, New Brunswick sent a letter to ALMMC notifying it of the non-renewal of the contract and listing New Brunswick's reasons for non-renewal.

On May 1, 2014, ALMMC appealed New Brunswick's non-renewal of its preschool program contract.

On June 19, 2014, respondent issued a decision reversing petitioner's decision.

On June 30, 2014, New Brunswick sent a letter to respondent addressing the New Jersey Department of Education's decision.

On July 29, 2014, New Brunswick sent a letter to parents/guardians in the school district indicating that ALMMC's facilities would no longer be available.

Petitioner, Board of Education of the City of New Brunswick, brings this action seeking emergent relief under N.J.A.C. 6A:3-1 et seq. regarding the New Jersey Department of Education's decision reversing petitioner's non-renewal of its Preschool Education Program contract with Acelero Learning Monmouth/Middlesex County, Inc. (ALMMC). On August 5, 2014, the Acting Commissioner of Education received Petitioner's application for emergent relief. On August 7, 2014, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) where it was filed as a contested case. On August 15, 2014, oral argument was presented in the Newark offices of the Office of Administrative Law.

The standards for the granting of emergency relief are set forth in N.J.A.C. 6A:3-1.6(b). It may be granted if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Petitioner, New Brunswick argues that they have certain rights and responsibilities towards oversight of programs which they are exercising with regards to ALMMC. The issue of irreparable harm, petitioner argues, would be evident in a poor program manifesting itself in the educational detriment to the child. Petitioner notes in its brief; "Respondent's reversal of petitioner's April 22, 2014, non-renewal of Acelero must be stricken. To do otherwise would be to subject the petitioner to an ongoing association with a Preschool Education Program Provider having a history of contract non-compliance and substandard practice, thus affecting the quality of Preschool Education offered to the children within Petitioner's District, and ultimately affecting the future academic standing of Petitioner District." After notifying parents as to the decision discontinuing ALMMC services, petitioner notes that 53 children have already been provided in-district school locations for September 2014. The issue as to the actual amount of children on the waiting list, however, is unclear.

Nonetheless, the existing program, with ALMMC participation, provides continued educational opportunities, without disruption, to the families of the New Brunswick school district. Petitioner's arguments as to irreparable harm are unconvincing. While there may be valid programming issues and factual disputes that could be dealt with at a hearing, this hearing is limited to whether the standards for granting emergent relief have been satisfied. In the instant case, after hearing the arguments of counsel and any other documentation submitted, I find that petitioner is not entitled to emergent relief because no proofs have been submitted that would establish irreparable harm as a necessary element to grant emergent relief. In addition, the proofs submitted have failed to establish the necessary elements to grant emergent relief under N.J.A.C. 6A:3-1.6(b). Petitioner's motion for emergent relief is therefore **DENIED**.

This order on application for emergent relief may be adopted, modified or rejected by the Commissioner of the Department of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Date: August 15, 2014

IMRE KARASZEGI, JR., ALJ

id

350-14M

350-14

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Acting Commissioner

August 27, 2014

Kevin Harriman
[redacted]
Westwood, New Jersey 07675

Nicholas Celso, III, Esq.
Schwartz, Simon, Edelstein & Celso
100 South Jefferson Road, Suite 200
Whippany, New Jersey 07981

Re: *In the Matter of the Tenure Hearing of Kevin Harriman, School District of the Borough of Elmwood Park, Bergen County. Agency Dkt. No. 50-3/12.*

Dear Parties,

I have reviewed the materials filed in connection with Kevin Harriman's Motion to Reopen the tenure charges filed against him by the Elmwood Park Board of Education (Board). It is well established that administrative agencies have an inherent authority to reconsider, reopen or revise a prior decision made by the agency. A Motion to Reopen, however, will only be granted when good cause is shown and the motion is made with reasonable diligence. *See, Duvin v. State of New Jersey, Dep't of the Treasury, Public Employees' Retirement System*, 76 *N.J.* 203, 207 (1978).

Upon review and consideration of the parties' submissions, I find that Mr. Harriman has not satisfied the requirements necessary to reopen the tenure charges filed against him by the Board. Despite his assertions to the contrary, Mr. Harriman has not provided any new evidence nor has he alleged the existence of any new information that was not previously argued throughout the litigation of this matter. Moreover, Mr. Harriman's claim that he was not properly guided by his former attorney does not amount to good cause necessitating the reopening of this case, which has already been appealed to – and decided by – the Appellate Division.

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Accordingly, the Motion to Reopen the tenure charges filed against Mr. Harriman by the Elmwood Park Board of Education is hereby DENIED.[1]

Sincerely,

David C. Hespe
Acting Commissioner

c: County Superintendent
State Law Library

DCH/MKD/JKH

Via Regular Mail

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1).

OAL DKT. NO. EDU 9228-14
AGENCY DKT. NO. 102-4/14

RON RODA,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON
NEW JERSEY STATE BOARD OF EXAMINERS,	:	APPLICATION FOR EMERGENT RELIEF
RESPONDENT.	:	

Petitioner challenges the New Jersey State Board of Examiners' (Board of Examiners or respondent) denial of his application for teaching certification. Further, petitioner has asked the Commissioner to review the Board of Examiners' determination on an emergent basis, and to order respondent to issue petitioner the certification he would need to teach special education in New Jersey. Upon review of the record, including a sound recording of the July 28, 2014 hearing in the Office of Administrative Law (OAL), and the recommended order of the Administrative Law Judge (ALJ), the Commissioner concludes that petitioner's application must be denied.

Pursuant to *N.J.A.C.* 6A:3-7.4, petitioners' application for emergent relief must conform to *N.J.A.C.* 6A:3-1.6(b) and meet the substantive standards – derived from *Crowe v. DeGioia*, 90 *N.J.* 126 (1982) – articulated therein. Petitioner must show:

1. That he will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

(Emphasis added.)

Since the standards are conjunctive, petitioners must prevail on all four.

At the outset, petitioner has failed to show that the Board of Examiners' action in denying him teaching certification would create irreparable harm. Petitioner's stated harm is loss of "family, friends, home, job." The record indicates, however, that these losses have already flowed from petitioner's own prior behavior.

More specifically, petitioner was charged with identity theft and forgery in Pennsylvania in 2004 and pled guilty to same in 2005. His license to teach in Pennsylvania was consequently revoked as of November 2006. Petitioner apparently moved to Maryland and taught there until the authorities learned of the revocation of his Pennsylvania license. Based upon the Pennsylvania revocation, Maryland revoked petitioner's licenses in January 2012. In 2013 petitioner applied to respondent for New Jersey certification, but his application was denied on November 6, 2013. Over five months later, April 22, 2014, petitioner instituted the present appeal.

The Commissioner first notes that petitioner's substantial delay in filing his appeal undermines his request for emergent relief. Further, petitioner does not allege a specific and immediate ramification of respondent's rejection of his application for certification. For instance, he does not contend that he has been offered a specific teaching contract which will be foreclosed by respondent's denial of certification. Rather, the harms he describes are general financial and personal damage. However, in the context of emergent relief applications, general financial damage is not considered irreparable. *See, e.g. Virginia Petroleum Jobbers* v. *FPC*, 259 *F.*2d 921, 925 (1958). And the nexus between petitioner's alleged personal harm and respondent's action in declining to issue him a teaching certification is remote.

As regards the second and third standards for emergent relief, petitioner advises that he is unsure which legal rights underlie his claim, but he is confident that his stellar career in education and the testimonials he provided constitute grounds for him to succeed on the merits of his application to the Commissioner. The record does contain a memorandum from petitioner's parole officer stating that petitioner successfully completed his parole, letters from two Maryland colleagues who praised petitioner's teaching skills and character, and complimentary letters from several of petitioner's friends and neighbors from Pennsylvania. However, the foregoing items do not help petitioner.

The Board of Examiners' denial of petitioner's application for certification was based upon *N.J.S.A.* 2A:168A-2, which allows licensing authorities to disqualify applicants to whom *N.J.S.A.* 2C:51-2 applies. *N.J.S.A.* 2C:51-2(a)(1), in turn, provides that a public employee forfeits employment if he is convicted of an offense involving dishonesty. Forgery and identity theft are such offenses. Similarly, *N.J.A.C.* 6A:9B-4.2 "Conduct barring candidate from certification" refers to *N.J.A.C.* 6A:9B-4.5, which, in turn, also instructs that applicants may be denied certification where *N.J.S.A.* 2C:51-2 applies.

Petitioner argues that his guilty pleas to identity theft and forgery should be ignored because he entered into them under pressure and due to false representations by his ex-wife or her attorney. He denies that his actions were crimes, and urges that barring him from his desired profession and livelihood is too harsh a consequence for those actions. However, the fact remains that petitioner chose a plea agreement over a trial on the merits of his case.[1] In the absence of such a trial, neither the Board of Examiners nor the Commissioner can accept petitioner's unilateral representation that his actions were not criminal, and that he is fit to educate students and serve as a role model to children and youth. In sum, respondent's decision that petitioner's guilty plea in

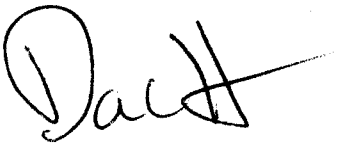
[1] Whether or not appellant was adequately advised about the ramifications of the terms of his plea agreement is a matter which must be resolved between him and his counsel.

Lancaster County, Pennsylvania, Court of Common Pleas – which plea admitted to ten counts of identity theft and two of forgery – barred the issuance to petitioner of a teaching certificate, was based upon application of the relevant statutes and regulations to the facts in the record before it. Petitioner has offered no grounds for a contrary determination.

In light of petitioner's failure to make a showing on the first three standards for evaluating emergent relief requests, a balancing of the equities is not essential to resolution of this motion. Nonetheless, the Commissioner finds that petitioner neither demonstrated that his present underemployment bears any connection to respondent's actions, nor that respondent's obligation to act in the best interests of the students of New Jersey is an equity of lesser merit than petitioner's desire to seek a teaching job in New Jersey.

The Commissioner accordingly denies petitioner's motion for emergent relief and returns the matter to the OAL for a hearing on the merits.[2]

IT IS SO ORDERED.[3]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/27/14

Date of Mailing: 8/27/14

[2] While the recommended order of the OAL suggests that all issues in controversy are resolved, there is no indication in the record that both parties consented to a final disposition of all issues without a hearing.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36, *N.J.S.A.* 18A:6-9.1.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 09228-14
AGENCY DKT. NO. 102-4/14

RON RODA,
Petitioner,
v.
NEW JERSEY STATE BOARD OF EXAMINERS,
Respondent.

Ron Roda, petitioner, pro se

Frederick H. Wu, Deputy Attorney General, for respondent (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

BEFORE **JOSEPH A. ASCIONE,** ALJ:

Petitioner Ron Roda (Roda), brings this emergent relief application to the Commissioner of Education seeking an order from this tribunal and/or the Commissioner compelling respondent, New Jersey State Board of Examiners (SBE) to issue a teaching certification. On November 6, 2013, the Examiner's blocked the certification due to petitioner's June 16, 2005 plea in Pennsylvania, Lancaster County Court of Common Pleas, to multiple counts of identity theft and forgery. Lancaster County Court of Common Pleas sentenced petitioner to seven years probation, the offenses carried exposure to incarceration for up to seven year. Pennsylvania revoked petitioner's certification on November 15, 2006. Sometime thereafter, petitioner gained

employment as a teacher in Maryland. On January 17, 2012, the certification authority in Maryland, based upon the Pennsylvania conviction, revoked petitioner's teaching certification. Petitioner's position is that he entered the plea, against advice of his counsel, to protect his family and in an attempt to save his marriage. Petitioner's wife is the alleged victim of the crimes charged. Petitioner attempted to reapply in Pennsylvania for his teaching certification. Pennsylvania denied the application as the State requires a ten-year passage of time from the date of sentencing to consider expungement of the conviction.

On April 11, 2014, petitioner made this application for emergent relief to the New Jersey State Commissioner of Education. On July 23, 2014, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-8.2. A hearing was conducted on July 28, 2014.

STATEMENT OF FACTS

The following facts are not disputed, and I **FIND**:

1. Petitioner is presently employed on an as needed basis for pool construction.

2. Petitioner presented no current offer of employment requiring a teaching certification.

3. Petitioner pled guilty on June 16, 2005, in the Pennsylvania, Lancaster County Court of Common Pleas to multiple counts of identity theft and forgery. He received a seven-year probationary sentence.

4. The States of Pennsylvania on November 15, 2006, and Maryland on January 17, 2012, revoked petitioner's teaching certification based upon the above guilty pleas (R-3, R-4) and reciprocity considerations.

5. Petitioner unsuccessfully attempted to have his teaching certification restored in the State of Pennsylvania. The State of Pennsylvania denied that application in November 2013.

6. On November 6, 2013, the SBE advised petitioner that they would block the teaching certification sought based upon the severity and recency of the conduct, but would reconsider their action on the expungement of the crime in Pennsylvania.

TESTIMONY

Ron Roda

Roda testified to the previous submissions provided the SBE on July 8, 2014 (P-1(a)). He testified that the attorneys involved are disbarred and imprisoned. He testified he filed ethics complaints against the attorneys. Roda, as part of his application, provided character references and recommendation letters including one from his probation officer. Roda testified that his irreparable injury is compounded by the state of the economy and describes the economy as a middle-class purging. The submission P-1(a) identifies irreparable harm that has already occurred, predominately due to his plea to the criminal charges. He claims additional irreparable harm if he were denied food and water. The submission recognizes that he is not sure of his legal rights and seeks a balancing of fairness by the SBE. As to the likelihood of success on the merits, he relies on his stellar career in education and testimonials. As to the balancing of the equities and interests, petitioner states that, "The probability of harm to others is outweighed by the movant if the stay is not granted & the public interest is not adversely affected by such a stay."

Petitioner's plight is recognized. His presentation on the issues to this tribunal are conclusions. His factual presentations of the perceived injustice he has suffered emanate from his own actions in entering guilty pleas to the charges of identity theft and forgery. Petitioner did relate that the bases for the identity theft and forgery counts involved the misuse of his wife's credit and credit cards.

LEGAL DISCUSSION

Initially, respondent argues that petitioner's request for a fair hearing is untimely, as it was only perfected on or about June 3, 2014, with service upon the New Jersey Attorney General's Office. Notification to petitioner of the SBE's action occurred on November 13, 2013. See N.J.A.C. 6A-3:1.3(i). Petitioner did seek to appeal the SBE's action on December 23, 2014, and the SBE advised petitioner on December 27, 2013, of all actions necessary to perfect his appeal. The actions were not completed in a timely manner by petitioner, and could warrant the dismissal of the appeal. However, granting such a procedural dismissal would likely result in a new application by petitioner, to be again reconsidered by the SBE and then appealed to this forum. This does not seem a wise use of time, I am certain this consideration, as well as others entered into the SBE's determination to forward this emergent application to this tribunal for consideration of the merits of petitioner's claim. Accordingly, I refrain from dismissing petitioner's claim on procedural grounds.

Petitioner must meet the requirements for emergent relief set forth in N.J.A.C. 6A:3-1.6(b), and must show that the SBE acted arbitrarily, capriciously or unreasonably in denying (blocking) petitioner's request for a teacher's certification.

N.J.A.C. 6A:3-1.6 sets forth the standards governing motions for emergent relief. The regulation instructs in salient part:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

Petitioner has the burden of establishing each of the above requirements in order to warrant relief in his favor.

The SBE argues that the application for emergent relief should be dismissed because the petitioner cannot demonstrate any irreparable harm that arises to petitioner as a result of the SBE's action, as distinguished from Roda's own actions and circumstances. Petitioner is presently employed, though, not in a teaching position. However, he does not present an offer of employment that is prevented by his absence of a teaching certification. That is not to say petitioner would be successful on his application for emergent relief if an offer of teaching employment were part of the application. It would only go toward satisfying the irreparable injury portion of the standard for review.

Another prong of the Crowe v. DeGioia test requires an analysis of whether the legal rights are settled. Petitioner acknowledges he is not aware of any legal precedent in support of granting the relief he has requested. He seeks the SBE to grant relief as it is fair to the movant. Petitioner makes a conclusory statement that, "The movant has all likelihood of prevailing on the merits of the underlying claim." His likelihood of prevailing is based upon his stellar career in education, testimonials from co-workers and supervisors, and his life experience.

The final prong of the Crowe v. DeGioia test is a balancing of the equities and the interests of the parties. Petitioner is presently employed. He has suffered since his guilty pleas to identity theft and forgery. Regretfully, he placed himself in this position by not accepting the advice of his counsel not to enter the guilty pleas. Petitioner believes that he took this action in an attempt to preserve his family unit. This tribunal is not at liberty to ignore or even look into those guilty pleas. The State of Pennsylvania is

empowered to address petitioner's grievance and provide an expungement of his criminal record, and reinstate his teaching certification. Petitioner recently unsuccessfully attempted this. Pennsylvania informs petitioner that consideration of expungement must await ten years from the date of the guilty pleas. That date is June 15, 2015. The potential injury to be sustained by petitioner, until Pennsylvania reconsiders petitioner's application in June 2015, does not balance favorably with the SBE's concern whether this petitioner, with this criminal background of moral turpitude, is an appropriate applicant to teach students in New Jersey. The injury to those students, or the public cannot be ascertained. It may be that there is no injury. Alternatively, the injury to the student or the public may be severe. It is for this reason that much discretion is placed with the Commissioner's expertise and judgment.

Turning to the standard to reverse the SBE's action, petitioner must show that the action to prevent the teaching certification of petitioner is arbitrary, capricious or unreasonable. The SBE has denied petitioner's application based upon the severity and recency of the offenses committed in the State of Pennsylvania. The denial acknowledges it would reconsider the application, if the State of Pennsylvania expunged petitioner's criminal conviction record. N.J.S.A. 18A:6-38 provides authority to the SBE to issue teaching certificates. N.J.A.C. 6A:9-17.2 and 6A:9-17.5 provides the SBE with the authority to refuse to issue or to suspend one's teaching certification for various reasons including conduct unbecoming a teacher. Petitioner's guilty pleas to identity theft and forgery fall into the category of conduct unbecoming a teacher. The severity of the consequences of this type of crime is also reflected in the New Jersey State Legislature's passage of N.J.S.A. 2C:51-2 which deals with the loss of office, position or employment within the State of New Jersey or its subdivisions of a person convicted of dishonesty. The SBE's actions are consistent with the reasonable exercise of its discretion in protecting the interest of the public by blocking the issuance of a teaching certification to petitioner. Petitioner has the burden of proof to show that the SBE's actions were arbitrary, capricious or unreasonable. Petitioner has not shown any arbitrary, capricious or unreasonable action in the process of the SBE's determination.

CONCLUSION

After hearing the arguments of petitioner and respondent and considering the documents submitted, I **CONCLUDE** that petitioner is not entitled to emergent relief because the proofs submitted fail to establish the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b). Specifically, there has been no showing that petitioner will suffer irreparable harm if the requested relief is not granted, or that he has a likelihood of prevailing on the merits. There has been no showing that the law is well settled in favor of the petitioner in this area, and petitioner has not shown that the balancing of harm to the parties weighs in favor of petitioner.

I further **CONCLUDE** that the SBE has properly acted in the exercise of its discretion to block the issuance of a teaching certification to petitioner.

For the foregoing reasons, petitioner's request for emergent relief is **DENIED**. Respondent's determination to deny petitioner's application for a teaching certification is within its discretion, which has been exercised reasonably considering the SBE's concern for the welfare and safety of the students, and public.

ORDER

It is hereby **ORDERED** that petitioner's request for emergent relief is **DENIED**.

It is hereby **ORDERED** that petitioner's request for relief from the actions of the New Jersey State Board of Examiners is **DENIED** in all respects. This Order disposes of all issues in controversy regarding this matter.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **Commissioner of the Department of Education**, does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

July 29, 2014
DATE

JOSEPH A. ASCIONE, ALJ

lam

APPENDIX

LIST OF WITNESSES

For Petitioner:

Ron Roda

For Respondent:

None

LIST OF EXHIBITS

For Petitioner:

P-1 Entire package included with transmittal

P-1(a) Petitioner's July 8, 2014, presentation to the Commissioner for consideration of emergent relief (2 pages)

For Respondent:

R-1 November 6, 2013, letter to petitioner advising of block to certification

R-2 Criminal Record Disposition Lancaster County, PA

R-3 NASDTEC report of PA revocation

R-4 NASDTEC report of MD revocation

352-14

OAL DKT. NO. EDU 7118-14
AGENCY DKT. NO. 275-11/13B

J.P. on behalf of minor child P.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF LONG HILL, MORRIS COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed Settlement/Release and Stipulation of Dismissal (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the settlement terms.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/27/14

Date of Mailing: 8/27/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 7118-14
AGENCY DKT. NO. 275-11/13B

J.P., ON BEHALF OF MINOR CHILD P.P.,
Petitioner,
v.
TOWNSHIP OF LONG HILL
BOARD OF EDUCATION, MORRIS COUNTY
Respondent.

Lisa M. Fittipaldi, Esq. for petitioner (DeFancesco, Bateman, Coley, Yospin, Kunzman, Davis, Lehrer & Flaum, attorneys)

Nicholas Celso, III, Esq., for respondent (Schwartz, Simon, Edelsein & Celso, attorneys)

Record Closed: July 30, 2014 Decided: July 30, 2014

BEFORE **ELLEN S. BASS**, ALJ:

This matter was transmitted to the Office of Administrative Law on June 10, 2014 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement. The Township of Long Hill Board of Education has approved the settlement, as evidenced by the attached certified Board resolution dated July 21, 2014.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 30, 2014
DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 7-31-14

Date Mailed to Parties: JUL 31 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

/rr

J.P. o/b/o P.P., Petitioners, V. LONG HILL TOWNSHIP BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDU AGENCY REF. NO.: **SETTLEMENT/RELEASE AND STIPULATION OF DISMISSAL**

WHEREAS, Judith Peacock is the parent of P.P (collectively referred to as "Petitioners"), a minor child and student residing within and attending school in the Long Hill Township School District ("District"); and

WHEREAS, a dispute exists arising from the events leading up to and following a decision of the Long Hill Township Board of Education ("Board") to affirm the District's finding that P.P. engaged in an act or acts of harassment, intimidation and bullying (HIB), prohibited by *N.J.S.A.* 18A:37-15, *et seq.;* and

WHEREAS, Petitioners appealed the Board's decision by filing the above referenced petition of appeal with the Commissioner of Education which presently is scheduled in for a plenary hearing in the Office of Administrative Law before the Hon. Ellen Bass, ALJ; and

WHEREAS, the parties, each having a desire to amicably settle any and all claims in all jurisdictions, asserted and unasserted, now hereby agree as follows:

1. Upon final execution and approval of this Agreement, the Petitioners shall withdraw their petition of appeal with prejudice.

2. P.P.'s current Principal shall prepare and cause to be placed in his file a letter updating P.P.'s positive behavior since the initial event/s which gave rise to the underlying HIB complaint, and indicating specifically that he has seen no evidence of recurrent misconduct.

3. P.P.'s mother shall prepare and submit a rebuttal to the HIB determination with accompanying letters of in support of J.P., all of which shall be placed in P.P.'s file.

4. J.P.'s file, inclusive of the above, shall be transmitted to his receiving High School, in accordance with N.J.A.C. 6A: 16-7-10(a) and N.J.A.C. 6A: 16-7-10(a)(2).

5. Petitioners, in consideration of the above terms and conditions, hereby release the Board and its agents and successors in interest from all claims they have or may have had emanating from the circumstances underlying the subject Petition of Appeal that could have, or have been, filed in any forum whatsoever, now and forever.

6. This Agreement contains the entire agreement between the parties hereto and is intended to resolve any and all disputes and issues, known or unknown, between them as of the date of execution of this Agreement.

7. The terms of this Agreement represent the compromise of disputed claims between the parties. This Agreement shall not be

treated as an admission that either party has failed to act in accordance with any laws, statutes, regulations and/or regulation.

8. Each party shall be responsible for its own attorney's fees and costs related to the underlying matter.

9. The parties represent that they sign this Agreement as their own voluntary act and deed, and that they have read and fully understand the terms, duties, requirements, obligations and limitations enumerated herein and have consulted with their respective legal representatives. The drafting and negotiation of this Agreement have been participated in by each of the parties and, for all purposes, this Agreement shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship.

10. This Agreement shall be governed by the laws of the State of New Jersey.

11. This Agreement shall be subject to ratification by the Board and is without prejudice to either party if the terms are not ratified. The parties shall not be bound by this Agreement until it has been ratified by the Board. Upon ratification of this Agreement, the Board shall cause a copy of the relevant resolution to be forwarded to Petitioners.

WITNESSETH:

In consideration of the foregoing covenants, the legal sufficiency of which is acknowledged by the parties, they have set forth their duly authorized signatures below:

WITNESS:

Judith Peacock, individually and o/b/o of P.P.

DATED: 7/1/14

DATED: 7/1/14

WITNESS:

Long Hill Township Board of Education

René Porter

By: Rita Barone
Rita Barone
Board President

DATED: July 21, 2014

DATED: 7/21/14

AFFIDAVIT OF SECRETARY

I, John Esposito, Board Secretary for the Board of Education in the Township of Long Hill, in the County of Morris, State of New Jersey, hereby certify that the extract below, from the minutes of the meeting of the Board of Education is a true, complete copy.

JOHN ESPOSITO, Board Secretary

July 21, 2014

EXTRACT FROM THE MINUTES
OF A MEETING OF THE BOARD OF EDUCATION
OF THE TOWNSHIP OF LONG HILL, MORRIS COUNTY, N.J.
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Township of Long Hill, in the County of Morris, New Jersey held a Public Meeting on Monday, **July 21, 2014** at **7:30** p.m. in the Township Municipal Building Gillette, New Jersey.

The following members of the Board of Education were present:

MS. RITA BARONE, President
MR/ ROBERT BLOCKER
MR. DAVID CARN
MR. STEVEN LoCASCIO
MS. KAREN ANN NYQUIST
MR. NICHOLAS STEVENS, Vice President
MR. STEVEN BROWN
MR. MATTHEW DiGIORGIO
MS. MARTA MOAKLEY

On a motion made by Mr. Stevens and seconded by Mr. Blocker, the Board of Education took action on the following resolution:

> Resolved, that the Board hereby approves the Settlement Agreement reached on remand by the Commissioner of Education, in the matter of J.P. o/b/o P.P. v. Long Hill Twp. Board of Education, OAL Dkt. No. EDU 071118-2014N, Agency Dkt. No. 275-11//13B. The Board President is authorized to execute said Agreement on behalf of the Board, and the Superintendent is authorized to carry out and implement the terms of the Agreement, subject to final approval by the Commissioner of Education. Further, the Board Attorney is authorized to take all steps necessary to file said Agreement with the OAL and the Commissioner.

The resolution was unanimously APPROVED by a vote of 9-0-0.

353-14

OAL DKT. NO. EDU 1765-14
AGENCY DKT. NO. 313-12/13

J.F., on behalf of minor child, M.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. According to the Agreement, the first settlement payment was due on June 1, 2014. This date preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms, or have agreed upon a mutually satisfactory alternate date for the effectuation of the settlement payment. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/27/14
Date of Mailing: 8/27/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1765-14

AGENCY DKT. NO. 313-12/13

J.F. O/B/O MINOR CHILD

M.F.,

Petitioner,

v.

OCEAN CITY BOARD OF EDUCATION,

Respondent.

William S. Donio, Esq., for petitioner J.F. O/B/O M.F., (Cooper, Levenson, attorneys)

Michael P. Stanton, Esq., for respondent Ocean City Board of Education, (McCrosson & Stanton, attorneys)

Record Closed: July 9, 2014 Decided: July 15, 2014

BEFORE **W. TODD MILLER**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 11, 2014, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

I have reviewed the record and the terms of the settlements and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by the signatures of the parties, as well as the Board Resolution approving the settlement.

2. The settlements fully dispose of all issues in controversy and are consistent with the law.

I **CONCLUDE** that these agreements meet the requirements of N.J.A.C. 1:1-19.1 and that the settlements should be approved. I approve the settlements and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 15, 2014
DATE

W. TODD MILLER, ALJ

Date Received at Agency: _____

Date Mailed to Parties: July 18, 2014

/jb

Residency / Tuition Settlement

This Agreement between the Ocean City Board of Education and Jackie Friend on behalf of her daughter, a minor, M.F. hereby agree to the following settlement agreement of $8,000 to be paid as follows:

1. Starting June 1, 2014 and every month thereafter on the first day of the month, payment shall be made in the amount of $333.00 to ~~501 Atlanti~~ the Ocean City Board of Education at 501 Atlantic Avenue, Ocean City, New Jersey. The total sum due shall be paid in 24 months, with final payment being made on or no later than May 31, 2016.

By: _____

2. In the event payment is not received by the 10th of every month, all outstanding balances will be due and owned.

3. M.F. shall remain enrolled in the Ocean City School District for the 2013-2014 school year. The 2014-2015 School year shall be determined by her residency.

4. All parties shall be responsible for their own a ~~Our~~ attorney fees.

5. The purpose of this settlement agreement is to release all outstanding issues and claims.

6. ~~This agreement shall release All parties~~
~~This agreement shall release all parties~~

Jackie Friend

By: Jackie Friend

By: Mike Stanton, Esq. on behalf of the Ocean City Board of Education

Date: May 28, 2014

RESOLUTION AUTHORIZING THE SETTLEMENT
OF THE MATTER J.F. O/B/O M.F. V. OCEAN CITY
BOARD OF EDUCATION

WHEREAS, the Ocean City Board of Education, hereinafter referred to as the BOARD, was the respondent in the matter brought by the parents of M.F. challenging the residency determination of the Board and the payment of tuition; and

WHEREAS, the Parent of M.F. filed a Due Process Request with the Commissioner of Education; and

WHEREAS, the Board filed a response to the Due Process Petition seeking to recover tuition payment; and

WHEREAS, the Department of Education transferred the matter to the Office of Administrative Law; and

WHEREAS, the matter was assigned to the Honorable Damon Tyner, ALJ; and

WHEREAS, the matter was scheduled for oral argument on May 28, 2014; and

WHEREAS, the parties agreed to settle the matter and the terms of settlement were reduced to writing.

NOW THEREFORE, the BOARD accepts the terms of the attached Settlement Agreement which is made a part hereof. A copy of the Settlement Agreement is available for review in the Business Administrator's Office.

Dated: 6/25 2014

OCEAN CITY BOARD OF EDUCATION

JOSEPH CLARK, PRESIDENT

The foregoing is a true copy of the Resolution adopted by the Ocean City Board of Education at its meeting on the 25th day of June, 2014.

Dated: 6/25 2014

PASQUALE YACOVELLI, BOARD SECRETARY

357-14

OAL DKT. NO. EDU 2601-14
AGENCY DKT. NO. 4-1/14

D.A., on behalf of minor child, L.A.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The instant controversy came before the Commissioner as a dispute concerning whether minor child, L.A., was eligible to receive a free public education in respondent's school district during October, November and the first half of December, 2013. L.A. is under the guardianship of her uncle, petitioner D.A., who resides in West Orange. However, an investigation by respondent revealed that during the autumn of 2013, L.A. resided with her sister in East Orange and traveled daily to West Orange High School via public transportation. Consequent to the residency investigation, respondent's Board voted – on December 16, 2013 – to remove L.A. from its district schools.

D.A. advised that the reason L.A. moved in with her sister in East Orange had been the development of a difficult family situation concerning elderly relatives. However, the record indicates that the family difficulties in D.A.'s home were resolved in November 2013. Nonetheless, L.A. continued to reside in East Orange with her sister and commute to school in West Orange until after respondent disenrolled her in mid-December 2013.

After a June 6, 2014 hearing in the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) determined that L.A. had not been entitled to a free education in West Orange during the period in which she lived with her sister in East Orange. This determination was memorialized in an Initial Decision dated July 21, 2014, which decision was forwarded to the Commissioner for review.

Prior to the issuance of the Commissioner's final decision, the parties agreed upon a settlement. They submitted a "Settlement Agreement" (Agreement) to the Commissioner on August 21, 2014, and the Commissioner reopened the record to review same. Upon consideration of the record and the Agreement, the Commissioner is satisfied that the parties have voluntarily and knowingly entered into a settlement of their claims, and that all issues posed by the instant controversy are resolved by the Agreement. Accordingly, the Agreement is approved, and the petition and related counterclaims, if any, are dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/03/14

Date of Mailing: 9/03/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02601-14
AGENCY DKT. NO. 1-4/14

D.A., ON BEHALF OF MINOR CHILD, L.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

D.A., uncle of **L.A.**, appearing pro se

Stephen J. Christiano, Esq., for respondent

Record Closed: June 6, 2014 Decided: July 21, 2014

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner D.A. challenges the residency determination made by the West Orange Board of Education ("Board") with regard to the minor child L.A. On February 28, 2014, respondent submitted an answer, which was filed with the Commissioner of Education on March 5, 2014. Respondent's demand included a request that the Commissioner dismiss the petition, that the child be removed from the district, and that

the petitioner be assessed a tuition charge for each day of L.A.'s ineligible attendance in the Board's schools.

The matter was transmitted to the Office of Administrative Law (OAL) on March 6, 2014, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A hearing was held on June 6, 2014, and the record closed on that date.

The issues in this matter are whether L.A. is eligible to attend respondent's public schools free of charge in accordance with N.J.S.A. 18A:38-1 and, if not, whether respondent's requests for tuition reimbursement and for disenrollment of L.A. should be granted.

FACTUAL DISCUSSION

Based upon the papers submitted as of the hearing date and the supplemental submission by respondent, I **FIND** the following **FACTS**, which are essentially undisputed:

In the spring of 2013 L.A. came to the United States to live with her uncle D.A. and his wife at 9 W. Drive South in West Orange, N.J. L.A.'s older sister S.A. had moved to the United States to live with D.A. some years ago and is now twenty years old and living in East Orange, N.J. She graduated from West Orange High School.

The Board commenced a residency investigation in this matter after receiving information from West Orange High School that suggested the student did not live in West Orange and instead takes NJ TRANSIT bus number 71 to and from school on a regular basis. The Board undertook an investigation of this matter, including an observation of the NJ TRANSIT bus stop at Pleasant Valley Way and Stanford Avenue in West Orange, N.J. Commencing on October 8, 2013, Gerard Drappi, the residency investigator for the Board, observed NJ TRANSIT bus 71 stop at that corner and a young female, later identified as L.A., exit the bus, cross the street and enter West Orange High School. Mr. Drappi made the same observations at the same location on

October 21 at 7:18 a.m. when bus 71 stopped, and L.A. exited the bus, crossed the street and entered the high school. The investigation was postponed for a brief period of time due to another pending matter, and then resumed in November. On November 22, 2013, Mr. Drappi monitored the area of 9 W. Drive South in West Orange, which was claimed to be the student's residence. There were no lights on in the home. The student was not observed exiting the house at any point between 6:00 a.m. and 7:30 a.m. and did not board the assigned school bus at the number 350 stop at Lorelei Road and Carolina Avenue. NJ TRANSIT bus 71 was monitored later that morning, and at 7:18 a.m. L.A. was observed again exiting bus 71, crossing the street and entering the school. The same observations of the W. Drive address, the school-bus stop and the NJ TRANSIT bus stop across the street from the school were made on November 25, 2013, November 26, 2013, and November 27, 2013, and in each case no lights were on in what was claimed to be the student's residence; she was not observed exiting the house nor entering the assigned school bus at the bus stop; and she was later observed exiting bus 71 across the street from the school and entering the school.

On December 2, 2013, Mr. Drappi followed bus 71 from the Newark border through East Orange, and at 6:50 a.m. observed L.A. standing on the corner of Freeway Drive (Main Street) and North Arlington Avenue, East Orange, and then boarding bus 71. She was later observed exiting the bus in front of West Orange High School and entering the building. The same observations were made on December 3, 2013, with the same results.

Based upon the results of the investigation to date, a public-records check was conducted on the student's family name in East Orange, and S.A. was listed as living at 220 North A. Avenue, East Orange, N.J. A review of L.A.'s emergency-contact card indicated that S.A. is L.A.'s sister and second guardian. On December 4, 2013, investigators monitored the area of S.A.'s residence, and at 6:35 a.m. observed L.A. exit the apartment carrying a large folder or portfolio, walk to the corner of Freeway Drive (Main Street), board bus 71, and exit the bus across the street from West Orange High School and enter the building. On December 5, 2013, the East Orange apartment was again monitored, and at 6:32 a.m. L.A. exited the apartment complex, walked to the same corner, boarded bus 71 and exited at West Orange High School and entered the

building. The same observations were made on December 6, 2013, December 9, 2013, December 10, 2013, and December 11, 2013.

A notice of residency hearing was then presented to D.A. for a hearing scheduled for December 16, 2013, at 6:15 p.m. at West Orange High School. The next day, December 12, 2013, investigators again monitored the East Orange apartment complex and observed L.A. exit the complex at 6:30 a.m., walk to the same corner and board bus 71. Later that morning, at 6:55 a.m., Mr. Drappi hand-delivered a copy of the hearing notice to D.A. at his 9 W. Drive South, West Orange, address.

On December 17, 2013, D.A. was notified by letter (R-2) that the Board had voted to remove L.A. from the district based upon the fact that the investigation revealed that she does not reside in West Orange.

The district provided tuition calculations, which indicate that the total tuition for a 180-day school year is $27,188, with a per-diem amount of $151.04. The tuition through the day of hearing is $23,562.24. There were 46 days from the date the investigation commenced on October 8, 2013, until the hearing of December 16, 2013, for a total of $6,947.84. The total tuition from the date the investigation was commenced until the last day of school, June 18, 2014, is $24,770.56.

D.A. agreed that L.A. had stayed with her sister in East Orange, but said that after the hearing held by the Board she stayed with them in West Orange and only visited her sister to spend time with her. D.A. has legal custody of L.A. and has three sons, ages six, eleven and twelve. D.A.'s mother-in-law was living with him and his family for a period of time until going into a nursing home in November 2013. D.A. does not dispute that L.A. was living with her sister in West Orange until the December 16 Board hearing, and does not dispute the investigation findings. D.A.'s wife, J.P., testified that L.A. was "not living with her sister, but just stayed there." She testified that in her view the "lack of compliance is de minimis," and that they pay their taxes, have lived in West Orange for ten years, and had no problem with S.A. when she lived with them. She testified that the district should have "worked with the family due to the

difficult home life," and that they made efforts to comply once they knew there was an issue.

ISSUES

1. Whether tuition expenses can be assessed against parents or guardians when they appeal a school board's decision to remove their child from the school district due to the child's domicile and the school board requests reimbursement of tuition for the period the child improperly attended school in the district in its answer to the petition of appeal.

2. Whether a child can have a different domicile than his or her guardian for purposes of determining the school district in which he or she is entitled to receive an education.

DISCUSSION

1. Parents or guardians may be assessed tuition expenses when they do not prevail in their appeal of a school board's decision to remove their child from the school district due to the child's domicile where the school board requests the tuition assessment in its answer to the petition of appeal

Under N.J.S.A. 18A:38-1(a), "[a]ny person who is domiciled within the school district" is entitled to a free education from that district.[1] However, "[i]f the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district . . . , the superintendent or administrative principal may apply to the board of education for the removal of the child." N.J.S.A. 18A:38-1(b)(2). The parents may contest a local school board's decision regarding the student's right to attend school in

[1] The school district must also provide a free education to "[a]ny person who is kept in the home of another person domiciled within the school district" when that person "is supported by such other person gratis as if he were such other person's own child" in certain circumstances if the other person files certain documentation with the secretary of the local board of education. N.J.S.A. 18A:38-1(b)(1). This is referred to as an "affidavit student." A.M.S. v. Bd. of Educ. of Margate, 409 N.J. Super. 149, 158 n.4 (App. Div. 2009); see also N.J.A.C. 6A:22-3.1(a)(2).

the district to the Commissioner of Education and "shall have the burden of proof by a preponderance of the evidence" to prove domicile in the school district. N.J.S.A. 18A:38-1(b)(2). The State Board of Education has promulgated various rules implementing N.J.S.A. 18A:38-1 and governing student domicile and eligibility to attend school. See N.J.A.C. 6A:22-1.1 to -6.3.

Generally, appeals of a local school board's "determinations with respect to entitlement to attend school pursuant to N.J.S.A. 18A:38-1 and N.J.A.C. 6A:22[-1.1 to -6.3]" proceed under the general provisions governing controversies and disputes before the Commissioner of Education, N.J.A.C. 6A:3-1.1 to -1.17, but certain exceptions exist. N.J.A.C. 6A:3-8.1(a). For example, pro se petitioners may file a petition in letter form if they use a specific form provided by the Department of Education. N.J.A.C. 6A:3-8.1(a)(1). When utilizing the Pro Se Residency Appeal form provided by the Department of Education to file their petition, the parents or guardians must "[i]nclude a signed attestation" that "[t]hey understand that they may be assessed tuition for the period of the child(ren)'s ineligible attendance . . . if the Commissioner determines that the appeal has been abandoned or withdrawn and/or that the child(ren) are ineligible for a free education in the district." N.J.A.C. 6A:3-8.1(a)(1)(iv)(2).

N.J.A.C. 6A:3-8.1's special procedures governing appeals of a local school board's "determinations with respect to entitlement to attend school" do not "preclude a district board of education from seeking payment of tuition, consistent with the provisions of N.J.A.C. 6A:22-6.1(a), for a student it determines to be ineligible to attend school in the district." N.J.A.C. 6A:3-8.1(e). Under N.J.A.C. 6A:22-6.1(a),

> [i]f no appeal to the Commissioner is filed by the parent, guardian, adult student, or district resident keeping an "affidavit" student following notice of an ineligibility determination, the district board of education may assess tuition for up to one year of a student's ineligible attendance, including the 21-day period provided by N.J.S.A. 18A:38-1 for appeal to the Commissioner.[2]

[2] Thereafter, "[i]f the responsible party does not pay the tuition assessment, the district board of education may petition the Commissioner pursuant to N.J.A.C. 6A:3[-1.1 to -13.1] for an order assessing tuition." N.J.A.C. 6A:22-6.1(a)(1).

The rules also provide for the Commissioner to assess tuition where the petitioners appeal a local school board's determination that their child was not entitled to attend school in the district. N.J.A.C. 6A:22-6.2(a) applies where the petitioners do not prevail in their appeal; it provides that

> [i]f an appeal to the Commissioner is filed by the parent, guardian, adult student, or school district resident keeping an "affidavit" student and the petitioner does not sustain the burden of demonstrating the student's right to attend the school district . . . the Commissioner may assess tuition for the period during which the hearing and decision on appeal were pending, and for up to one year of a student's ineligible attendance in a school district prior to the appeal's filing and including the 21-day period to file an appeal.

Tuition assessments have not been provided by the Commissioner when the school board fails to request such an assessment. See, e.g., H.T. v. Bd. of Educ. of Orange, EDU 7916-11, Final Decision, Comm'r (January 17, 2012), <http://njlaw.rutgers.edu/collections/oal/>; T.H. v. Bd. of Educ. of Somerville, EDU 249-08, Final Decision, Comm'r (May 9, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Prior decisions have addressed the propriety of a school district requesting an assessment of tuition in its answer to an appeal of the local school board's determination regarding a student's entitlement to attend school in the district.[3] For example, tuition has been assessed against petitioners where the school district "filed an Answer to [an] appeal with the Commissioner with a Counterclaim for reimbursement from petitioners for the costs of tuition incurred by the attendance" of the minor children who attended school in a district they were not domiciled in. See M.J.M. v. Bd. of Educ. of Ridgefield, EDU 5660-08 & EDU 5561-08 (consolidated), Initial Decision (August 4, 2008), adopted, Comm'r (September 15, 2008), <http://www.njlaw.rutgers.edu/collections/oal/>.

In Z.A. v. Board of Education of Ridgewood, EDU 1030-03, Initial Decision (June 11, 2003), modified, Comm'r, (July 23, 2003),

[3] As noted above, a local school board may assess tuition independently and without needing to file a petition with the Commissioner in a situation where the school board's determination that a student is not entitled to attend school in the district is not appealed under N.J.A.C. 6A:22-6.1(a).

<http://www.njlaw.rutgers.edu/collections/oal/>, an administrative law judge (ALJ) determined that children were not domiciled in the school district they attended during the prior two school years and did not meet the requirements of N.J.S.A. 18A:38-1(a), but declined to calculate tuition costs, because the school district did not include a counterclaim for tuition in its answer to the petition.

In its exception, the local school board disagreed that it "waived its right to seek tuition from the petitioner for the 2001–02 and 2002–03 school years," and maintained that at the OAL hearing it "stipulated on the record that it would only seek tuition if exceptions were filed by the [parent], at which point [it] would submit information regarding the outstanding tuition due." Z.A., supra, EDU 1030-03, Comm'r Decision, <http://www.njlaw.rutgers.edu/collections/oal/>. The parent filed exceptions, and the school board sought a tuition assessment before the Commissioner while providing a certification as to the amount of tuition due. The Commissioner explained that the parent "claims that her children are entitled to attend school in the district based on her domicile there, yet she offers nothing more than her own assertion in support of that contention," and her "entire appeal is based on the premise that she should not have to provide any such evidence, either to the [school board] or to the ALJ, because [the school board's] own unlawful actions have nullified the requirement that she do so." The Commissioner agreed with the ALJ's conclusion that the children were not entitled to attend school in the district based on the evidence presented.

> However, the Commissioner also observe[d] that, contrary to the suggestion of the ALJ (Initial Decision at 4), in order for a board to be entitled to collect tuition in a residency matter where the petitioner has failed to prevail on appeal to the Commissioner and a tuition calculation for the period of ineligible attendance exists on record, **it is not necessary for the board to have actually filed a counterclaim with its Answer to the Petition of Appeal**.
>
> [Citing N.J.S.A. 18A:38-1; N.J.A.C. 6A:3-8.1(d); N.J.A.C. 6A:22-6.2[4]) (emphasis added).]

[4] The decision actually cites N.J.A.C. 6A:28-2.10(b) rather than N.J.A.C. 6A:22-6.2, because N.J.A.C. 6A:28-2.10(b) was recodified to N.J.A.C. 6A:22-6.2 in 2004. See 36 N.J.R. 2279(a), 2281, 2285; 36 N.J.R. 4448(a), 4452.

The Commissioner assessed tuition reimbursement and directed the parent to remit payment for the children's tuition regarding one of the years the children attended school in the district rather than both, because the issue of the children's residency was only raised before the start of the second school year in which the children were not domiciled in the school district.

Similarly, in M.F. v. Board of Education of Atlantic Highlands, EDU 2566-03, Comm'r Decision (September 22, 2003), <http://www.njlaw.rutgers.edu/collections/oal/>, an ALJ determined that a parent and her children were not domiciled in the school district, but declined to assess tuition because the school board made no claim for tuition. The Commissioner found "no basis to disturb the conclusion of the ALJ that [the parent] has failed to establish that she is a domiciliary of Atlantic Highlands so as to entitle her minor children . . . to a free public education in that District." However, the Commissioner "reject[ed] the ALJ's apparent belief that, absent the filing of a counterclaim for tuition, the Board is not entitled to collect such compensation for the period of [the children]'s ineligible attendance in its schools." The Commissioner emphasized that "tuition is clearly identified as a relief sought in the Board's Answer" and concluded that the school board was entitled to collect such tuition because the parent failed in her appeal. The matter was remanded to the OAL because the record lacked sufficient information to calculate the tuition owed.

Accordingly, a parent or guardian may be assessed tuition expenses when he or she does not prevail in his or her appeal of a school board's decision to remove his or her child from the school district due to the child's domicile where the school board requests the tuition assessment in its answer rather than in a cross-petition.

2. A child will typically be domiciled where his or her guardian is domiciled, but a child may still not be entitled to attend school in his or her guardian's school district if it is proven that the child does not actually live with the guardian under N.J.A.C. 6A:22-1.2

"A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district." N.J.A.C. 6A:22-

3.1(a)(1). "Domicile" has been "defined as 'the place where [a person] has his [or her] true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has an intention of returning.'" See D.L. v. Bd. of Educ. of Princeton Reg'l Sch. Dist., 366 N.J. Super. 269, 273–74 (App. Div. 2004) (quoting T.B.W. v. Bd. of Educ. of Belleville, EDU 5959-96, Initial Decision (April 30, 1998), adopted, Comm'r (June 18, 1998), <http://www.njlaw.rutgers.edu/collections/oal/>. "A person may have several residences or places of abode, but only one domicile at a time." Id. at 274.

Special rules exist for determining domicile in situations where a student's parents or guardians are domiciled in different school districts. See N.J.A.C. 6A:22-3.1(a)(1)(i–ii). However, "[w]hen a student is **living with** a person other than a parent or guardian, nothing in this section is intended to limit the student's right to attend school in the parent or guardian's school district of domicile pursuant to this chapter." N.J.A.C. 6A:22-3.1(a)(1)(iii) (emphasis added).

Notwithstanding N.J.A.C. 6A:22-3.1's provisions regarding a child's domicile, in situations involving a child whose guardian maintains residential custody, the Department's definition of "guardian" includes a stipulation that could result in a student's ineligibility to attend school in the district:

> "[g]uardian" means a person to whom a court of competent jurisdiction has awarded guardianship or custody of a child, **provided that a residential custody order shall entitle a child to attend school in the residential custodian's school district unless it can be proven that the child does not actually live with the custodian.**
>
> [N.J.A.C. 6A:22-1.2 (emphasis added).]

No located decisions specifically address this portion of the definition of guardian, but some guidance may be gleaned from its regulatory history. Prior to the current version of N.J.A.C. 6A:22-1.2's definition of guardian, the definition was first adopted in 2009, and guardian was defined as

> a person to whom a court of competent jurisdiction has awarded guardianship or custody of a child, provided that a residential custody order shall entitle a child to attend school in the residential custodian's school district **subject to a rebuttable presumption that the child is actually living with such custodian**.
>
> [See 42 N.J.R. 179, 182 (providing the text of N.J.A.C. 6A:22-1.2 effective January 19, 2010).]

Essentially, a child will typically be domiciled where his or her parent or guardian is domiciled under N.J.A.C. 6A:22-3.1(a)(1), but this rule is not necessarily absolute. Regardless, notwithstanding N.J.A.C. 6A:22-3.1, a child may still not be entitled to attend school in the guardian's school district when the guardian maintains residential custody, if it is proven that the child does not actually live with the guardian under N.J.A.C. 6A:22-1.2.

CONCLUSIONS AND ORDER

Based upon the undisputed facts and circumstances, I **FIND** that D.A. failed to meet the burden of proof that L.A. met the requirements to receive a free education within the District's public schools between October 8, 2013, the date of the commencement of the investigation in this matter, and December 16, 2013, the date of the Board's hearing. L.A. returned to live in D.A.'s home following the Board's determination of December 16, 2013. I therefore **CONCLUDE** that L.A. was not entitled to a free public education in the West Orange School District during the period of time in question, and further **CONCLUDE** that the tuition costs set forth by respondent are uncontradicted. Therefore petitioner is assessed tuition in the amount of $6,947.84 (annual tuition of $27,188, and a per-diem rate of $151.04 for 46 days).

It is hereby **ORDERED** that petitioner's appeal of respondent's determination is **DENIED**. It is further **ORDERED** that petitioner be assessed tuition costs as set forth above for the period of L.A.'s ineligible attendance in respondent's school district.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 21, 2014
DATE

LESLIE Z. CELENTANO, ALJ

Date Received at Agency: 7/21/14

Date Mailed to Parties: JUL 22 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

359-14

OAL DKT. NO. EDU 09584-10
AGENCY DKT. NO. 178-7/10

DENNIS Z. FEDAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement[1] and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9-04/14
Date of Mailing: 9/04/14

[1] The parties are reminded that the Commissioner does not have jurisdiction over the subject matter of paragraph 11 of the Settlement Agreement.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09584-10

AGENCY DKT. NO. 178-7/10

DENNIS Z. FEDAK,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BURLINGTON, BURLINGTON COUNTY,

Respondent.

Jason E. Sokolowski, Esq. for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Frank P. Cavallo, Esq., for respondent (Parker McCay, attorneys)

Record Closed: July 17, 2014 Decided: July 23, 2014

BEFORE **SUSAN M. SCAROLA,** ALJ:

This matter was transmitted to and filed with the Office of Administrative Law ("OAL") on September 8, 2010, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that settlement should be approved. Accordingly, I approve the settlement **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 23, 2014 — Susan Scarola

DATE — **SUSAN M. SCAROLA**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: July 28, 2014

/mel

RECEIVED
2014 JUN 17 A 8:39

File No. 13963-0001
Law Offices
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
(856) 596-8900
Attorneys for Respondent, Burlington City Board of Education

DENNIS FEDAK, Petitioner, v. BURLINGTON CITY BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY Docket No. EDU 09584-2010S Agency Dkt. No.: 178-7/10 CIVIL ACTION **SETTLEMENT AGREEMENT**

This Agreement is made this __ day of 2014, by and between the Burlington City School District Board of Education (the "District"), with principal offices at 518 Locust Avenue, Burlington, New Jersey, 08016 and Dennis Fedak ("Fedak") residing at 24 Bennington Road, Bordentown, New Jersey 08505, both of whom are collectively referred to as "the Parties."

WITNESSETH:

WHEREAS, the Petitioner, Dennis Fedak, ("Fedak") was employed as a teaching staff member in the Burlington City School District ("District") for approximately 34 years; and,

WHEREAS, the District engaged in a Reduction In Force ("RIF") in April 2010 and abolished Fedak's teaching position effective June 30, 2010; and,

WHEREAS, Fedak filed a Petition of Appeal against the District challenging the

abolishment of his position; and,

WHEREAS, the Parties have engaged in settlement negotiations throughout this matter through their respective counsel; and,

WHEREAS, as a result of the settlement negotiations the Parties have reached the within Settlement Agreement;

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

1. Fedak, for and in consideration of the undertakings of the District set forth in ¶4 herein, and intending to be legally bound, does hereby remise, release and forever discharge the District and its officers, members, employees and agents, its and their respective successors and assigns, heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which he ever had, now has, or hereinafter may have, or which her heirs, executors or administrators hereinafter may have with respect to his employment relationship with the District with the following exceptions: claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq. and claims arising from the breach of this Agreement. shall dismiss, with prejudice, the Petition of Appeal filed in this matter.
2. This release shall not apply to matters occurring after it is signed by Mr. Fedak.
3. The District, for and in consideration of the undertakings of Fedak set forth herein, and intending to be legally bound, does hereby remise, release and forever discharge Fedak and his heirs, executors and administrators, of and from any and all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which it ever had, now has, or hereinafter may

have, or which its officers, members, employees and/or agents, and its respective successors and assigns, heirs, executors or administrators hereinafter may have with respect to his employment relationship with the District except for claims arising from the breach of this Agreement.

4. The District shall pay Fedak the sum of Ten Thousand Dollars ($10,000.00). This payment shall be for the relinquishment of any and all tenure, seniority, recall, and other reemployment rights that Fedak may have or may claim hereafter, and shall not be considered back pay, back salary, or back wages. Upon receipt of said payment, Fedak shall withdraw the Petition of Appeal with prejudice.
5. It is expressly agreed and understood that the District does not have and will not have any obligation to provide Fedak at any time in the future with any payments, benefits or considerations other than those recited above.
6. Fedak hereby agrees and recognizes that any claim referred to above shall be extinguished by same payment and that no employment relationship exists with the District and that the District does not have any obligation, contractual or otherwise, to hire, rehire, or re-employ him in the future.
7. Fedak agrees and acknowledges that the agreement by the District described herein is not and shall not be construed to be an admission of any violation of federal, state or local statute or regulation, or of any duty owed by the District to him. Fedak further agrees and acknowledges that the execution of this Agreement is to provide an amicable conclusion of any claims that Fedak has relating to his employment relationship with the District.

8. Nothing in this Agreement shall constitute evidence of a past practice on the part of the District, nor shall it be binding upon the District with respect to any other employee of the Burlington City School District. The District and Fedak have entered into this Agreement based upon the particular facts and circumstances unique to Fedak.

9. By signing this Agreement, the Parties certify that they have had the opportunity to discuss this Agreement with counsel. They are fully satisfied with the services of their counsel with respect to both this Agreement and all other aspects of this case and they enter into this Agreement knowingly, willingly and without any coercion or improper inducements.

10. The Parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

11. The Parties agree that this Agreement is contingent upon the Division of Pensions and Benefits' and if necessary the Board of Trustees of the Teachers' Pension and Annuity Fund's agreement that the payment set forth in ¶ 4 herein shall not be deemed back pay, back salary, or back wages, and shall create no financial obligation on Mr. Fedak's part to the Division of Pensions and Benefits.

12. This settlement is also subject to the approval of the Office of Administrative Law and the Commissioner of Education, and shall not be binding until said approvals are received.

13. If this settlement is not approved by the Office of Administrative Law and Commissioner of Education, this matter shall be returned to the Office of Administrative Law for further proceedings. Upon approval of this Settlement and

Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the Parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR PETITIONER

Date: 5/25/14

DENNIS FEDAK

FOR RESPONDENT,
BURLINGTON CITY
BOARD OF EDUCATION

Date: 6/9/14

DARRYL S. THOMPSON, SR.
BOARD PRESIDENT

Exhibit NN-1
6/9/14

THE CITY OF BURLINGTON BOARD OF EDUCATION
RESOLUTION #2443-14
APPROVING THE SETTLEMENT AGREEMENT BETWEEN
THE CITY OF BURLINGTON BOARD OF EDUCATION AND DENNIS FEDAK

WHEREAS, Dennis Fedak, ("Fedak") was employed as a teaching staff member in the Burlington City School District ("District") and was tenured; and,

WHEREAS, the District engaged in a Reduction In Force ("RIF") in April 2010 and abolished Fedak's teaching position effective June 30, 2010; and,

WHEREAS, Fedak filed a Petition of Appeal against the District challenging the abolishment of his position; and,

WHEREAS, the Petition of Appeal was transmitted to the Office of Administrative Law for a Hearing before the Honorable Susan Scarola, A.L.J.; and

WHEREAS, the District and Fedak, through their respective counsel engaged in extensive settlement discussions in this matter; and

WHEREAS, as a result of those settlement discussions the parties have expressed a desire to settle the matter; and

WHEREAS, the Board believes it to be the best interest of the City of Burlington School District to settle all disputes in accordance with the terms of this Agreement.

NOW, THEREFORE, BE IT RESOLVED ON THE 9TH DAY of JUNE 2014, BY THE CITY OF BUARLINGTON BOARD OF EDUCATION AS FOLLOWS:

1. The Settlement Agreement between the City of Burlington Board of Education and Dennis Fedak is hereby approved.

2. The Board of Education President or in his absence the Board of Education Vice President is hereby authorized to execute the Settlement Agreement.

I, CRAIG H. WILKIE, do hereby certify the above to be a true and correct copy of a resolution adopted by the Board of Education at its meeting held on June 9, 2014 in Burlington City, New Jersey.

Craig H. Wilkie
Board Secretary

360-14

NAOMI WEISS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contended that the Board improperly docked her sick leave bank and placed her on unpaid leave following a work–related injury, in contravention of *N.J.S.A.* 18:30-2.1. Petitioner was employed by the Board as a speech therapist when she was injured on March 1, 2013. The injury was determined to be work-related and compensable under the laws governing Workers' Compensation. Petitioner received temporary disability benefits from the date of the accident until September 2013, and the Board paid any differential between her benefits and her full salary during that time, without docking her sick leave bank. Following an August 2013 medical opinion that petitioner was capable of resuming her duties, her workers' compensation benefits were terminated. Petitioner, however, contended that she is still disabled, and remained out of work on paid sick leave. The Board docked her sick leave bank until it was exhausted, and then began to dock petitioner's pay. A formal application to restore workers' compensation benefits was filed in January 2014 and remains pending before the Division of Workers' Compensation (Division). The Board contended that the instant petition was filed prematurely, and should be dismissed.

The ALJ found, *inter alia*, that: it is uncontroverted that petitioner's original injury was work-related and compensable, and there was no issue that she was disabled until October 1, 2013, or that her injuries were compensable until that date; however, the extent and duration of petitioner's disability remains in contention before the Division; a February 11, 2014 order that accompanied petitioner's filing was an interim order and not intended to offer finality on the question of her continued disability; proceedings at the Division continue to date; the applicable regulations specify that the Commissioner is without jurisdiction until the Division has made its final determination in this matter. Accordingly, the ALJ concluded that the petition was filed prematurely and should be dismissed without prejudice.

The Commissioner concurred with the ALJ that the matter was filed prematurely. Accordingly, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, and dismissed the petition without prejudice.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 9/04/14

OAL DKT. NO. EDU 3576-14
AGENCY DKT. NO. 41-2/14

NAOMI WEISS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

On exception, petitioner essentially replicates the arguments she advanced in submissions before the Administrative Law Judge (ALJ) below. As it is determined that these arguments were fully considered and addressed in the Initial Decision, they will not be revisited here.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons clearly stated in her opinion – that the petition was filed prematurely and should be dismissed without prejudice. Petitioner may refile the petition in the event that the Division of Workers' Compensation validates her claims regarding the duration of her compensable injury and there continues to be a disagreement respecting her rights pursuant to *N.J.S.A.* 18A:30-2.1.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter, and the instant petition of appeal is hereby dismissed without prejudice.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/04/14

Date of Mailing: 9/04/14

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

360-14

NAOMI WEISS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner contended that the Board improperly docked her sick leave bank and placed her on unpaid leave following a work–related injury, in contravention of *N.J.S.A.* 18:30-2.1. Petitioner was employed by the Board as a speech therapist when she was injured on March 1, 2013. The injury was determined to be work-related and compensable under the laws governing Workers' Compensation. Petitioner received temporary disability benefits from the date of the accident until September 2013, and the Board paid any differential between her benefits and her full salary during that time, without docking her sick leave bank. Following an August 2013 medical opinion that petitioner was capable of resuming her duties, her workers' compensation benefits were terminated. Petitioner, however, contended that she is still disabled, and remained out of work on paid sick leave. The Board docked her sick leave bank until it was exhausted, and then began to dock petitioner's pay. A formal application to restore workers' compensation benefits was filed in January 2014 and remains pending before the Division of Workers' Compensation (Division). The Board contended that the instant petition was filed prematurely, and should be dismissed.

The ALJ found, *inter alia*, that: it is uncontroverted that petitioner's original injury was work-related and compensable, and there was no issue that she was disabled until October 1, 2013, or that her injuries were compensable until that date; however, the extent and duration of petitioner's disability remains in contention before the Division; a February 11, 2014 order that accompanied petitioner's filing was an interim order and not intended to offer finality on the question of her continued disability; proceedings at the Division continue to date; the applicable regulations specify that the Commissioner is without jurisdiction until the Division has made its final determination in this matter. Accordingly, the ALJ concluded that the petition was filed prematurely and should be dismissed without prejudice.

The Commissioner concurred with the ALJ that the matter was filed prematurely. Accordingly, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, and dismissed the petition without prejudice.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 9/04/14

OAL DKT. NO. EDU 3576-14
AGENCY DKT. NO. 41-2/14

NAOMI WEISS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and respondent's reply thereto – filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4 – were fully considered by the Commissioner in reaching his determination herein.

On exception, petitioner essentially replicates the arguments she advanced in submissions before the Administrative Law Judge (ALJ) below. As it is determined that these arguments were fully considered and addressed in the Initial Decision, they will not be revisited here.

Upon a comprehensive review of the record in this matter, the Commissioner concurs with the ALJ – for the reasons clearly stated in her opinion – that the petition was filed prematurely and should be dismissed without prejudice. Petitioner may refile the petition in the event that the Division of Workers' Compensation validates her claims regarding the duration of her compensable injury and there continues to be a disagreement respecting her rights pursuant to *N.J.S.A.* 18A:30-2.1.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter, and the instant petition of appeal is hereby dismissed without prejudice.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/04/14

Date of Mailing: 9/04/14

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03576-14
AGENCY DKT. NO. 41-2/14

NAOMI WEISS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

William Volonte, Esq., for petitioner (Oxfeld Cohen, attorneys)

George F. Hendricks, Esq., for respondent (Hendricks and Hendricks, attorneys)

Record Closed: July 7, 2014 Decided: July 24, 2014

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Naomi Weiss (Weiss), a teaching staff member employed by the New Brunswick Board of Education (the Board), contends that the Board improperly docked her sick leave bank and placed her on an unpaid leave following a work-related injury, in contravention of N.J.S.A. 18:30-2.1. The Board replies that the petition of appeal before

the Commissioner of Education (the Commissioner) has been filed prematurely and should be dismissed, citing the requirement contained at N.J.A.C. 6A:3-1.3(c) that the Commissioner refrain from exercising jurisdiction until the Division of Workers' Compensation (the Division) makes a determination of work-related injury.

PROCEDURAL HISTORY

Weiss's petition of appeal was filed with the Commissioner on January 9, 2014. Via letter dated January 10, 2014, her attorney was advised by the Director of the Bureau of Controversies and Disputes that the petition was "not eligible for docketing as a contested case" because the petition made no reference to a Division judgment or settlement, and thus appeared to have been filed prematurely. The letter noted that "should a [Division] proceeding be instituted and result in a determination . . . of work-related causation, any remaining dispute with the employing district may be appealed at that time as provided by rule."

The petition was refiled on January 13, 2014. Via letter dated February 12, 2014, Weiss's counsel supplied the Commissioner with a Division order dated February 11, 2014; pointing out via cover letter that this order stated that Weiss had sustained a compensable injury. The petition was accepted for filing by the Commissioner; an answer was filed by the Board on March 25, 2014; and the matter was transmitted to the Office of Administrative Law (OAL) on March 26, 2014. Ongoing concerns regarding the ripeness of the petition were discussed by counsel and me during several telephone conferences. Thereafter, via letter dated May 27, 2014, counsel for the Board asked that the matter be dismissed. He shared the certification of John Geaney, Esq., Board counsel in the Workers' Compensation matter, which clarified the background and chronology of events relative to the Division proceeding. Counsel for Weiss replied via brief and accompanying documents filed on July 7, 2014, at which time the record closed.

FINDINGS OF FACT

The salient facts are uncontroverted, and I **FIND**:

Weiss was employed by the Board as a speech therapist when, on March 1, 2013, she was injured at work after falling from a chair and hitting her head. The injury was determined to be work-related and compensable under the laws governing Workers' Compensation. Weiss received temporary disability benefits from the date of her accident until September 24, 2013. The Board paid any differential between her benefits and her full salary during this time, and did not dock her sick leave bank.

But the parties continued thereafter to litigate before the Division regarding the extent of Weiss's disability; indeed, the Geaney certification readily confirms that this issue remains starkly in dispute. On August 29, 2013, a physician placed Weiss at maximum medical improvement and opined that she was capable of resuming her duties. On the basis of this medical opinion, Weiss's workers' compensation benefits were terminated. She contended that she remained disabled. Weiss continued on paid sick leave, but the Board docked her sick leave bank; when her sick days were exhausted, the Board began to dock Weiss's pay.

A formal application to restore Weiss's workers' compensation benefits was filed on or about January 2, 2014, and remains pending before the Division. A February 11, 2014, Division order directed that Weiss be evaluated by another physician, Dr. Joshua Hersh.[1] While this order states that Weiss suffered a compensable injury, this is a clear reference to the determination in March 2013 that led to her receipt of workers' compensation benefits until October 1, 2013. Dr. Hersh issued a report on February 21, 2014, but that report did not address Weiss's ability to return to work. A follow-up note dated March 18, 2014, did state that Weiss was unable to work, but referenced a reevaluation after which Hersh would opine further. Geaney notes that Hersh cancelled this latter visit and has refused to continue to treat Weiss. There have been follow-up visits with other physicians retained by the workers' compensation carrier; to date none have confirmed Weiss's inability to return to work.

[1] This is the order that was filed by Weiss to perfect her petition of appeal.

Accordingly, the issue of Weiss's entitlement to workers' compensation benefits from October 1, 2013, forward remains hotly in contention before the Division. Indeed, counsel for Weiss notes that he filed an additional "Motion for Temporary and/or Medical Benefits" before the Division as late as March 26, 2014.

ANALYSIS AND CONCLUSIONS OF LAW

Weiss's claims before the Commissioner spring from N.J.S.A. 18A:30-2.1(a), which provides as follows:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S.A. 18A: 30-2 and N.J.S.A. 18A: 30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.
>
> [Emphasis supplied.]

A local school board's obligation to pay an injured employee her full salary for up to one year without thus hinges on whether that employee "received or was eligible to receive a temporary disability benefit" under the Workers' Compensation laws. The school law questions implicated by N.J.S.A. 18A:30-2.1 cannot be resolved until the Division acts. Accordingly, N.J.A.C. 6A:3-1.3(c) provides as follows:

> A petitioner claiming benefits under N.J.S.A. 18A:30-2.1 shall include a copy of the ruling or settlement agreement issued by the Division of Workers' Compensation with respect to the injury underlying the claim or provide reasons why the matter constitutes an exception to the requirement

> that the Commissioner refrain from exercising jurisdiction until the Division makes a determination of work-related injury.

Elsewhere the regulations again explicitly require that the Commissioner "refrain from exercising jurisdiction until the Division has made a determination on the underlying injury, in which case the petition shall be filed within 90 days of receipt of notice of the district board of education's action . . . which has the effect of denying such benefits." N.J.A.C. 6A:3-1.3(i)(1).

The intent of the regulatory scheme is clear. Since the Commissioner is without jurisdiction until the Division makes its final determination, a filing before the Commissioner must await a Division settlement or ruling that calls the obligations implicated by N.J.S.A. 18:30-2.1 into contention. In the past, petitioners would file with the Commissioner within ninety days of sustaining what they contended was a compensable injury, doing so to avoid later dismissal of their claims on timeliness grounds. Cases would then linger on the inactive list at the OAL, often for years, while the parties waited for the Division ruling that was needed to guide a decision under N.J.S.A. 18A:30-2.1. Amendments to N.J.A.C. 6A:3-1.3, effective July 3, 2006, were intended to rectify what was an inefficient system by making it plain that petitioners can, and should, wait to invoke the Commissioner's jurisdiction until their school law claims are ripe. Indeed, the outcome of the Division proceeding often obviates the need for further litigation before the Commissioner and OAL.

Here, it is uncontroverted that Weiss's original injury was work-related, and was thus compensable. Importantly, there was no issue that Weiss was disabled until October 1, 2013, or that her injuries were compensable until that date. The Board did not dock her sick days, and paid her, during this uncontroverted period of disability. But the extent and duration of Weiss's disability remains in contention before the Division. Clearly, the February 11, 2014, order that accompanied Weiss's filing was an interim order that was never intended to offer finality on the question of her continued disability. Indeed, proceedings at the Division are ongoing. Accordingly, the Commissioner is without jurisdiction to rule on Weiss's rights under N.J.S.A. 18A:30-2.1 until after the Division has determined whether the extent of Weiss's "underlying injury" is such that

she is entitled to benefits under the Workers' Compensation Act from October 1, 2013, to date.

Weiss points to the financial difficulties she is experiencing as a result of her unpaid leave status. I have been given no reason to doubt that her difficulties are very real. Moreover, Weiss's submission correctly urges that the issue of her paid sick day entitlement under N.J.S.A. 18A:30-2.1(a) is a matter for the Commissioner's exclusive jurisdiction. But in support of her arguments that her dispute is ripe for adjudication by the Commissioner Weiss relies on cases that predate the amendments to N.J.A.C. 6A:3-1.3. Her arguments thus are unconvincing and inconsistent with the express language and intent of N.J.A.C. 6A:3-1.3.

I **CONCLUDE** that this petition was filed prematurely and should be dismissed without prejudice. The petition should be refiled if and when there is a Division finding that validates Weiss's claims regarding the duration of her compensable injury; and if, thereafter, the parties remain at odds on the effect of such a finding on her rights under N.J.S.A. 18A:30-2.1.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the petition of appeal be **DISMISSED** without prejudice.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 24, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: July 24, 2014

Date Mailed to Parties: JUL 25 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

361-14

OAL DKT. NO. EDU 18535-13
AGENCY DKT. NO. 293-11/13

L.L., on behalf of minor child, A.F.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, OCEAN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the settlement terms to the extent they are within his jurisdiction and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/04/14
Date of Mailing: 9/04/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 18535-13

AGENCY DKT. NO. 293-11/13

L. L. ON BEHALF OF MINOR CHILD, A.F.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF OCEAN, OCEAN COUNTY,

Respondent.

Michael A. Malia, Esq., for petitioner (Pringle, Quinn, Anzano, P.C., attorneys)

Cherie L. Adams, Esq., for respondent (Adams, Stern, Gutierrez & Lattiboudere, LLC, attorneys)

Record Closed: July 28, 2014 Decided: July 28, 2014

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on December 20, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

July 28, 2014
DATE

JOHN SCHUSTER III, ALJ

Date Received at Agency:

Date Mailed to Parties: July 30, 2014

/cad

ADAMS GUTIERREZ & LATTIBOUDERE, LLC
1037 Raymond Boulevard, Suite 900
Newark, NJ 07102
(973) 735-2742
Attorneys for Respondent,
Ocean Township Board of Education

2013 JUL 25 A 11:32

L.L obo A.F., Petitioners, v. OCEAN TOWNSHIP BOARD OF EDUCATION, Respondent.	Agency Reference No.: 293-11/13 OAL Docket No.: EDU 18535-2013 S **SETTLEMENT AGREEMENT**

WHEREAS, the Ocean Township Board of Education ("Board" or "District") is the local education agency responsible for providing a public education to A.F., a minor; and

WHEREAS, L.L., parent of A.F. ("Parent"), resides within the geographic area served by the District; and

WHEREAS, Parent filed an appeal to the Commissioner of Education on behalf of her son, currently docketed as Agency Reference No. 293-11/13 and OAL Docket No. 18535-2013 S; and

WHEREAS, without waiving their respective positions and without any admissions by either party, Parent and the District wish to fully resolve all outstanding disputes between the parties pursuant to the terms set forth below;

NOW THEREFORE, on her own behalf and on behalf of A.F., Parent and the District hereby agree to the following items:

1. The District shall pay Parent a total of $7,500.00 as reimbursement for educational services provided by Parent.

2. The payment under paragraph 1 shall be in full and final settlement of this petition and any and all claims known or claims that could have been made herein, including any claims for fees or costs. Said payment shall represent the District's entire financial obligation to the Parent.

3. The parties agree that this Agreement fully resolves all outstanding claims and obligations of either party in connection with the above-captioned matter and that it is entered into voluntarily after consultation with legal counsel. Parent and A.F. specifically waive and release the Ocean Township Board of Education from any and all claims for damages, compensation, education, attorney fees, and/or expert fees or other expenses, and/or claims, except as set forth herein, under the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.), the Civil Rights Act of 1966 (42 U.S.C. § 1981 et seq.), the New Jersey Civil Rights Act (N.J.S.A. 10:6-1 et seq.), the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.), the Anti-Bullying Bill of Rights Act (N.J.S.A. 18A:37-13.1 et seq.), the New Jersey Law Against Discrimination ("LAD") (N.J.S.A. 10:5-1 et seq.), or any other state or federal law or regulation or common law claim, regardless of forum, through the date of this Agreement. Neither party shall be deemed a prevailing party and each party shall be responsible for its own attorney's fees and costs.

4. As a result of this Agreement, the parties, including the Parent and members of the Board of Education and District administrators, agree to keep confidential and not share any information as to the terms of the settlement, except as required by law or as necessary to implement its terms.

5. This Agreement is subject to the approval of the Ocean Township Board of Education.

The parties hereby acknowledge their agreement to the terms set forth above by signing below.

OCEAN TOWNSHIP BOARD OF EDUCATION

S. Cornette Stryde
By

6/23/14
Date

L.L., Parent

6/18/14
Date

Ocean Township School District Board of Education
64 Railroad Avenue
Waretown, NJ 08758

Approval of Settlement:

Motion by Mrs. Bruno, seconded by Dr. LoParo, on recommendation of the Superintendent, to approve the settlement for Hearing 14-02.

The motion carried unanimously by roll call vote.
Present: Mrs. Bruno, Mr. Lange, Dr. LoParo and Mrs. Stride
Absent: Mrs. Sweeney

I hereby certify that at the Regular Meeting of the Ocean Township School District Board of Education, held on June 23, 2014, the resolution above was approved and recorded in the Minutes.

Steven Terhune
Board Secretary

26 JUN 02 PM 4:02

380-14

OAL DKT. NO. EDU 06058-14
(EDU 16369-12 ON REMAND)
AGENCY DKT. NO. 344-11/12

PATRICIA TREGO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement and General Release, and the Initial Decision on Remand issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/16/14
Date of Mailing: 9/16/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06058-14
AGENCY DKT. NO. 344-11/12

PATRICIA TREGO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MADISON, MORRIS COUNTY,

Respondent.

ON REMAND
OAL DKT. NO. EDU 16369-12

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld Cohen, P.C., attorneys)

Jeffrey R. Caccese, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: August 11, 2014 Decided: August 13, 2014

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 19, 2014, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

The attached Settlement Agreement and Board Resolution were submitted on August 11, 2014, indicating the terms of agreement which are incorporated herein by reference.

Having reviewed the record and the settlement terms, I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and, therefore, **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

8/13/14
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

8-15-14

Date Mailed to Parties: AUG 15 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

dr

BOARD OF EDUCATION OF THE BOROUGH OF MADISON

359 Woodland Road • Madison, NJ 07940 • (973) 593-3101 • Fax (973) 593-3161

Dr. Michael A. Rossi
Superintendent

Gary S. Lane
Business Administrator/
Board Secretary

Extract of the minutes of a meeting of the Madison Board of Education, Borough of Madison, Morris County, New Jersey as recorded in the official minute book

The Public Meeting of the Madison Board of Education, Morris County, New Jersey, was called to order by President Ellis at **6:39 p.m.** on **December 17, 2013** in the Alice Perlaw Library Media Center of Madison High School, Ridgedale Avenue, Madison, NJ.

ROLL CALL:

Board Members Present:
Lisa Ellis, President
Patrick Rowe, Vice President – *left the meeting at 7:06 p.m.; returned at 7:31 p.m.*
Dave Arthur
Shade Grahling
Thomas Haralampoudis
James Novotny

Board Member Absent: Kevin Blair, Linda Gilbert

Also Present:
Dr. Michael A. Rossi, Superintendent
Mr. Gary S. Lane, Business Administrator, Board Secretary
Mr. Matthew Mingle, Director of Curriculum & Instruction

Moved by Pat Rowe, seconded by Shade Grahling, to approve as follows: a-m

Settlement Agreements
Resolved, that the Board of Education hereby approve the settlement agreements and releases pursuant to the agreed upon terms and conditions outlined in said agreements for the staff members listed on attachment "A"

ROLL CALL: UNANIMOUS 6-0

Madison Board of Education
Regular Board Meeting of 12/17/13

Attachment
A

Approval of Settlement Agreements:

1. Approval of Settlement Agreement and Release between the Madison Board of Education and Patricia Trego in the amount of $39,492.50 pursuant to the terms and conditions outlined therein.

STATE OF NEW JERSEY)
)ss
COUNTY OF MORRIS)

I, Gary S. Lane, Secretary of the Madison Board of Education, Borough of Madison, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on December 17, 2013, has been compared by me with the original minutes as officially recorded in my office in the minute book of said the Madison Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 10th day of July 2014.

Gary S. Lane, RSBA

School Business Administrator/
Secretary to the Board of Education

SETTLEMENT AGREEMENT AND GENERAL RELEASE

THIS AGREEMENT is made by and between Patricia Trego, P.O. Box 370 Far Hills, NJ 07931 (hereinafter referred to as "Ms. Trego") and the Board of Education of the Borough of Madison, 359 Woodland Road, Madison, NJ 07940, its predecessors, successors, individual Board members, officers, directors, administrators, representatives, employees, attorneys, agents, and assigns, individually, jointly and severally (hereinafter collectively referred to as "Board") pursuant to the following terms and conditions:

WHEREAS, Ms. Trego was employed by the Board as a teaching staff member since 2001;

WHEREAS, on or about June 30 2011, Ms. Trego was dismissed by the Board due to a reduction in force;

WHEREAS, at the time of her termination from employment, Ms. Trego was a part-time employee and as a part-time employee her adjusted salary was $31,594.00.

WHEREAS, on or about November 20 2012, Ms. Trego filed an appeal with the New Jersey Department of Education captioned *Patricia Trego v. Board of Education of the Borough of Madison, Morris County* (OAL Docket No. EDU 16369-2012N; Agency Docket No. 344-11/12) (hereinafter "Appeal") claiming that there were full-time positions to which she was entitled under her Instructional Certificate and relevant endorsements, but she was not offered those positions by the Board in violation of *N.J.S.A.* 18A:28-12 and *inter alia Capodilupo v. West Orange Bd. of Ed.*, 218 NJ Super 510 (App Div 1986) and *Bednar v. Westwood Bd. or Ed.*, 221 NJ Super 239 (App Div 1987).

WHEREAS, at all times, the Board has denied and continues to deny the allegations set forth in Ms. Trego's appeal;

WHEREAS, the parties wish to avoid the expense and uncertainty of continued litigation;

NOW, THEREFORE, in consideration of the mutual covenants herein contained and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Ms. Trego and the Board hereby agree as follows:

1. GENERAL RELEASE OF CLAIMS

In consideration of the Settlement Amount set forth below and the other promises made herein, Ms. Trego and her respective heirs, shareholders, directors, officers, employees, agents, attorneys, affiliates, parents, subsidiaries, predecessors, successors, assigns, and all persons acting by, through, under or in concert with any of them each release the Board and its respective heirs, shareholders, directors, officers, employees, agents, attorneys, affiliates, parents, subsidiaries, predecessors, successors, assigns, and all persons acting by, through, under or in concert with any of them (the "Released Parties"), from any and all charges, complaints, claims,

liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims of any nature whatsoever, known or unknown, which they now have, claim to have, own, hold or which they at any time heretofore had, held, or claimed to have, relating in any manner whatsoever to: (i) the Appeal; (ii) any employment relationship between Ms. Trego and the Board, and (iii) any other relationship by, among, and/or between Ms. Trego and the Board. Ms. Trego further understands, covenants, and agrees that she will not enter, permit to be entered or cause to be entered, directly or indirectly, any suit or other claim against the Released Parties related to the foregoing. Ms. Trego represents and warrants that she has not sold, assigned, transferred, conveyed or otherwise disposed of any claim, demand or cause of action, including any claim for attorneys' fees, against the Board or the Released Parties which relates to the Appeal and the other matters stated above.

Ms. Trego's release and discharge also includes, without limitation, any contract or tort claim or potential claim, and any claim arising under common law, such as claims for breach of contract, defamation, breach of implied covenant of good faith and fair dealing, misrepresentation, libel, slander, invasion of privacy, negligence, interference with advantageous relations, infliction of emotional distress, loss of consortium, discrimination, retaliation, or wrongful termination.

This release shall not apply to any claim arising out of (a) the enforcement of this agreement; (b) any claim that arises after the date of this agreement; or (c) claims that may not lawfully be released, discharged, or waived.

2. NO OTHER LEGAL ACTION BY THE PARTIES.

The Parties confirm that no charge, complaint or action is pending in any forum or form, except the Appeal, which the Parties have agreed to voluntarily dismiss with prejudice in their entirety. Further, the Parties covenant and agree not to bring any charge, complaint, action, suit, or administrative proceeding in any forum before any federal, state, or local administrative agency or in any federal, state or local court against any of the Released Parties for any actions that could or did arise or accrue prior to and including the date of this Agreement; provided, however, it does not interfere with or limit either of the Parties protected right to file a charge with or participate in an investigation by or proceeding before the Equal Employment Opportunity Commission or any similar state or local commission that investigates and enforces anti-discrimination laws. Nothing contained herein shall in any manner be deemed a waiver or extension of any applicable statute of limitations, whether administrative or otherwise. Nonetheless, the Parties understands that, by signing this Agreement, they each waive any rights they may have to recover money or other relief in any lawsuit or proceeding they brings or that is brought on her behalf by any agency or third party against any of the Released Parties based on events arising out of or relating to the Appeal through the date of this Agreement. Except where otherwise permitted under this paragraph, the Parties agree that any such action shall be dismissed with prejudice upon presentation of this Agreement. Nothing in this paragraph is intended to limit either of the Parties from instituting legal action for the sole purpose of enforcing this Agreement.

3. SETTLEMENT TERMS

a. In consideration of the above, the Board agrees that Ms. Trego's employment with the Board shall be deemed terminated effective February 28, 2013.

b. In further consideration of the above, and since Ms. Trego's last day of employment will be considered February 28, 2013, Ms. Trego will receive back pay for the period of September 1, 2011 until February 28, 2013 in the amount of $39,492.50 ("Settlement Amount"), minus applicable deductions set forth in subsection (c) below, which will be inclusive of all accumulated sick leave, therefore, Ms. Trego's sick leave will be deemed exhausted as a result of this settlement agreement. For the period of set forth above, Ms. Trego will be considered as having been placed on a paid administrative leave.

c. The Board will deduct from the Settlement Amount all applicable withholdings and taxes, including the employer share of social security, Medicare, FUTA, and the New Jersey unemployment and temporary disability taxes, and pension deductions, if applicable.

d. Ms. Trego agrees that she is solely responsible and legally bound to make payments of any other taxes, if any, which are determined to be owed (including penalties and interest related thereto) by any taxing authority. Ms. Trego understands and agrees that the Board has not made any representation regarding the tax treatment of the Settlement Amount, and Ms. Trego agrees that she is responsible for determining the tax consequences of such payments and for paying taxes owed, if any, that may be owed with respect to the Settlement Amount. In the event of a claim for such taxes, and/or penalties or interest, by a taxing authority, Ms. Trego agrees to and does hereby indemnify and hold the Board harmless against any and all tax liability, penalties, and/or interest as due thereon.

e. The Settlement Amount will be paid by one regular check payable to the order of "and Patricia Trego (Social Security Number: 145-50-1878)" and delivered by mail to Oxfeld Cohen, P.C., 60 Park Place, Suite 600, Newark, NJ 07102, to the attention Sanford Oxfeld, Esquire.

f. Ms. Trego asserts that had she been employed for the month of February, 2013 she would have been entitled to health insurance as her claim was to a full-time position and there were non-tenured, full-time teachers employed by the Board in positions being claimed by Trego. The Board makes no representation as to the status of Ms. Trego's employment from June 30, 2011 through February 28, 2013, including the affect this settlement agreement will have upon Ms. Trego's pension, if any, but does acknowledge that full-time employees of the Board are entitled to health insurance coverage.

5. NO OTHER COMPENSATION DUE

Ms. Trego understands and agrees that the Settlement Amount represents benefits to which Ms. Trego is not otherwise entitled to but for her execution of this Agreement and her fulfillment of all of the promises contained herein and that no other compensation is due to her by the Board. Ms. Trego further acknowledges that she is not a "prevailing party" in the Appeal and that, in exchange for the consideration provided for by this Agreement, she waives any and all claims against the Board and the Released Parties for any attorneys' fees and/or costs relating to the

Action.

6. NON-ADMISSION

This Settlement Agreement shall not be construed as an admission of any wrongdoing of any kind whatsoever by the Parties, including the allegations set forth in the Appeal. The Board has specifically denied and continues to deny that they or Released Parties are liable to Ms. Trego for any damages whatsoever.

7. DISMISSAL OF THE ACTION WITH PREJUDICE

In consideration for the Settlement Amount and the other promises set forth herein, Ms. Trego agrees to dismiss the Appeal with prejudice upon execution by all parties of this Agreement.

8. POSITIONS WITH THE BOARD

Ms. Trego hereby waives any rights to seek any position, paid or unpaid, with the Board, and specifically promises not to apply for any position with the Board or the Release Parties. Ms. Trego agrees that any attempt to obtain a position with the Board or the Released Parties will constitute a breach of this agreement and the Board and the Released Parties may rely on the breach in rejecting the application or refusing to employ, reemploy, appoint, nominate, or contract with Ms. Trego.

Ms. Trego agrees that her signature on this Agreement constitutes an acknowledgment that her rights to employment, including any and all tenure rights and any and all future rights to employment and/or re-employment with the Board will end as of the end of the day on February 28, 2013. Ms. Trego agrees she shall never again seek employment with the Board.

9. PESONAL PROPERTY

Should Ms. Trego have certain personal property on Board premises, she and her designated representative shall be permitted, on notice to school administration, and at a mutually convenient day and time, to come onto school property, and, if deemed necessary, meet with a representative of school administration and accompanied by a representative, designate which property belongs to her and remove her personal property. The Board will cooperate in this regard.

10. AUTHORIZED SIGNATORY

By signing this Agreement, each signatory represents that he or she is a Party or has been duly authorized by a Party to sign on that Party's behalf and that this Stipulation is duly authorized, approved and consented to as to terms.

11. COUNTERPARTS AND FACSIMILES

The parties agree that this Agreement may be signed in counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

12. ENTIRE AGREEMENT

This Settlement Agreement represents the entire understanding between the Board and Ms. Trego with respect to the subject hereof. This Settlement Agreement supersedes all prior written and oral understandings between the Board and Ms. Trego with respect to this subject. There are no representations which are not contained herein that have been made or relied upon by the Board and Ms. Trego in entering this Settlement Agreement. This Settlement Agreement may not be modified except by a writing signed by the Board and Ms. Trego. The Board and Ms. Trego acknowledge their obligations to act in good faith with respect to the performance of their obligations under this Settlement Agreement.

It is understood between the parties that neither party has relied upon any representation, express or implied, made by any other party or their counsel or any of their representatives, and that this Stipulation constitutes the entire understanding of the parties and cannot be modified except in writing signed by all of the parties hereto.

MS. TREGO ACKNOWLEDGES THAT SHE HAS BEEN ADVISED THAT HER LEGAL RIGHTS AND RESPONSIBILITIES WILL BE AFFECTED BY EXECUTING THIS AGREEMENT AND THAT SHE ACKNOWLEDGES THAT SHE IS REPRESENTED BY HER OWN ATTORNEY AND HAS CONSULTED WITH HER ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT.

13. SEVERABILITY

In the event that any section or part of this Agreement shall be found to be void or unenforceable, such section or part shall be deemed to be surplusage and the remainder of the Agreement shall remain in full force and effect.

14. GOVERNING LAW

The parties agree that this Agreement shall be interpreted in accordance with the laws of the State of New Jersey. All disputes arising under or relating to this Agreement or the breach of this Agreement shall be brought exclusively in the federal or state courts of the State of New Jersey.

15. REVOCATION/RIGHT OF REVIEW

Pursuant to the requirement of the Older Workers Benefit Protection Act, 29 U.S.C. § 626 *et seq.*, Ms. Trego acknowledges that she has been given the opportunity, if she so desires, to consider this Settlement Agreement for twenty-one (21) days before executing it. In the event that Ms. Trego executes this Settlement Agreement within less than twenty-one (21) days of the date of its delivery to him, Ms. Trego acknowledges that such decision was entirely voluntary and that she had the opportunity, if she had so desired, to consider this Settlement Agreement for the entire twenty-one (21) day period. Ms. Trego further acknowledges that for a period of seven (7) days from the date of Ms. Trego's execution of this Settlement Agreement, she shall retain the right to

revoke this Settlement Agreement by written notice to Jeffrey R. Caccese Esquire, Comegno Law Group, P.C., 521 Pleasant Valley Avenue, Moorestown, NJ 08057, and that this Settlement Agreement shall not become effective or enforceable until the expiration of such revocation period. Therefore, the consideration called for under paragraph 3 of this agreement above shall not be made until this Settlement Agreement has been fully executed and until after expiration of such revocation period.

PLEASE READ CAREFULLY. THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE CONTAINS A GENERAL RELEASE OF ALL CLAIMS

Intending to be legally bound hereby, Ms. Trego and the Board execute the foregoing Agreement as indicated below.

WITNESS:

Kathleen O'Brien 3/10/14

KATHLEEN O'BRIEN
NOTARY PUBLIC OF NEW JERSEY
I.D. # 2371666
My Commission Expires 3/31/2018

WITNESS:

Patricia Trego 3/10/14
Patricia Trego
PATRICIA TREGO
DATED: 3/7/14

BOARD OF EDUCATION OF THE BOROUGH OF MADISON

BOARD SECRETARY

Lisa S. Ellis
LISA ELLIS
BOARD PRESIDENT
DATED:

381-14

381-14LM

State of New Jersey
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Acting Commissioner

September 12, 2014

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Gluck & Allen
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Dept. of Law and Public Safety
Richard J. Hughes Justice Complex
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Toms River, NJ 08753

Ben A. Montenegro, Esq.
Montenegro Thompson Montenegro & Genz
531 Burnt Tavern Road
Brick, NJ 08723

Re: TOWNSHIP OF BERKELEY, OCEAN COUNTY AND BOARD OF EDUCATION OF THE CENTRAL REGIONAL SCHOOL DISTRICT V. BOARD OF EDUCATION OF THE TOMS RIVER REGIONAL SCHOOL DISTRICT, ET AL., Agency Dkt No. 348-11/09, OAL Dkt. Nos. EDU 2253-10 and EDU 15559-12, App. Div. Dkt. Nos. A-002768-12T3 and A-002826-12T3 AND TOWNSHIP OF BERKELEY, OCEAN COUNTY AND BOARD OF EDUCATION OF THE CENTRAL REGIONAL SCHOOL DISTRICT V. BOROUGH OF SEASIDE PARK, ET AL., Agency Dkt No. 348-11/09, OAL Dkt. No. EDU 2253-10, App. Div. Dkt. Nos. A-001968-13T3 and A-001943-13T3.

Dear Counsel:

I have reviewed the Motion to Settle the Record on Appeal filed by the Township of Berkeley, pursuant to R. 2:5-5(a), as well as the papers filed on behalf of the Borough and Board of Education of Seaside Park, and the Board of Education of the Central Regional School District. I have also reviewed the records transmitted to this office by the Office of Administrative Law (OAL) and the

April 26, 2013 and June 18, 2014 Statements of Items Comprising the Record (SICR) filed in this matter by the Attorney General's Office (AG's Office).

Pursuant to *R.* 2:5-4(a), the record on appeal shall consist of all papers on file in the agency below, with all entries as to matters made on the records of such agency, the stenographic transcript or statement of the proceedings therein, and all papers filed with or entries made on the records of the appellate court. A party who questions whether the SICR fully and truly discloses what occurred in the agency below may apply on motion to that agency to settle the record. *R.* 2:5-5(a). Here, Berkeley contends that the SICRs do not accurately reflect the proceedings below. By way of relief, Berkeley requests the following:

1) The April 26, 2013 SICR be corrected to list and identify all of the items that comprised the record certified by the Clerk of the OAL to the Commissioner with respect to ALJ Metzger's Initial Decision of November 29, 2012, and the Commissioner's decision of January 10, 2013.

2) The June 18, 2014 SICR be corrected to list and identify all of the items that comprised the record certified by the Clerk of the OAL to the Commissioner with respect to ALJ Metzger's Initial Decision of May 16, 2013, and the Commissioner's decision of November 4, 2013.

3) Identification of the source of Item 1 in the June 18, 2014 SICR, the Davy certification and exhibits

4) Inclusion in the SICR of all Motions to Settle the Record, as well as the papers filed in relation to the motions and correspondence related thereto.

Upon review and consideration of the submissions, I conclude, for the reasons stated below, that Berkeley's Motion to Settle the Record must be granted in part and denied in part.

The April 26, 2013 SICR

A comparison of the April 26, 2013 SICR and the record that was transmitted to this office by the OAL[1] following issuance of the November 29, 2012 Initial Decision revealed no discrepancies. To that end, the list prepared by the AG's Office is coextensive with the record that was transmitted by the OAL at that time. Thus, I find that – contrary to Berkeley's assertion – the April 26, 2013 SICR is not in need of correction.

The June 18, 2014 SICR

A comparison of the June 18, 2014 SICR and the record that was transmitted to this office by the OAL following issuance of the May 16, 2013 Initial Decision revealed no discrepancies. To that end, the list prepared by the AG's Office is coextensive with the record that was transmitted by

[1] As a matter of practice, the OAL routinely forwards the documents which constitute the record to this office following issuance of an Initial Decision; however, the record is not accompanied by a formal certification of the Clerk of the OAL.

the OAL at that time. Thus, I find that – contrary to Berkeley's assertion – the June 18, 2014 SICR is not in need of correction.

The Davy Certification

I concur with Berkeley's contention that the inclusion of item #1, the certification of former Commissioner Davy, warrants explication. As noted by Berkeley, the certification was filed with the Ocean County Superior Court on May 23, 2008. I found the certification useful in illuminating the historical background of the parties' relationship in this matter. As a court record, it is a document of which I may take official notice, pursuant to *N.J.A.C.* 1:1-15.2. Upon reflection, I conclude that the better course would have been to follow the formal procedures prescribed by the Administrative Procedure Act for taking official notice of this court record. However, since the certification was relied upon solely for historical background information, and the parties in this case were familiar with the document – having been parties to the Ocean County Superior Court case in which it was filed – I perceive no prejudice to the parties here.

The Motions to Settle the Record

I further concur with Berkeley's contention that all documents and correspondence related to its original and renewed Motions to Settle the Record constitute "papers on file in the agency below" and, thus, are part of the administrative record and must be included on the SICR filed with the Appellate Division.

With the amendments here directed, I am satisfied that the SICR will accurately reflect what occurred in the proceedings before this agency. Accordingly, the Motion to Settle the Record is granted in part and denied in part. The AG's Office is hereby directed to amend the Statement of Items Comprising the Record on Appeal in accordance with the decision herein.

Sincerely,

David C. Hespe
Acting Commissioner

c: County Superintendent
State Law Library
Barbara D'Artagnan, Case Manager

DH/MKD/JLC

Via Facsimile

382-14

382-14EM

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Acting Commissioner

September 15, 2014

C[redacted] and M[redacted] C[redacted], *Pro se*
[redacted]
East Brunswick, New Jersey 08816

Matthew J. Giacobbe, Esq.
Cleary Giacobbe Alfieri Jacobs
169 Ramapo Valley Road, Upper Level 105
Oakland, New Jersey 07436

Re: *C.C. and M.C. on behalf of minor child B.C. v. Board of Education of the Township of East Brunswick, Middlesex County, Michael Vinella, and Kevin Brady*
Agency Dkt. No. 219-8/14

Dear Parties:

I have reviewed the materials filed in connection with petitioners' motion for emergent relief, which motion demands the immediate suspension of Kevin Brady from his duties as a soccer coach.

Pursuant to *N.J.A.C.* 6A:3-1.6(b), a motion for emergent relief is considered an extraordinary remedy that may only be issued upon a finding that petitioner has met **each** of the four standards set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, emergent relief may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits, **and** where the relative hardship to the moving party favors granting such relief. *Id.* at 132-134. In other words, the standards which must be met are conjunctive.

Upon review of the parties' submissions, I find that petitioners have failed to meet the *Crowe v. DeGioia* standards. Most notably, petitioners have failed to identify a settled legal right upon which they may rely, and have failed to show that they are likely to succeed on the merits.

It is undisputed that under the school laws it is district boards of education who are the employers of teaching staff members. As such, boards have the responsibility to establish standards of conduct and to discipline employees for infractions of same. *See, e.g., N.J.S.A.* 18A:6-10; *N.J.S.A.* 18A:29-14. Thus, the suspension of Kevin Brady from his position as soccer

coach is a measure that may be imposed, *vel non,* by the respondent board in the first instance – not by the Commissioner.

Because the Commissioner does not have jurisdiction to grant the particular relief which petitioners have requested in their emergent application, petitioners cannot show that they stand on a settled legal right. Nor can they show a likelihood of prevailing on the merits of their application. In light of the fact that the four *Crowe* standards are conjunctive, it is not necessary to analyze the parties' allegations concerning the possible irreparable harm to B.C. or the balance of the equities amongst the parties.

The Commissioner does have jurisdiction over the controversy introduced by petitioners in a petition filed on August 11, 2014, challenging the respondent Board's performance of and ultimate determinations about petitioners' allegations of bullying by respondent Brady. That controversy is moving forward and will be scheduled for a hearing in the Office of Administrative Law.

Accordingly, petitioners' motion for emergent relief is hereby DENIED.[1]

Sincerely,

David C. Hespe
Acting Commissioner of Education

c: County Superintendent
State Law Library

[1] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Superior Court, Appellate Division.

383-14

IN THE MATTER OF THE TENURE HEARING :

OF DEVORAH DESOUZA-ALVES, : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT : DECISION

OF THE CITY OF NEWARK, ESSEX COUNTY. :

SYNOPSIS

Petitioning Board filed tenure charges of excessive absenteeism and conduct unbecoming a teaching staff member against respondent, a tenured teacher, and sought to terminate her employment with the district. Neither respondent nor any attorney acting on her behalf filed an answer to the petition following notice pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4.

The Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the allegations – which respondent has chosen not to deny – may be deemed admitted and are sufficient to warrant termination of the respondent from her tenured position. Accordingly, the Commissioner granted summary decision to the petitioner, dismissed the respondent from her tenured position in petitioner's school district, and forwarded a copy of this decision to the State Board of Examiners for review and action as that body deems appropriate.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 9/17/14

AGENCY DKT NO. 170-7/14

IN THE MATTER OF THE TENURE HEARING	:	
OF DEVORAH DESOUZA-ALVES,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF NEWARK, ESSEX COUNTY.	:	

For the Petitioner, Bernard Mercado, Esq.
No appearance by or on behalf of Respondent, Devorah DeSouza-Alves

This matter was opened before the Commissioner of Education on July 21, 2014, through tenure charges of chronic and excessive absenteeism certified by Cami Anderson, State District Superintendent of the State-Operated School District of the City of Newark, together with supporting evidence against Devorah DeSouza-Alves, a tenured teacher in the petitioner's employ. The petitioner provided respondent with written notice of such certification at the respondent's last known address, via regular and certified mail, sent on or about July 17, 2014. The petitioner also served a copy of the tenure charges on the respondent's union representative, as well as general counsel to the Newark Teacher's Union. Counsel for the petitioner submitted a certification indicating that the charges sent to the respondent via certified mail and regular mail were returned as undeliverable. Counsel for the petitioner also certified that the charges sent to the respondent's union representative and general counsel to the Newark Teacher's Union were duly received and not returned.

On July 21, 2014, the Commissioner directed the respondent – via both certified and regular mail – to file an answer to the charges. This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom

tenure charges are certified "*shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,*" and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. A copy of the July 21, 2014 notice was also sent to general counsel for the Newark Teacher's Union. Both the certified mail copy and the regular mail copy sent to the respondent were returned as undeliverable. The copy sent to general counsel for the Newark Teacher's Union was not returned. No reply to the tenure charges was received from or on behalf of respondent.

The certified tenure charges and statement of supporting evidence filed by the petitioner in this matter indicate that respondent was absent for all of the 2010-2011 and 2011-2012 school years, utilizing her sick time. During the 2012-2013 school year, the respondent reported to the Educator Without Placement Site for four days, and thereafter was Absent Without Leave (AWOL) for the remainder of the school year. According to the certification, the District contacted the respondent via email in October 2012 indicating that she had not been to work since September 10, 2012, and requesting either a resignation letter or notice to the District explaining her absence. The respondent did not respond to the October 2012 correspondence. Finally, the respondent was AWOL for the entire 2013-2014 school year.

Deeming the allegations to be admitted and noting that respondent has failed to respond to the charges certified against her, the Commissioner finds that petitioner's charges of excessive absenteeism and conduct unbecoming a teaching staff member have been proven and that they warrant respondent's dismissal. Accordingly, summary decision is hereby granted to the petitioner, and the respondent is dismissed from her tenured position with the District. This

matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/17/14

Date of Mailing: 9/17/14

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

385-14

SANDRA GADSDEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed an appeal in 2006, challenging the Board's charging of her accumulated sick leave for absences associated with a work-related injury. This matter was the subject of a pending Worker's Compensation case, and was placed on the inactive list between 2006 and 2013. A hearing in the matter was scheduled for August 11, 2014, but petitioner failed to appear. A notice was sent to the parties by the Office of Administrative Law on August 13, 2014, which provided the petitioner with an opportunity to submit an explanation for her failure to appear to the Department of Education within thirteen days of the notice. No explanation was filed with the Department.

There being no explanation for her non-appearance filed by the petitioner, the matter was deemed to no longer be a contested case before the Commissioner. Accordingly, the Commissioner dismissed the petition with prejudice.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 22, 2014

OAL DKT. NO. EDU 7632-06
AGENCY DKT. NO. 202-6/06

SANDRA GADSDEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter – which includes the advisement of the failure to appear transmitted by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and the notification sent to the parties by the OAL on August 13, 2014, providing an opportunity to submit an explanation for such nonappearance – has been reviewed. There was no explanation filed by petitioner, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/22/14
Date of Mailing: 9/22/14

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1).

389-14

AGENCY DKT NO. 251-9/14

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTHONY D. BROWN,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF CAMDEN,	:	
CAMDEN COUNTY.	:	

For the Petitioner, Louis R. Lessig, Esq.
For the Respodent, Cristal Holmes-Bowie, Esq.

This matter was opened before the Commissioner of Education on September 11, 2014, through tenure charges of chronic and excessive absenteeism certified by the State Superintendent, together with supporting evidence against Anthony D. Brown, a tenured teacher in the District's employ. On September 15, 2014, the Commissioner received correspondence from respondent's counsel indicating that respondent had resigned from his position with the District, and enclosing a copy of respondent's resignation letter.

In light of respondent's resignation from the District, the tenure charges against respondent have been rendered moot, and there is no basis upon which this matter may be ordered to proceed. Accordingly, the matter is hereby dismissed as moot.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/25/14
Date of Mailing: 9/25/14

* This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36. (*N.J.S.A.* 18A:6-9.1)

Human Resources Department
Camden City School District
201 North Front Street
Camden , New Jersey 08102

Anthony D. Brown
1902 Shasta Circle
Morton, PA 19070

September 12, 2014

To Whom it May Concern:

As per my instructional position in the education system in the Camden City School District, I am submitting my letter of resignation as a Teacher of Art in the Camden School District.

I would like to express my sincere thanks and deepest gratitude for the opportunity to have worked with outstanding professionals, educators, administrators, co-workers and staff members at Hatch Middle School and Veterans Memorial Family School. The students in this District that I loved to teach, made this experience worthwhile.

Sincerely,

Anthony Darryl Brown

Anthony Darryl Brown

390-14

OAL DKT. NO. EDU 11681-13
AGENCY DKT. NO. 181-8/13

D.L., on behalf of minor child, J.L.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed Settlement Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

The Commissioner approves the Agreement and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/25/14

Date of Mailing: 9/25/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11681-13

AGENCY DKT. NO. 181-8/13

D. L. on behalf of minor child, J.L.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BURLINGTON, BURLINGTON COUNTY,

Respondent.

Howard S. Mendelson, Esq., for petitioner (Davis & Mendelson, L.L.C., attorneys)

David M. Serlin, Esq., for respondent

Record Closed: August 22, 2014 Decided: August 25, 2014

BEFORE **RONALD W. REBA**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 20, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a settlement agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the settlement terms and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1, and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

8/25/14
DATE

RONALD W. REBA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: 8/27/14

/cad

FAX COVER SHEET

TO	A.L.J. Honorable Ronald W. Reba
COMPANY	
FAX NUMBER	16096894100
FROM	Germano/ Serlin
DATE	2014-07-17 15:27:09 GMT
RE	Privileged and Confidential EDU 11681-2013S

COVER MESSAGE

RECEIVED
JUL 17 2014
OALJ

DAVID M. SERLIN
ATTORNEY AT LAW
505 South Lenola Road
Blason II, Suite 120
MOORESTOWN, NEW JERSEY 08057

(856) 222-9460
(856) 324-9106
DMSerlin@AOL.com

July 16, 2014

Via fax only 609-689-4100
Honorable Ronald W. Reba
Administrative Law Judge
ATTN: Colleen
Office of Administrative Law
9 Quakerbridge Plaza
Trenton, New Jersey 08625-0049

RE: J.L., a minor child by her Legal Guardian, D.L. v. Burlington Township Board of Education
Docket No.: EDU 11681-2013S; Agency No. 181-8/13 (Department of Education)

Dear Administrative Law Judge Reba:

As requested, my secretary has typed the handwritten settlement agreement. I added the caption and the introductory sentence, otherwise nothing of substance has been modified. It is my understanding that you will attach the signed settlement agreement to the typed version. A formal order will await action by the Burlington Township Board of Education at its July 30, 2014 meeting. I will be attending the executive session meeting on July 23 wherein this will be discussed and I can advise as of July 24 if there will be any issue regarding approval of the settlement agreement on July 30. As I will be on vacation the week of July 28 I will not be able to inform you of the official action until my return during the first week of August.

Also, for your information the hip specialist in New York who I was referring to is Dr. Bryan Kelly. His website is http:// BryanKellymd.com.

Sincerely,

David M. Serlin, Esquire

DMS/jm
enclosure
cc: Howard Mendelson, Esquire (facsimile only w/enc 856-627-0300)
Mrs. Mary Ann Bell, Business Administrator (email only w/enc)
S:\MyFiles\BTBE2013-12\BTBE 7-17-14 Judge enc settlement agreement

J.L., a minor child by her Legal Custodian, D.L. Petitioner, v. Burlington Township Board of Education Respondent/Counterclaimant.	**OFFICE OF ADMINISTRATIVE LAW** **DOCKET NO.: EDU 11681-2013S** **SETTLEMENT AGREEMENT**

The Petitioners and Respondent have agreed to enter into the following settlement agreement:

1. The Petition and Answer and Counterclaim shall be amended to include Stamatios Lavdas, Kathleena Lavdas and J.L., by her guardian Dorothy Lavdas, and by her mother Kathleena Lavdas, as parties to the above captioned action.

2. While the parties hereto are not admitting liability and/or fault as concerns the allegations concluded within the respective Petition and Answer and Counterclaim, they are agreeing that the dismissal of same is conditioned upon each party's compliance with this Settlement Agreement.

3. As consideration for Respondent's withdrawal of its Answer and Counterclaim, including claims for removal and unpaid tuition, Petitioners consent to the entry of a judgment for the principal amount of $22,967.00.

4. As consideration for Petitioners' withdrawal of their Petition, including opposition to Respondent's request for removal and payment of tuition, Respondent consents to permit J.L. to attend Burlington Township High School without the payment of tuition for her senior year; the 2014-2015 school year.

5. Notwithstanding any contrary provision contained within this Settlement Agreement, as additional consideration for Respondent's dismissal of its Answer and Counterclaim, Petitioners agree to waive any rights they might otherwise have to "stay-put" under Federal law and as such, that Respondent shall have no responsibility for the education of J.L. after June 30, 2015.

6. Should enforcement of the terms of this Settlement Agreement be necessary, either party may move for relief with the "prevailing party" receiving reasonable attorney's fees.

Date: July 16, 2014

DOROTHY LAVDAS

Date: July 16, 2014

MRS. MARY ANN BELL,
BUSINESS ADMINISTRATOR

STAMATIOS LAVDAS

J.L., by Dorothy Lavdas, guardian, and Kathleena Lavdas, mother

Under Federal law and as such, that ~~the~~ Respondent shall have no responsibility for the education of J.E. ~~after~~ after June 30, 2015.

6) Should ~~enforcement~~ enforcement of the terms of this Settlement Agreement be necessary either party may move for relief with the "prevailing party" receiving reasonable attorneys fees

to permit ~~Jac~~ J.C.
to attend Smyth Tp
HS. without the payment
of tution for her
senior year; the 2014-
15 School year.

5) Notwithstanding ~~Nothing~~ any
~~contrary~~ provision ~~Section~~ ~~Contained~~
contained within this Agmt;
and as addtnl
consideration for Rept's
dismissal of its ~~Appeal~~
~~Cross~~ Counterclaim, Petitioner agrees
to waive any rights

with this Settlement Agmt.

~~Any party should file~~

~~any Acceptance should be filed~~

~~until the parties clearly~~

~~etc~~

including claims for removal and vacatur motion,

3) As consideration for Regents's withdrawal of its Answer + CC; Petitioners consent to the entry of a judgment for the principal sum amount of $ 22,967.00.

4) As consideration for Petitioners' withdrawal of their Petition; Respondents mutually ~~claims~~ ~~appeals~~

PL 6/3/0 3.2 ... of Township of ... Township

EDU 11681-2013S

7/16/14 Settlement Agreement

1) Petition and Answer and Counterclaim shall be amended to include [illegible] Kathleen Landis [illegible] Darin Landis [illegible] Jazmine Landis by her guardian [illegible] Kathleen Landis as parties to the above-captioned action.

2) while the parties hereto are not admitting liability and/or fault as to ~~such~~ as concerns the allegations included within their respective Petition and Answer and Counterclaim, they are agreeing ~~to~~ that the dismissal

DAVID M. SERLIN
ATTORNEY AT LAW
505 SOUTH LENOLA ROAD
BLASON II, SUITE 120
MOORESTOWN, NEW JERSEY 08057

(856) 222-9460
FAX (856) 324-9106
dmserlin@aol.com

August 22, 2014

Via mail and fax 609-689-4100
Honorable Ronald W. Reba
Administrative Law Judge
Office of Administrative Law
9 Quakerbridge Plaza
PO Box 49
Trenton NJ 08625-0049

8/7

RE: J.L., a minor child by her Legal Guardian, D.L. v. Burlington Township Board of Education
Docket No.: EDU 11681-2013S; Agency No. 181-8/13 (Department of Education)

Dear Administrative Law Judge Reba:

Pursuant to your request enclosed please find a certified copy of the minutes from the Burlington Township Board of Education meeting of July 30, 2014 noting in Item 11 that the members voted unanimously to approve the settlement agreement. I trust that this is the documentation that you required to finalize this matter.

Respectfully yours,

David M. Serlin, Esquire

DMS/jm
cc: Dr. Michael Kozak, Superintendent (e-mail only)
Mrs. Mary Ann Bell, Business Administrator (email only)
Howard Mendelson, Esquire (e-mail only)
S:\MyFiles\BTBE2013-12\BTBE 8-21-14 Judge enc cert cc minutes

2014 AUG 22 P 4:12

2014-7-30 13

REGULAR MEETING and PUBLIC HEARING
July 30, 2014

2014 AUG 22 P 2:12

D. BUSINESS (Continued)

9. On the motion by Mrs. Hirt, seconded by Dr. Lynch to recommend approval to award the High School HVAC bid to Gaudelli Brothers

Base Bid $1,485,500.00
Alternate #1 $ 66,000.00
Alternate #2 $ 55,700.00
Alternate #3 $ 325,900.00
Alternate #4 $ 144,900.00
and approve use of additional capital reserve of $970,500.00

Contractor	Base Bid	Alternate #1	Alternate #2	Alternate #3	Alternate #4
GUADELLI BROS	1,485,500.00	66,000.00	55,700.00	325,900.00	144,900.00
Falasca Mechanical	1,646,000.00	72,000.00	46,000.00	352,900.00	101,460.00
Gabe Sganga, Inc.	1,860,000.00	104,000.00	58,000.00	318,000.00	112,000.00
Kappa Construction	1,873,000.00	110,000.00	40,000.00	296,000.00	120,000.00
Surety Mechanical	1,979,570.00	101,661.00	132,741.00	355,829.00	135,781.00
Thermal Piping	1,725,000.00	73,700.00	53,000.00	266,000.00	146,000.00

Roll Call Vote: 9 Ayes, 0 Nays, motion carried.

10. On the motion by Mrs. Hirt, seconded by Dr. Lynch to recommend approval of the Board of Education Goals for the 2014-15 school year as established during the Board Retreat July 25, 2014. Roll Call Vote: 9 Ayes, 0 Nays, motion carried.

11. On the motion by Mrs. Hirt, seconded by Dr. Lynch to recommend approval of the settlement agreement regarding residency of student J.L., including judgment for tuition when student was not domiciled in BT.
Roll Call Vote: 9 Ayes, 0 Nays, motion carried.

I certify that this is a true copy of the minutes from the Burlington Township Board of Education Meeting on July 30, 2014.

Adrienne M. Bilotta
Assistant Board Secretary

FAX COVER SHEET

TO	A.L.J. Honorable Ronald W. Reba
COMPANY	
FAX NUMBER	16096894100
FROM	Germano/ Serlin
DATE	2014-08-22 16:25:39 GMT
RE	Docket #: EDS 11681-2013S, Agency # 181/8-13

COVER MESSAGE

2014 AUG 22 P 2:12

392-14

392-14L

State of New Jersey

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

DAVID C. HESPE
Acting Commissioner

September 26, 2014

Denise Rekem, Esq.
Parles & Rekem
675 Morris Avenue, Suite 200
Springfield, NJ 07081

Isabel Machado, Esq.
Machado Law Group
Clark Parkway Plaza
136 Central Ave., 2nd Floor
Clark, NJ 07066

Re: *Y.J. and K.J., on behalf of minor child I.J. v. Board of Education of the City of Jersey City, Hudson County,* Agency Dkt. No. 275-9/14

Dear Counsel:

The above-captioned matter was filed with the Bureau of Controversies and Disputes on September 24, 2014 and transmitted to the Office of Administrative Law (OAL) on September 25, 2014 for an emergent relief hearing. I have been advised that today is the last day the Board of Education will permit I.J. to remain enrolled in the pre-school program and that the hearing at OAL will not be conducted until October 1, 2014. Accordingly, in order to preserve the status quo pending a final determination on the motion for emergent relief, it is hereby **ORDERED** that I.J. shall remain enrolled in and be permitted to attend the pre-school program until I render a decision on the Administrative Law Judge's recommended order on the application for emergent relief.

Sincerely,

David C. Hespe
Acting Commissioner

DCH/MKD/ch/yj-ky 9-26

OAL DKT. NO. EDU 7248-14
AGENCY DKT. NO. 128-5/14

E.G., on behalf of minor child, R.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and general release, and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/29/14

Date of Mailing: 9/29/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07248-14
AGENCY DKT. NO. 128-5/14

E.G. ON BEHALF OF MINOR CHILD
R.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF PICATAWAY, MIDDLESEX COUNTY,

Respondent.

Emelaine Galimba o/b/o **R.G.** petitioner pro se

David B. Rubin, Esq., for respondent

Record Closed: August 20, 2014 Decided: August 21, 2014

BEFORE **IMRE KARASZEGI, JR.,** ALJ:

On June 12, 2014, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement and the Board's resolution.

Having reviewed the record and the settlement terms, I **FIND** as follows:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. Accordingly, it is **ORDERED** that the parties comply with the settlement terms, and it is **FURTHER ORDERED** that the proceedings in this matter be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Aug. 21, 2014
DATE

IMRE KARASZEGI, JR., ALJ

Date Received at Agency: 8-25-14

Date Mailed to Parties: AUG 25 2014

id

Laura Dudden
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

RECEIVED
2014 AUG 20 A 11:27
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

DAVID B. RUBIN, P.C.
Attorney At Law
44 Bridge Street
P. O. Box 4579
Metuchen, New Jersey 08840
(732) 767-0440
Attorney for Respondent
Attorney I.D. No. 022151977

E.G. o/b/o R.G.,	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	OAL Dkt. No. EDU 07248-2014 N
vs.	Agency Ref. No. 128-5/14
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY,	SETTLEMENT AGREEMENT
Respondent.	

The parties having amicably resolved their differences, the Petition of Appeal is hereby dismissed, with prejudice, on the following terms:

1. Petitioner acknowledges that R.G. must make up 160 hours of school attendance ("seat time") to regain the lost credits that are the subject of this action.

2. The Administration of Piscataway High School will permit R.G. to make up the 160 hours of seat time during the 2014-2015 school year by attending a sufficient number of detention sessions to cover them.

3. R.G. will be responsible for meeting with Assistant Principal Aaron Eyler, or his designee, to create a schedule of detention sessions, and the Administration will track R.G.'s

attendance throughout the school year. The recovery of all 160 hours of seat time must be completed by June 30, 2015.

4. R.G. will only receive credit for courses in which she receives passing grades.

5. In consideration of the arrangements set forth above, E.G., on behalf of herself and her daughter, R.G., dismisses the Petition of Appeal, and releases the Piscataway Township Public School District, its Board of Education, employees, agents and representatives from all claims, known or unknown, based on events preceding the execution of this Settlement Agreement, including but not limited to those claims that were or could have been asserted in the Petition of Appeal.

6. This Settlement Agreement is entered into solely to avoid the expense and inconvenience of continued litigation, and shall not be construed as an acknowledgment by either party of the correctness of the other party's factual or legal contentions.

7. Petitioner enters into this Settlement Agreement voluntarily, without coercion or duress, and with a full and complete understanding of its terms.

8. Petitioner represents that she has full authority to enter into this Settlement Agreement on behalf of herself and R.G.

Dated: 8/18/14

Emblaine Galimba

EMBLAINE GALIMBA, On behalf of herself and R.G.

DAVID B. RUBIN, ESQ., On behalf of Board of Education of the Township of Piscataway

Dated: 8/15/14

394-14

OAL DKT. NO. EDU 6302-11
AGENCY DKT. NO. 120-5/11

NEPTUNE EDUCATION ASSOCIATION, ELIZABETH MARKULIN, PAMELA KELLETT, CHARLES YOUNG AND BILLIE WEISE,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the parties' proposed Settlement Agreement and General Release, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/30/14

Date of Mailing: 9/30/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6302-11

AGENCY DKT. NO. 120-5/11

NEPTUNE EDUCATION ASSOCIATION, ELIZABETH MARKULIN, PAMELA KELLETT, CHARLES YOUNG AND BILLIE WEISE,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE,

Respondent.

Richard A. Friedman, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

John E. Croot, Esq., for respondent (Schwartz, Simon, Edelstein & Celso, attorneys)

Record Closed: August 13, 2014 Decided: August 15, 2014

BEFORE **LISA JAMES-BEAVERS,** ALJ:

Petitioners allege that respondent is not accepting vandalism, violence and substance abuse reports. Repondent contends that it is accepting such reports, but in a new format.

Telephone conferences were scheduled and held and a settlement conference was held on September 13, 2012, to try to resolve discovery issues.

On February 6, 2014, an executed settlement agreement was received, which is attached and fully incorporated herein. However, there was no Board Resolution attached to the settlement agreement, nor did the Board attorney execute the settlement agreement. By letter dated February 27, 2014, petitioners' attorney sent a letter to Board counsel indicating the Office of Administrative Law (OAL) needs either a Board Resolution adopting the settlement or Board attorney signature on the agreement before an initial decision approving the settlement could be issued. Numerous phone calls were made to counsel for the Board from both the petitioners' attorney and the OAL requesting this document. On July 28, 2014, I sent a letter to Mr. Croot, Board counsel, advising that we have been trying since February 2014 to obtain a Board Resolution from him authorizing the settlement. On August 13, 2014, Mr. Croot supplied a Certification verifying the signature of the Superintendent of Schools on the settlement agreement. That document is attached.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures, and as confirmed by the representations of both counsel.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 15, 2014
DATE

Lisa James-Beavers
LISA JAMES-BEAVERS, ALJ

Date Received at Agency:

Date Mailed to Parties: August 19, 2014

mph

SCHWARTZ SIMON EDELSTEIN
& CELSO LLC
100 South Jefferson Rd – Suite 200
Whippany, NJ 07981
(973) 301-0001
Attorneys for Respondent
Board of Education of the Township of
Neptune

Neptune Township Education Association, Elizabeth Markulin, Pamela Kellet, Charles Young and Billie Weise, Petitioners, vs. Board of Education of the Township of Neptune, Monmouth County, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION AGENCY DOCKET NO.: 120-5/11 OAL DOCKET NO.: EDU 6302-2011S ADMINISTRATIVE ACTION SETTLEMENT AGREEMENT

In full and final settlement of the above-captioned matter, the Petitioners Neptune Township Education Association ("Association") , Elizabeth Markulin, Pamela Kellet, Charles Young and Billie Weise and the Respondent Board of Education of the Township of Neptune ("Board" or "District") hereby agree as follows:

1. The District agrees that it will comply with the violence and vandalism reporting requirements of N.J.S.A. 18A:17-46 and N.J.A.C. 6A:15-3, consistent with the definitions set forth in the EVVRS User Manual published by the New Jersey Department of Education. See Exhibit A attached hereto.
2. The District shall provide the Association monthly, pursuant to N.J.S.A. 18:17-46, with

the number and disposition of all reported acts of school violence, vandalism, and harassment, intimidation or bullying.

3. It is specifically acknowledged and understood by the parties that this Agreement is not an indication or admission of any liability, or the violation of any statute or regulation, or the breach of any duty, by any of the parties.

4. The Petitioners release any and all claims which they may have, individually or collectively, against the Board and its past and present members, officers, administrators, agents or employees arising out of, or related to, the District's obligation to report incidents of violence and vandalism, including, but not limited to, all claims asserted, or which could have been asserted, in the present matter. This release applies to anything which has happened until now.

5. The Petitioners agree to immediately withdraw, with prejudice, the Petition filed in this matter.

Mary Kupinski — On behalf of the Association — 6/12/13 Date

Elizabeth Markulin — Elizabeth Markulin — 7/3/13 Date

Pamela Kellet — Pamela Kellet — 6/12/13 Date

Charles J. Young — Charles Young — 6/30/13 Date

Billie E Weise — Billie Weise — 7/6/13 Date

On behalf of the Board

7/22/13
Date

SCHWARTZ SIMON EDELSTEIN
& CELSO LLC
100 South Jefferson Rd – Suite 200
Whippany, NJ 07981
(973) 301-0001
Attorneys for Respondent
Board of Education of the Township of
Neptune

Neptune Township Education Association, Elizabeth Markulin, Pamela Kellet, Charles Young and Billie Weise, Petitioners, vs. Board of Education of the Township of Neptune, Monmouth County, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION AGENCY DOCKET NO.: 120-5/11 OAL DOCKET NO.: EDU 6302-2011S ADMINISTRATIVE ACTION **CERTIFICATION OF JOHN CROOT**

I, John E. Croot, Jr., of full age, hereby certify as follows:

1. I am an Attorney at Law of the State of New Jersey and a Member of the firm of Schwartz Simon Edelstein & Celso, LLC, counsel for the Neptune Township Board of Education ("Board") in the above-captioned matter. I am fully familiar with the facts herein.
2. This matter was settled over a year ago, with the terms memorialized in a Settlement Agreement that was executed by all parties. A copy of the Agreement is attached hereto as Exhibit A.
3. I understand that an issue has arisen concerning the signatory to the Agreement on behalf of the Board of Education.

4. I have confirmed that David A. Mooij, the Superintendent of Schools, executed the Agreement on behalf of the Neptune Township Board of Education.
5. Mr. Mooij recalls signing the Agreement and acknowledges the genuineness of his signature on the document.
6. Mr. Mooij also affirms that he was authorized to execute the Agreement on behalf of the Board of Education.
7. As indicated above, this matter has been resolved for over a year. It is respectfully requested that the settlement be approved.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

JOHN E. CROOT, JR.

Dated: August 13, 2014

EXHIBIT A

SCHWARTZ SIMON EDELSTEIN
& CELSO LLC
100 South Jefferson Rd – Suite 200
Whippany, NJ 07981
(973) 301-0001
Attorneys for Respondent
Board of Education of the Township of
Neptune

Neptune Township Education Association, Elizabeth Markulin, Pamela Kellet, Charles Young and Billie Weise, Petitioners, vs. Board of Education of the Township of Neptune, Monmouth County, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION, NEW JERSEY DEPARTMENT OF EDUCATION AGENCY DOCKET NO.: 120-5/11 OAL DOCKET NO.: EDU 6302-2011S ADMINISTRATIVE ACTION SETTLEMENT AGREEMENT

In full and final settlement of the above-captioned matter, the Petitioners Neptune Township Education Association ("Association") , Elizabeth Markulin, Pamela Kellet, Charles Young and Billie Weise and the Respondent Board of Education of the Township of Neptune ("Board" or "District") hereby agree as follows:

1. The District agrees that it will comply with the violence and vandalism reporting requirements of N.J.S.A. 18A:17-46 and N.J.A.C. 6A:15-3, consistent with the definitions set forth in the EVVRS User Manual published by the New Jersey Department of Education. See Exhibit A attached hereto.
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the number and disposition of all reported acts of school violence, vandalism, and harassment, intimidation or bullying.

3. It is specifically acknowledged and understood by the parties that this Agreement is not an indication or admission of any liability, or the violation of any statute or regulation, or the breach of any duty, by any of the parties.

4. The Petitioners release any and all claims which they may have, individually or collectively. against the Board and its past and present members, officers, administrators, agents or employees arising out of, or related to, the District's obligation to report incidents of violence and vandalism, including, but not limited to, all claims asserted, or which could have been asserted, in the present matter. This release applies to anything which has happened until now.

5. The Petitioners agree to immediately withdraw, with prejudice, the Petition filed in this matter.

Mary Kupinski — On behalf of the Association — 6/12/13 Date

Elizabeth Markulin — Elizabeth Markulin — 7/3/13 Date

Pamela Kellet — Pamela Kellet — 6/12/13 Date

Charles J. Young — Charles Young — 6/30/13 Date

Billie E Weise — Billie Weise — 7/6/13 Date

On behalf of the Board

7/22/13
Date

399-14

OAL DKT. NO. 5052-14
(EDU 10009-10 ON REMAND)
AGENCY DKT. NO. 331-8/10

DEBRA STALLONE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF ELIZABETH, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record, Initial Decision on Remand of the Office of Administrative Law and revised agreement settling this matter. For the reasons set forth by the Administrative Law Judge, the Commissioner adopts the Initial Decision in its entirety.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/02/14

Date of Mailing: 10/02/14

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
REMAND
OAL DKT. NO. EDU 05052-14
AGENCY DKT. NO. 331-8/10

DEBRA STALLONE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Respondent.

Gail Oxfeld Kanef, Esq. for petitioner (Oxfeld Cohen, LLC, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: September 3, 2014 Decided: September 3, 2014

BEFORE **ELLEN S. BASS**, ALJ:

This matter is before me via remand order dated April 24, 2014. Petitioner, Debra Stallone, had filed a petition of appeal before the Commissioner of Education (the Commissioner) on August 9, 2010. That matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 on September 14, 2010, and bore docket number EDU 10009-10.

The matter was settled and an Initial Decision approving the settlement issued by me on March 19, 2014. The remand decision declined to approve the settlement, noting calculation/typographical errors in the settlement agreement relative to the amounts payable to petitioner. Specifically, the settlement agreement provided that the gross back pay due and owing petitioner was $19,131.21, but that this amount was subject to a reduction in the amount of $8,400 in unemployment benefits. The agreement as approved provided in paragraph four that petitioner was thus owed $9,657.90. The correct amount, as noted by the Commissioner in his remand decision, is $10,731.21. This latter sum was actually correctly referenced in paragraph three of the agreement.

I conferred with counsel on May 14, 2014, who agreed that the agreement simply contained a typographical error, and that in all other respects the agreement as approved by the Board at its meeting of December 23, 2013, was consistent with the intent of the parties. Marvin Lehman, Esq. participated in that telephone conference on behalf of the Board. He is counsel of record. We moreover agreed that it would be best if the Board adopted a resolution approving a corrected agreement; Mr. Lehman indicated that the matter would be placed on the Board agenda on June 12, 2014. He at no time informed me that further communication should be with any other attorney in lieu of him. [1]

On June 16, 2014, I wrote to counsel and asked for an update. My letter was sent via facsimile and regular mail; I received no indication that the letter was not successfully forwarded. Nonetheless, I received no reply. I wrote again on June 19, 2014, this time indicating that I expected to receive a fully executed accurate settlement agreement within thirty days, and that, if I did not, I would schedule the matter for plenary hearing. This letter also was send via facsimile and regular mail. I again received no indication that the letter was not received. I again did not receive the courtesy of a reply from counsel for the Board.

[1] It is noted that at some point in 2013, an additional attorney, Paul Kalac, Esq., made an appearance in the case for the Board, but was appearing in addition to Mr. Lehman, and not in substitution for him.

Accordingly, via notice dated July 24, 2014, I scheduled this matter for hearing. The notice stated clearly that the hearing date was peremptory. The notice was sent to Marvin Lehman, Esq., who was counsel of record and whose mailing address was at the school district administration building. I have received no indication via my clerk's office that the notice was returned as undeliverable.

Indeed, counsel for petitioner plainly received the notice, because on August 28, 2014, she appeared. Counsel for the Board did not. I waited for approximately forty-five minutes, and then opened the record. In light of the protracted history of this matter, I proceeded to take ex parte proofs from counsel for petitioner, as permitted by N.J.A.C. 1:1-14.4(d). Indeed, this matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 and 2011-2012 school years. These cases were case managed together via regular case management conferences with counsel. As I indicated on the record, petitioner has waited close to four years to bring this matter to closure. What was required from the Board and its counsel at this juncture was the simple ministerial act of placing a corrected agreement on its agenda for approval. The disrespect shown this petitioner and this tribunal in failing to promptly do so, or in the alternative, communicate any concerns about the settlement to me, is intolerable.

Indeed, counsel for petitioner provided me with a corrected agreement, which has been signed by her client. She has likewise received no communications from counsel for the Board about the status of this matter. Counsel indicated that she forwarded the proposed revised settlement to Mr. Lehman's co-counsel via email on July 1, 2014, and that he acknowledged receipt of it. But she has heard nothing further. Likewise, I have received no indication from Board counsel that there has been any change from what was represented to me when we spoke in May 2014; that is, that the $10,731.21 amount reflected in the agreement is correct; reflects the intent of the parties; and that the $9,657.90 sum is merely a typographical error.

Petitioner should not have to wait any longer for the moneys owed her. Four years is long enough. The settlement agreed upon by the parties was the culmination of years of discussion and negotiation; fairly, reasonably, and efficiently resolves the

claims raised in the petition; and is in the best interest of the parties and the taxpayers of Elizabeth. The settlement was duly approved by the Board; albeit with a typographical error.

Accordingly, I **CONCLUDE** that the interests of justice dictate that I accept the revised agreement and direct the Board to compensate petitioner in the agreed upon amount; to wit, back pay in the amount of $10,731.21. It is so **ORDERED**.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 3, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 9-4-14

Mailed to Parties: SEP - 4 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEBRA STALLONE Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU-10009-2010N Agency Ref. No. 331-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, __DEBRA STALLONE__ ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned _DEBRA STALLONE__ v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU _10009-2010N___, Agency Dkt. No. __331-8/10_ (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $19,131.21, for the period from September 1, 2010 through December 6, 2010. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from September 1, 2010 through December 6, 2010. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, 2010, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, 2010 at that time and the back pay due to Petitioner runs from September 1, 2010.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from September 1, 2010 through December 6, 2010 was $8,400.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $ 10,731.21.

4. The Parties agree that Petitioner had no earnings from other employment during the period from September 2010 through December 6, 2011__. Thus, the Final Gross Amount of back salary due to petitioner is $10,731.21. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "Debra Stallone".

5. In addition to back salary, the Board shall pay Petitioner the sum of $_0_ as money damages based on amounts paid by Petitioner for medical bills during the period from _____ to _____ that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "_____N/A_____" and will not be subject to income tax withholding or payroll deductions since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the 2010-2011 school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from September 1, 2010 to December 6, 2010. In addition, Petitioner's seniority will be credited for one full year for the entire school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the 2010-2011 school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of

action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the 2010-2011 school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the 2011-2012 school year or thereafter.

8. The Parties agree that Petitioner's seniority as of January 31, 2013 as a result of this settlement is:

a) 7.42 years as an elementary school teacher.

b) _____ years as a _____.

9. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the 2010-2011 school year. Said dismissal

shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

14. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this agreement.

15. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR PETITIONER

Date: 7/1/14

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date:

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O
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Y

RECEIVED
2014 JAN 31 P 2:59
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education has discussed a resolution of the Office of Administrative Law matters listed below; and,

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement on file with the Board Secretary, provided that it is fully signed by all parties.

Susy Basilici	Agency Docket No. 639-11/10	OAL Docket No. EDU 13416-2010
Beth Ann Clayton	Agency Docket No. 324-11/11	OAL Docket No. EDU 12774-2012
Milena Maya	Agency Docket No. 338-08/10	OAL Docket No. EDU 10165-2010
Wilfredo Romero	Agency Docket No. 299-08/10	OAL Docket No. EDU 9657-2010
Debra Stallone	Agency Docket No. 331-08/10	OAL Docket No. EDU 10009-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD DECEMBER 23, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

13-83

DEBRA STALLONE Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU-10009-2010N Agency Ref. No. 331-8/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, __DEBRA STALLONE__ ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned _DEBRA STALLONE_ v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU _10009-2010N___, Agency Dkt. No. __331-8/10_ (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ _19131.21_, for the period from _September 1, 2010_ through _December 6, 2010__. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from __September 1, 2010_ through __December 6, 2010_. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, _2010_, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, _2010_ at that time

and the back pay due to Petitioner runs from _September 1, 2010_.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from _September 1, 2010_ through __December 6, 2010__ was $ __8,400__.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $ _10,731.90_.

4. The Parties agree that Petitioner had no earnings from other employment during the period from __September 2010_ through _December 6, 201___. Thus, the Final Gross Amount of back salary due to petitioner is $ __9,657.90__. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "__Debra Stallone__".

5. In addition to back salary, the Board shall pay Petitioner the sum of $_0_ as money damages based on amounts paid by Petitioner for medical bills during the period from _____ to _____ that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "_____N/A_____" and

will not be subject to income tax withholding or payroll deductions since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the __2010-2011___ school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from ___September 1, 2010____ to __December 6, 2010_____. In addition, Petitioner's seniority will be credited for one full year for the entire school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the __2010-2011__ school year, less any days used during any portion of

that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the ___2010-2011__ school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the _2011-2012__ school year or thereafter.

8. The Parties agree that Petitioner's seniority as of __January 31, 2013_ as a result of this settlement is:

a) __7.42_____ years as an __elementary school teacher___.

b) _____ years as a _____.

9. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the _2010-2011_ school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

14. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding

action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this agreement.

15. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR PETITIONER

Date: 9/17/13

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date: 3/11/14

400-14

OAL DKT. NO. EDU 5247-14
(EDU 13416-10 ON REMAND)
AGENCY DKT. NO. 639-11/10

SUZY BASILICI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the record, Initial Decision on Remand of the Office of Administrative Law and revised agreement settling this matter. For the reasons set forth by the Administrative Law Judge, the Commissioner adopts the Initial Decision in its entirety.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/02/14

Date of Mailing: 10/02/14



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION SETTLEMENT
REMAND
OAL DKT. NO. EDU 05247-14
AGENCY DKT. NO. 639-11/10

SUZY BASILICI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY

Respondent.

Gail Oxfeld Kanef, Esq. for petitioner (Oxfeld Cohen, LLC, attorneys)

Marvin Lehman, Esq. for respondent

Record Closed: September 3, 2014 Decided: September 3, 2014

BEFORE **ELLEN S. BASS**, ALJ:

This matter is before me via remand order dated April 30, 2014. Petitioner, Suzy Basilici, had filed a petition of appeal before the Commissioner of Education (the Commissioner) on November 3, 2010. That matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13 on December 1, 2010, and bore docket number EDU 13416-10.

The matter was settled and an Initial Decision approving the settlement issued by me on March 19, 2014. The remand decision declined to approve the settlement, noting calculation errors in the settlement agreement relative to the amounts payable to petitioner. Specifically, the settlement agreement provided that the gross back pay due and owing petitioner was $40,799.20, but that this amount was subject to a reduction in the amount of $14,160 in unemployment benefits. The agreement as approved contained an arithmetic error; providing that petitioner was thus owed $23,975.28. The correct amount, as noted by the Commissioner in his remand decision, is $26,639.20.

I conferred with counsel on May 14, 2014, who agreed that this was simply an error in calculation, and that in all other respects the agreement as approved by the Board at its meeting of December 23, 2013, was consistent with the intent of the parties. Marvin Lehman, Esq. participated in that telephone conference on behalf of the Board. He is counsel of record. We moreover agreed that it would be best if the Board adopted a resolution approving a corrected agreement; Mr. Lehman indicated that the matter would be placed on the Board agenda on June 12, 2014. He at no time informed me that further communication should be with any other attorney in lieu of him. [1]

On June 16, 2014, I wrote to counsel and asked for an update. My letter was sent via facsimile and regular mail; I received no indication that the letter was not successfully forwarded. Nonetheless, I received no reply. I wrote again on June 19, 2014, this time indicating that I expected to receive a fully executed accurate settlement agreement within thirty days, and that, if I did not, I would schedule the matter for plenary hearing. This letter also was send via facsimile and regular mail. I again received no indication that the letter was not received. I again did not receive the courtesy of a reply from counsel for the Board.

Accordingly, via notice dated July 24, 2014, I scheduled this matter for hearing. The notice stated clearly that the hearing date was peremptory. The notice was sent to

Marvin Lehman, Esq., who was counsel of record and whose mailing address was at the school district administration building. I have received no indication via my clerk's office that the notice was returned as undeliverable.

Indeed, counsel for petitioner plainly received the notice, because on August 28, 2014, she appeared. Counsel for the Board did not. I waited for approximately forty-five minutes, and then opened the record. In light of the protracted history of this matter, I proceeded to take ex parte proofs from counsel for petitioner, as permitted by N.J.A.C. 1:1-14.4(d). Indeed, this matter was one of nearly one hundred challenges to a reduction in force that took place effective with the 2010-2011 and 2011-2012 school years. These cases were case managed together via regular case management conferences with counsel. As I indicated on the record, petitioner has waited close to four years to bring this matter to closure. What was required from the Board and its counsel at this juncture was the simple ministerial act of placing a corrected agreement on its agenda for approval. The disrespect shown this petitioner and this tribunal in failing to promptly do so, or in the alternative, communicate any concerns about the settlement to me, is intolerable.

Indeed, counsel for petitioner provided me with a corrected agreement, which has been signed by her client. She has likewise received no communications from counsel for the Board about the status of this matter. Counsel indicated that she forwarded the proposed revised settlement to Mr. Lehman's co-counsel via email on July 1, 2014, and that he acknowledged receipt of it. But she has heard nothing further. Likewise, I have received no indication from Board counsel that there has been any change from what was represented to me when we spoke in May 2014; that is, that the agreement correctly reflects the intent of the parties and merely contains an arithmetic error.

Petitioner should not have to wait any longer for the moneys owed her. Four years is long enough. The settlement agreed upon by the parties was the culmination of years of discussion and negotiation; fairly, reasonably, and efficiently resolves the

[1] It is noted that at some point in 2013, an additional attorney, Paul Kalac, Esq., made an appearance in the case for the Board, but was appearing in addition to Mr. Lehman, and not in substitution for him.

claims raised in the petition; and is in the best interest of the parties and the taxpayers of Elizabeth. The settlement was duly approved by the Board; albeit with an arithmetic error.

Accordingly, I **CONCLUDE** that the interests of justice dictate that I accept the revised agreement and direct the Board to compensate petitioner in the agreed upon amounts; to wit, back pay in the amount of $26,639.20 and $638.69 in unreimbursed medical expenses.[2] It is so **ORDERED**.

I **CONCLUDE** that the agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

[2] The latter amount was correctly reflected in the original agreement, and was thus not referenced in the Commissioner's remand decision.

OAL DKT. NO. EDU 02116-14

September 3, 2014

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: 9-4-14

Mailed to Parties: SEP - 4 2014

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SUSY BASILICI Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. Agency Ref. No. **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, __Susy Basilici__ ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned __Susy Basilici___v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU __13416-2010__, Agency Dkt. No. __639-11/10__ (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ _40,799.20_, for the period from _September 1, 2010__ through __March 15, 2011_. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all

Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from ___September 1, 2010____ through __March 15, 2011_. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, _2010__, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, _2010 at that time and the back pay due to Petitioner runs from _September 1, 2010_.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from __September 2010__ through __March 2011__ was $ _14,160_.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $ _26,639.20_.

4. The Parties agree that Petitioner had no earnings from other employment during the period from __September 2010__ through _March 2011__. Thus, the Final Gross Amount of back salary due to petitioner is $ __26,639.20__. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "_Susy Basilici_".

5. In addition to back salary, the Board shall pay Petitioner the sum of $_638.69_ as money damages based on amounts paid by Petitioner for medical bills during the period from _September 1, 2010__ to __March 15, 2011_ that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "_Susy Basilici___" and will not be subject to income tax withholding or payroll deductions since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the __2010-2011__ school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from _September 1, 2010 to __March 15, 2011___. In addition, Petitioner's seniority will be credited for one full year for the entire school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other

forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the __2010-2011__ school year, less any days used during any portion of that year when Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the __2010-2011___ school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the _2011-2012__ school year or thereafter.

8. The Parties agree that Petitioner's seniority as of _January 31, 2013_ as a result of this settlement is:

a) _6.25__ years as an _elementary school teacher__.

b) _____ years as a _____.

9. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete [redacted]ent of the matter hereby agrees to a dismissal, with [redacted]ce, of her Petition of Appeal in this matter as to all [redacted]related to the _2010-2011_ school year. Said dismissal [redacted]ave no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

14. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this agreement.

15. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR PETITIONER

Date: 06/30/14 _____

FOR RESPONDENT,

ELIZABETH BOARD OF EDUCATION

Date: _____

SUSY BASILICI Petitioner, v. ELIZABETH BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU 13416-2010N Agency Ref. No. 639-11/10 **SETTLEMENT AND RELEASE**

THIS STIPULATION OF SETTLEMENT AND RELEASE is made by and between Petitioner, __Susy Basilici__ ("Petitioner"), and the Respondent, Elizabeth Board of Education ("the Board"), (hereinafter jointly referred to as the "Parties").

WHEREAS, Petitioner is a tenured employee of the Board; and

WHEREAS, Petitioner has commenced an administrative proceeding captioned __Susy Basilici__ v. Elizabeth Board of Education, which is presently pending before the Commissioner of Education in the Office of Administrative Law and docketed as OAL Dkt. No. EDU __13416-2010__, Agency Dkt. No. __639-11/10__ (the "Litigation"), the allegations of which are detailed more fully in the Petition of Appeal served and filed in the Litigation; and;

WHEREAS, the parties desire to resolve and settle all disputes between them under the terms and conditions set forth in this Agreement;

OAKLEY COHEN, P.C. 9738021066 P.002

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the parties agree as follows:

1. The Parties mutually agree that Petitioner is entitled to gross back salary in the amount of $ _40,799.20_, for the period from _September 1, 2010__ through __March 15, 2011_. This amount is subject to reduction in an amount equal to the Unemployment Benefits received by Petitioner which the Board will repay pursuant to the statutes, regulations and policies of the New Jersey Department of Labor and Workforce Development (LWD) in a manner which is consistent with the Board's use of a self-insured trust for the payment of Unemployment Benefits. The Board takes sole responsibility for the repayment of all Unemployment Benefit reimbursement due from Petitioner for the period specified and agrees to release Petitioner from any liability to the State, the Board or any other party for the repayment of Unemployment Benefits received by Petitioner from ___September 1, 2010____ through __March 15, 2011_. The Board will indemnify and hold Petitioner harmless as to any such claim to repayment of said benefits. The parties have obtained an opinion from the LWD stating that Unemployment Benefits received by Petitioner during the months of July and August, _2010__, do not have to be repaid because Petitioner had no reasonable expectation of employment for September, _2010 at that time

and the back pay due to Petitioner runs from _September 1, 2010_.

2. The Parties agree that the total gross amount of Unemployment Benefits received by Petitioner from __September 2010__ through __March 2011__ was $ _14,160_.

3. The Parties agree that said total gross amount of such benefits must be repaid pursuant to the regulations of the LWD. As a result, the remaining gross amount of back pay due to the Petitioner after the reduction for repayment of Unemployment benefits is $ _23,975.28_.

4. The Parties agree that Petitioner had no earnings from other employment during the period from __September 2010__ through _March 2011__. Thus, the Final Gross Amount of back salary due to petitioner is $ __23,975.28__. Said amount shall be paid to Petitioner, subject to all applicable payroll taxes and normal payroll deductions, in the form of a check made payable to "_Susy Basilici_".

5. In addition to back salary, the Board shall pay Petitioner the sum of $_638.69_ as money damages based on amounts paid by Petitioner for medical bills during the period from _September 1, 2010__ to __March 15, 2011_ that were not covered by insurance during that time period. These amounts will be paid in a separate check payable to "_Susy Basilici__" and

will not be subject to income tax withholding or payroll deductions since they do not constitute back salary.

6. The Parties agree that the payments specified herein shall constitute full and final settlement of all claims to money damages for salary or on any other basis which were or could have been asserted against the Board in the Litigation with respect to the __2010-2011__ school year. The back pay amounts specified represent back salary due (after the reductions and deductions specified above) for the period from _September 1, 2010 to __March 15, 2011___. In addition, Petitioner's seniority will be credited for one full year for the entire school year and that year shall be treated as a full year of employment for purposes of all benefits and emoluments of employment which are impacted by years of service (including but not limited to (as applicable), sick leave accrual, other forms of leave, salary guide step advancement, terminal leave, sick leave cash-in and longevity, as well as any benefit or emolument which may become available in the future which is based on years of service) whether it be based upon rights that arise from statute, regulation, contract, policy, practice or otherwise. Petitioner's accrued sick leave will be credited with a full complement of sick days for the __2010-2011__ school year, less any days used during any portion of that year when

Petitioner was allowed to return to active employment in the Board.

7. Petitioner hereby releases the Board, its agents, servants and employees, from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought or could be brought, now and in the future, arising under or relating in any way to the issues which were raised or could have been raised in this or any action arising out of the subject matter of the within controversy, except to enforce the terms of this Agreement. This release only relates to Petitioner's claims arising out of the above-captioned matter which relates solely to a claim to employment for the __2010-2011___ school year. Petitioner does not waive or release any existing rights he/she may have to tenure, seniority, recall or any other contractual or legal rights he/she may have as a past, present or future employee of the Board, including but not limited to, the right to claim employment for the _2011-2012__ school year or thereafter.

8. The Parties agree that Petitioner's seniority as of _January 31, 2013_ as a result of this settlement is:

a) _6.25__ years as an _elementary school teacher__.

b) _____ years as a _____.

9. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of the matter hereby agrees to a dismissal, with prejudice, of her Petition of Appeal in this matter as to all claims related to the _2010-2011_ school year. Said dismissal shall have no effect on Petitioner's on-going tenure, seniority or recall rights, as well as any rights she/he may have as a current or future employee of the Board.

10. This Agreement shall not constitute an admission of wrongdoing by any party and no party shall be considered to be a prevailing party for any purpose.

11. This Agreement contains the entire agreement between the parties, and all terms of this Agreement are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

12. This Agreement is to be construed in accordance with the laws of the State of New Jersey.

13. Petitioner represents that he/she is freely entering into this Agreement, that he/she is acting with the advice of counsel of his/her choosing, and that he/she has read and fully understand the contents and effects of this Agreement.

14. The Board represents that it has taken all action necessary for the adoption of this settlement as a binding

action of the Elizabeth Board of Education including the obtaining of any approval necessary from the State or County offices of the New Jersey Department of Education and the issuance of any required "Action Notices" or resolutions required to bind the Board to the terms of this agreement.

15. This settlement is subject to the approval of the Office of Administrative Law and the Commissioner of Education and shall not be binding until said approvals are received. Upon approval of this Settlement and Release by the Commissioner of Education, the Board shall issue the payments required herein within 30 calendar days.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR PETITIONER

Date:

FOR RESPONDENT,
ELIZABETH BOARD OF EDUCATION

Date:

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2014 JAN 31 P 2:59
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

10r

BOARD OF EDUCATION

RESOLUTION

WHEREAS, the Elizabeth Board of Education has discussed a resolution of the Office of Administrative Law matters listed below; and,

WHEREAS, in the interest of cost efficiency and in lieu of a hearing, the parties have agreed to settle this case.

NOW, THEREFORE, BE IT RESOLVED, that the Board hereby accepts and approves the terms of the Confidential Settlement Agreement on file with the Board Secretary, provided that it is fully signed by all parties.

Susy Basilici	Agency Docket No. 639-11/10	OAL Docket No. EDU 13416-2010
Beth Ann Clayton	Agency Docket No. 324-11/11	OAL Docket No. EDU 12774-2012
Milena Maya	Agency Docket No. 338-08/10	OAL Docket No. EDU 10165-2010
Wilfredo Romero	Agency Docket No. 299-08/10	OAL Docket No. EDU 9657-2010
Debra Stallone	Agency Docket No. 331-08/10	OAL Docket No. EDU 10009-2010

TRUE COPY APPROVED AND ADOPTED
AT THE BOARD OF EDUCATION MEETING
HELD DECEMBER 23, 2013

Harold E. Kennedy, Jr.
School Business Administrator/Board Secretary
Elizabeth, New Jersey

401-14

OAL DKT. NO. EDU 16147-13
AGENCY DKT. NO. 254-10/13

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ADAM P. SCHOENFELD, SCHOOL DISTRICT OF THE BOROUGH OF REDBANK, MONMOUTH COUNTY.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the proposed Settlement Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the Agreement terms and adopts the Initial Decision as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/02/14

Date of Mailing: 10/02/14

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 16147-13
AGENCY DKT. NO. 254-10/13

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF ADAM P. SCHOENFELD, BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY.

R. Armen McOmber, Esq., for petitioner (McOmber and McOmber, attorneys)

Stephen B. Hunter, Esq., for respondent (Detzky, Hunter and DeFillippo, LLC, attorneys)

Record Closed: September 3, 2014 Decided: September 3, 2014

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law for determination as a contested case on November 7, 2013, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

September 3, 2014
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Date Received at Agency:

Date Mailed to Parties: September 8, 2014

cmo

2014 AUG -5 A 9:01

DETZKY, HUNTER & DEFILLIPPO, LLC
33 North Bridge Street
Somerville, N.J. 08876
(908) 707-4560
dhlaw@optonline.net
Attorneys for Adam Schoenfeld

BOROUGH OF RED BANK BOARD OF EDUCATION, Petitioner,	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
	:	OAL DOCKET NO. EDU-16147-2013S
vs.	:	AGENCY REFERENCE NO. 254-10/13
ADAM SCHOENFELD, Respondent.	:	SETTLEMENT AGREEMENT

This Settlement Agreement is entered into and effective this _____ day of June, 2014, by and between Adam P. Schoenfeld ("Schoenfeld") and the Board of Education of the Borough of Red Bank, in the County of Monmouth ("Board of Education");

WHEREAS, the Board of Education and Schoenfeld wish to resolve the above-referenced Petition of Appeal; and

WHEREAS, the Board of Education has considered Schoenfeld's instructional performance as a teacher staff member at the Red Bank Middle School; and

WHEREAS, the Board of Education recognizes the extraordinary circumstance in which Schoenfeld was offered a full-time position on very short notice prior to the 2013-2014 school year as a Band Teacher in the New York City School that he attended after the prior Band Teacher retired after 35 years of employment; and

WHEREAS, the Board of Education further acknowledges Schoenfeld's offer to assist the new Red Bank Music Teacher after his departure from the Red Bank School District; and

WHEREAS, the Board of Education is cognizant of the offer by Schoenfeld to volunteer his services to the Board of Education for the summer of 2014, which offer shall be considered by the Board of Education; and

WHEREAS, the Board of Education and Schoenfeld are now mutually desirous of settling all matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

The Board of Education agrees to withdraw the pending Petition of Appeal in this matter and further agrees that Schoenfeld should not face any suspension of his teaching certificate relating to the late notification of his resignation from the Red Bank School District.

RED BANK BOARD OF EDUCATION

By: _____

_____
Adam Schoenfeld

_____
Witness:

Aug. 5, 2014
Dated: ~~June , 2014~~

_____
Witness: Attorney at Law State of New Jersey

Dated: June 12, 2014

_____
R. ARMEN McOMBER, ESQUIRE
Attorney for Petitioner, Red Bank Board of Education

402-14

OAL DKT. NO. EDU 06078-14
(EDU 388-14 ON REMAND)
AGENCY DKT. NO. 299-12/13

E.H., on behalf of minor child, G.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision on Remand issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/02/14
Date of Mailing: 10/02/14



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6078-14
(ON REMAND EDU 388-14)
AGENCY DKT. NO. 299-12/13

E.H. O/B/O MINOR CHILD
G.H.,

Petitioner,

v.

BOARD OF EDUCATION OF
THE CITY OF OCEAN CITY,
CAPE MAY COUNTY,

Respondent.

E.H., parent, pro se

Michael Stanton, Esq., for respondent (McCrosson & Stanton PC, attorneys)

Record Closed: August 8, 2014 Decided: August 14, 2014

BEFORE **W. TODD MILLER**, ALJ:

This matter was originally transmitted to the Office of Administrative Law on December 5, 2013, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On April 3, 2014, an Initial Decision was issued determining that petitioner was not a resident in the district and therefore tuition

must be paid for the 2013-2014. The Commissioner of Education issued a decision on May 16, 2014, remanding the matter back to the Office of Administrative Law for the sole purpose of factual findings regarding the tuition amount due respondent. On July 31, 2014, the parties reached a settlement. The agreement was executed by petitioner and counsel for the school board who represented that he has board authority to sign the settlement agreement.

I have reviewed the record and the terms of settlement and I **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and as placed on the record on July 29, 2014.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 14, 2014
DATE

W. TODD MILLER, ALJ

Date Received at Agency:

Date Mailed to Parties: August 21, 2014

/jb/lam

RESIDENCY/TUITION SETTLEMENT AGREEMENT

THIS AGREEMENT, between the Ocean City Board of Education and Ellen Haviland,, on behalf of her daughter, a minor, G.H., hereby agree to the following settlement agreement:

$8,365 to be paid as follows:

1. Starting September 1, 2014, and every month thereafter on the first day of the month, payment shall be made in the amount of $348.54 to the Ocean City Board of Education at 501 Atlantic Avenue, Ocean City, New Jersey 08226. The total sum due shall be paid in 24 months, with final payment being made no later than August 31, 2016.

2. In the event payment is not received by the 10th of every month, all outstanding balances will be due and owing.

3. All parties shall be responsible for their own attorney fees.

4. The purpose of this Settlement Agreement is to release all outstanding issues and claims.

ELLEN HAVILAND

BY: MICHAEL P. STANTON, on behalf of
The Ocean City Board of Education

Dated: 31 July 2014

406-14

OAL DKT. NO. EDE7017-12
STATE BOARD OF EXAMINERS DKT. NO. 1112-111;
COMMISSIONER APPEAL NO. 3-1/14A

NELSON EVANS, JR.	:	
APPELLANT,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	
RESPONDENT.	:	

Appellant Nelson Evans, Jr., challenges the determination of the New Jersey State Board of Examiners (Board) that his actions during a 2010 administration of the New Jersey Assessment of Skills and Knowledge (NJASK) tests constituted unbecoming conduct and warranted the suspension of his teaching certificate for one year. The Commissioner has reviewed the record[1] and the findings set forth in the Initial Decision of the Office of Administrative Law (OAL) and the Board of Examiners' Order of Suspension, and concurs with the Board that appellant violated NJASK testing policy.

The material facts disclosed through exhibits and testimony presented at the OAL hearing are as follows. In May 2010, appellant was responsible for administering NJASK tests to three of his students, all of whom had "multiple disabilities challenged by behaviors." (Summary of testimony of School Principal Angela Rose-Bounds, Initial Decision at 4) It appears undisputed that prior to the testing, appellant received training in the required rules and testing protocols, received a script setting forth what to say and do when administering the NJASK tests, and signed a test security agreement. Shortly after the testing had been administered, the district superintendent received an

[1] The Commissioner has not been provided with a transcript of the hearing in the Office of Administrative Law.

anonymous call suggesting that appellant had breached testing protocol. This call precipitated an investigation.

On May 17, 2010, Vice Principal Robert Holmes interviewed the three children who took the NJASK test under appellant's supervision. (Board Exhibit P-6) Two of the three indicated that appellant had helped them. (*Ibid.*) On May 18, 2010 Principal Rose-Bounds met with appellant, at which time he indicated that he might have given the students clues. (Summary of Rose-Bounds testimony, Initial Decision at 4; Board Exhibit P-7) On or before May 19, 2010, Rose-Bounds interviewed the above referenced three children with their parents and/or other school personnel present. (Summary of Rose-Bounds' testimony, Initial Decision at 5) In notes which she took during or immediately after those meetings, and in a memorandum dated May 19, 2010 (Board Exhibits P-8 and P-9), Rose-Bounds recounted that M.F. and N.B. told her that appellant had reworded a passage in the reading portion of the NJASK test. M.F. and C.L. recalled that appellant had demonstrated how to do a mathematics problem. M.F. stated that appellant had "used scratch paper to explain how to do a long division problem" and helped her with another math problem requiring the calculation of a maximum number of color combinations possible in a given scenario. (*Ibid.*) N.B. mentioned that he perceived appellant to have suggested to M.F. that she rethink some of her answers on the mathematics test. (*Ibid.*) He also recalled that appellant had reminded C.L. to begin answering science test questions by eliminating answers that C.L. knew to be incorrect. (*Ibid.*)

Based upon what she had learned from her interviews with appellant and the students, Rose-Bounds determined that appellant had breached his test security agreement. (Summary of Rose-Bounds' testimony, Initial Decision at 6) While test monitors may assist students with disabilities in accordance with the accommodations set forth in their Individual Education Programs (IEPs) or 504 plans, Rose-Bounds concluded that appellant had given more assistance than what was indicated in the IEPs – to the detriment of the integrity of the testing. (*Ibid.*) After sitting in on the

interviews which Rose-Bounds conducted with the three students, Gloucester Township Special Education Supervisor Bonnie Edwards also concluded that the assistance which the students attributed to appellant went beyond what was appropriate for the accommodations included in their IEPs. (Summary of the testimony of Bonnie Edwards, Initial Decision at 9-10)

Appellant was placed on administrative leave with pay on May 24, 2010, and the district developed a corrective action plan to avoid future test breaches. Appellant was returned to service for the 2010-11 school year, but the Gloucester Township Board of Education had voted to withhold his increment.

The results of Rose-Bounds' investigation were shared with the State Department of Education (DOE).[2] Upon review of same, Jeffrey Hauger, Director of the Office of Assessments at the DOE, agreed that appellant's conduct had violated the integrity of the NJASK assessment. (Summary of the testimony of Jeffrey Hauger, Initial Decision at 11) According to Hauger, examiners are allowed to read out instructions and periodically post the remaining time for a test. An examiner may issue a general reminder to a class to check work, but may not direct such a comment to an individual student after looking at the student's work. Examiners may not reword passages or "clarify" portions of the test itself. After the tests are given out, examiners must say "Sorry, I cannot help you," if they are asked for assistance. Interactions between individual students and examiners should be minimal. (*Id.* at 10-11) At the hearing in the OAL, Hauger referred to Paragraph 8(c) of the security agreement which the examiners are required to sign, which states:

> I will not interfere with the independent work of any student taking the assessment, and I will not compromise the security of the test by any means

[2] Immediately after Rose-Bounds advised Superintendent Seddon of her conclusion that appellant had breached NJASK test security, Genevieve Lumia from the Camden County Office of the Department of Education conducted a preliminary investigation concerning the incident. She interviewed appellant, Rose-Bounds, Edwards, Holmes, Rodney Greco (the Gloucester Township District Test Coordinator) and Dion Davis (the District Human Resources Coordinator). She did not interview the students, but reviewed their statements. (Joint Exhibit J-3) Her conclusion was that appellant inappropriately gave the students answers to the tests. (*Ibid.*)

including, but not limited to: coaching students during testing or altering or interfering with the students' responses in any way.

(Board Exhibit P-1 at 69)[3]

Hauger further referenced the first page of the 2010 "Grade 4 Examiner Manual, Group 2" (Examiner Manual) (Board's Exhibit P-4) which reminded teachers, *inter alia,* that they may not answer any questions about test items or content. (Summary of Hauger testimony, Initial Decision at 11)

With regard to the question of accommodations for special education students, Hauger testified that appellant's assistance to the students in question fell outside the parameters of allowable accommodations. (Summary of Hauger's testimony, Initial Decision at 12) Appendix B to the Examiner Manual, which addresses the procedures for testing special education students, reinforces Hauger's determination. At the outset, any modification of the testing procedure for a special education student must relate to an accommodation set forth in the student's IEP or 504 plan. Section D of Appendix B allows an examiner to read out loud, repeat, clarify or even reword test directions. It also allows an examiner to read aloud test questions. It expressly forbids an examiner from reading aloud passages in the Language Arts Literacy section of NJASK. In addition, amongst the slides in the training presentation given by Rose-Bounds to the examiners, was one entitled "Never." (Board's Exhibit P-23 at 68) Two of the admonishments on the slide were: "Never read the reading passages to students includ[ing] IEP and 504 students;" "Never provide extra sheets of paper [*e.g.* scratch paper] unless an IEP or 504 plan specifies this as an accommodation." In light of all of the foregoing, the Office of Assessments voided the results of the tests administered by appellant. (Summary of the testimony of Jeffrey Hauger, Initial Decision at 11) As far as he knew, appellant's students were not retested. (*Ibid.*)

[3] Also, Paragraph 6 of the security agreement states "I will not review any test items or passages with students before, during or after the assessment." (Board Exhibit P-1)

The Investigations Unit of the Office of Fiscal Accountability and Compliance of the Department of Education (OFAC) also conducted an inquiry into appellant's administration of the 2010 NJASK tests. In December 2010 it issued a "Report of Examination." (Joint Exhibit J-4) Investigator Joanne V. Griffith interviewed the Gloucester Township Superintendent Thomas Seddon, Vice Principal Holmes, Principal Rose-Bounds, Special Education Supervisor Edwards and appellant. She did not interview the students, but rather relied on Rose-Bounds' memorandum summarizing the student accounts of the May 2010 testing.[4] (Joint Exhibit J-4 at 3)

In his interview with Griffith, appellant expressed his view that the 2010 test administration training was inadequate, particularly concerning what was or was not appropriate procedure in administering the NJASK tests to special education students. He conceded that the test training had been the same when he previously taught in the middle school, but that the inadequacies had been counterbalanced by the fact that he had proctors when administering the tests in the middle school. (Joint Exhibit J-4 at 4) Without the assistance of proctors in the 2010 testing, appellant felt himself at a disadvantage. *(Ibid.)*

Appellant told Griffith that he had reviewed methods for solving long division problems before he administered the NJASK test because he felt that division had not been adequately covered in class. (Joint Exhibit J-4 at 5) Review before tests had always been his practice as an examiner. *(Ibid).* He had also reminded the students of test-taking aids which they had previously learned. *(Ibid.)* However, he denied that he gave any of the students answers, told anyone that their answer was wrong, or reworded reading passages. *(Ibid.)* He only reworded directions. *(Ibid.)*

[4] Edwards told Griffith that, in her view, M.F. and N.B. were functional and capable of adequately reporting about their testing experiences. C.L. had lower comprehension skills and may have been less capable of reporting adequately. (Joint Exhibit J-4 at 4)

The conclusion set forth in the December 2010 OFAC report was that appellant did not properly administer the NJASK4 tests. (Joint Exhibit J-4 at 5) The report was forwarded to the State Board of Examiners (Board) for its review and consideration, and on November 1, 2011 the Board voted to issue appellant an Order to Show Cause why his teaching certification should not be suspended for one year. The Board sent the Order to Show Cause to appellant on April 17, 2012. Upon receiving appellant's answer on May 11, 2012, the Board transmitted the matter to the Office of Administrative Law (OAL) for a hearing, which hearing was held on May 21 and 23, 2013.

At the OAL hearing, appellant testified that he had attended the 2010 training for the NJASK testing, but it had felt brief and rushed.[5] (Summary of the testimony of Nelson Evans, Initial Decision at 12) His recollection was that the slide concerning acceptable accommodations was not legible. (*Ibid.*) He asked for a proctor[6] -- which had been provided to him when he taught in the Gloucester Township middle school – and/or to be located close to the principal during the 2010 testing, in the event that he needed assistance. These requests were not granted. (*Ibid).* Appellant urged that the absence of a proctor was a significant disadvantage because all three of his students had both learning disabilities[7] and behavioral issues, did not want to sit still and take the test, took significantly different amounts of time to complete each test section, and needed more time than regular education students. (*Id.* at 13) The process was arduous and the students became tired.

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[5] Subsequent to the April 19, 2010 training appellant signed a security agreement which acknowledged that he had been trained to administer the statewide assessments. (Board's Exhibit P-1)

[6] Appellant conceded that he had never followed up on his verbal request for a proctor, which request was made a month before the testing. He had never spoken with his principal or put the request in writing. (Summary of Evans testimony, Initial Decision at 14)

[7] The record indicates that for all three of the students taking the NJASK test with appellant, accommodations called for in their IEP or 504 Plans included 1) the reading aloud, repeating, clarifying and/or rewording of directions, 2) the reading aloud of test questions (but not Language Arts reading passages), supervision by an examiner familiar to the students, and description by the examiner of charts, pictures or graphs. One of the three students was also allowed manipulatives and graph paper for math problems. (Joint Exhibit J-4 at 4)

While appellant conceded that on the test date he went over math and long division, using scratch paper, he testified that it was prior to his procuring the test materials and starting the test. (Summary of Evans' testimony, Initial Decision at 13-14) He acknowledged that he may technically have interfered by conducting a review prior to the test, but he had never been told he could not do so, and did not believe that his review was, in fact, interference. (*Id.* at 13) He further stated, as he had to the OFAC investigator, that he had only reworded the directions, not the test questions or items in the language arts test section. (*Id.* at 13-14) Appellant denied 1) assisting M.F. on the test, 2) telling her to look at another letter before putting her answer on the test, 3) helping her with a question involving combinations of colors. (*Ibid).* He also denied telling C.L. to eliminate answers. (*Id.* at 14) Appellant testified that when the students asked him for help, he referred them to the test-taking clues that they had learned in an assembly. (*Ibid.)* He suggested that the students may have confused incidents that had occurred in the regular classroom with what took place on the days of the NJASK testing. (*Id.* at 13-14)

The Administrative Law Judge (ALJ) assessed the testimony of all of the witnesses. Particularly crucial was the testimony of M.F., whom the ALJ found to be credible, and whose testimony the ALJ found consistent with both the documents entered into evidence and the testimony of other witnesses. M.F. could not recall receiving help with a problem involving color combinations, but did testify that during the testing appellant reworded a language arts passage for her and explained a math problem using scratch paper. (Summary of the testimony of M.F., Initial Decision at 17) Further, M.F.'s testimony was the 'residuum of competent evidence' needed to consider Rose-Bounds' and Holmes' double hearsay memoranda identifying what N.B. had told them about appellant's conduct during the testing.

The ALJ found M.F.'s testimony and N.B.'s memorialized accounts to be harmonious and more persuasive than appellant's version of the testing he had administered. More specifically, the ALJ found that appellant "reviewed both Math and Language Arts items with his

students, particularly M.F.", in violation of Section 6 of the Statewide Assessments Test Security Agreement (Security Agreement) which states: "I will not review any test items or passages with students before, during or after the assessment." (Board Exhibit P-1; Initial Decision at 18) Further, the ALJ found that the evidence in the record supported the conclusion that appellant interfered with the independent work of M.F., contravening Section 8(c) of the Security Agreement which prohibits coaching during the tests. *(Ibid.)*

Thus, the ALJ concluded that appellant breached the Security Agreement, which breach constituted conduct unbecoming a teacher. Notwithstanding the fact that subsequent to his deficient administration of the 2010 NJASK tests, appellant had served successfully as an NJASK examiner during the 2010-11 and 2011-12 school years, the ALJ determined that appellant's conduct in 2010 had been sufficiently damaging to warrant a one year suspension of appellant's teaching certificate. On August 8, 2013, she issued an Initial Decision recommending same.

On November 1, 2013, the Board voted to adopt the Initial Decision and on December 6, 2013, it issued a decision suspending appellant's certificate for one year, commencing on January 1, 2014. However, on January 17, 2014, the Board granted appellant a stay of its decision pending the resolution of the instant appeal before the Commissioner.

Careful review of the record, Initial Decision, Board decision and appellate papers filed by the parties reveals no basis to disturb the factual findings set forth in the Initial Decision, nor the consequent determinations of the ALJ and Board that appellant perpetrated unbecoming conduct by breaching NJASK test security. Further, while the penalty suggested by the ALJ and adopted by the Board of Examiners is stringent, the Commissioner cannot conclude that it is arbitrary, capricious or unreasonable.

Appellant may not go without discipline. His actions resulted in the disqualification of test results for three students, depriving the school district, the State Department of Education, and

the students themselves of important feedback about their progress. Accordingly, the one year suspension of petitioner's teaching certification is upheld.

IT IS SO ORDERED.[8]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/30/14

Date of Mailing: 10/03/14

[8] Pursuant to *P.L.* 2008, *c.* 36 (*N.J.S.A.* 18A:6-9.1), Commissioner decisions are appealable to the Appellate Division of the Superior Court.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATE OF	:	STATE BOARD OF EXAMINERS
NELSON EVANS, JR.	:	ORDER OF SUSPENSION
_____	:	DOCKET NO: 1112-111

At its meeting of September 15, 2011, the State Board of Examiners (Board) reviewed a report it had received from the Office of Fiscal Accountability and Compliance (OFAC) regarding Nelson Evans, Jr. The report, titled "Gloucester Township Public School District, Alleged NJ ASK4 Test Breach," concluded that Evans did not properly administer the NJ ASK4 test. OFAC reported that Evans breached test protocol by helping students on the test. Specifically, OFAC concluded that Evans conducted math reviews prior to the test, which was contrary to the test security agreement. Evans also allegedly reworded some questions on the test for students. Evans currently holds a Teacher of the Handicapped certificate, issued in August 2002. Upon review of the above information, at its November 1, 2011 meeting, the Board voted to issue an Order to Show Cause to Evans as to why his certificate should not be suspended for one year.

After securing a correct address, the Board sent Evans the Order to Show Cause by regular and certified mail on April 17, 2012. The Order provided that Evans must file an Answer within 30 days. Evans responded on May 11, 2012. In his Answer, Evans admitted that the OFAC report spoke for itself but denied any conclusions reached that he breached the test security agreement or reworded questions for students. (Answer, ¶ 3). Evans also denied that he engaged in inappropriate conduct and stated that there was no just cause to consider the suspension of his certificate. (Answer, ¶ 4). Evans also filed some affirmative defenses including: procedural deficiencies, lack of specificity, vagueness, lack of due process, laches, and the fact that he had successfully tested students after the 2010 test cycle without incident or allegation. (Answer, Affirmative Defenses, ¶¶ 3,4,6,9,10,12). Finally, Evans stated that he was entitled to a hearing at the Office of Administrative Law. (Answer, Affirmative Defenses, ¶ 14).

Since there were material facts in dispute, on May 11, 2012, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. Administrative Law Judge (ALJ) Lisa James-Beavers heard the matter on May 21 and 23, 2013. The record closed on June 24,

2013, and the ALJ issued an Initial Decision on August 8, 2013. *In the Matter of the Teaching Certificate of Nelson Evans, Jr.*, Dkt. No. EDE 7017-12 (Initial Decision, August 8, 2013).

After assessing the witnesses' credibility and their direct knowledge of the events, the ALJ found that student M.F. "testified credibly that Evans helped her when she asked for help." (Initial Decision, slip op. at 17). Although another student told the Principal that Evans gave M.F. the answers while M.F. recalled only that Evans told her to check her answer, the ALJ determined that, in either case, "Evans interfered with the independence of the students taking the exam." *Id.* at 17-18. ALJ James-Beavers concluded that Evans reviewed both Math and Language Arts items with his students, particularly M.F., and that by providing this help, Evans breached the Statewide Assessments Test Security Agreement that he had signed. *Id.* at 18. The ALJ concluded that Evans' breach of the test security agreement constituted conduct unbecoming a teacher. *Ibid.* ALJ James-Beavers found that "Evans' interference with the students taking the test compromised the validity of the test scores such that they had to be discarded." *Id.* at 18-19. As a result, the ALJ determined that the Board "met its burden of proving by a preponderance of the credible evidence" that suspension of Evans' certificate for one year was justified. *Id.* at 19. ALJ James-Beavers therefore ordered Evans' certificate suspended for one year. *Ibid.* Evans submitted Exceptions in the case and the Deputy Attorney General (DAG) representing the Board submitted Reply Exceptions.

In his Exceptions, Evans noted that he suffered an increment withholding for the test breach at issue and apologized to his Superintendent, who stated that the matter was resolved. (Exceptions, p. 1). Evans added that he administered the NJASK for two consecutive years after the test breach before he was told "that the state was bringing charges against me for the same matter." (Exceptions, p. 1). Evans stated that with the current one year suspension, he would not be able to return to the classroom until the 2014-2015 school year, with "no guarantee to return back to my district at that point." (Exceptions, p. 2).

In his Reply Exceptions, the DAG argued that the findings in the Initial Decision were "clearly supported by ample evidence" and that the legal conclusions were "well-reasoned and based on applicable statutes, regulations and case law." (Reply Exceptions, pp. 1-2). The DAG noted that ALJ James-

Beavers found that Evans had violated the test security agreement by interfering with the independent work of students and that this breach constituted conduct unbecoming. (Reply Exceptions, pp. 3-4). The DAG therefore urged the Board to adopt the Initial Decision. (Reply Exceptions, p. 4).

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of September 20, 2013, the Board reviewed the Initial Decision, the Exceptions and Reply Exceptions. After full and fair consideration of the Decision, the Board voted to adopt the Initial Decision.

There is no doubt that the ALJ is in the best position to render credibility determinations in this matter. Accordingly, the Board will defer to those findings. As noted above, after assessing the evidence and the credibility of the witnesses, ALJ James-Beavers found that Evans had interfered with his students' independent work on the 2010 NJ ASK4 test. (Initial Decision, slip op. at 17-19.) That interference undermined the integrity of the test, to the extent that Evans' students had their scores discarded. Although Evans may have successfully administered successive exams, having learned from his mistake, his initial breach cannot go unpunished. The Board, therefore, further agrees with the ALJ's conclusion that he engaged in unbecoming conduct and that a one-year suspension of his certificate is appropriate.

Accordingly, on November 1, 2013, the Board voted to adopt the Initial Decision and suspend Nelson Evans, Jr.'s Teacher of the Handicapped certificate for a period of one year. On this 6th day of December 2013, the Board formally adopted its written decision to adopt the Initial Decision in this matter, and it is therefore ORDERED that Evans' certificate be hereby suspended for a period of one year, effective January 1, 2014. It is further ORDERED that Evans return his certificate to the Secretary of the State Board of Examiners, Office of Licensure, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

Date of Mailing: 12/19/13

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

407-14A

STATE BOARD OF EXAMINERS DKT. NO. 1011-141
OAL DKT. NO. EDE 14576-1145
AGENCY DKT NO. 10-10/13A

IN THE MATTER OF THE REVOCATION OF	:	
THE CERTIFICATES OF BENJAMIN NORTON	:	COMMISSIONER OF EDUCATION
BY THE NEW JERSEY STATE BOARD	:	DECISION
OF EXAMINERS	:	

Order of Revocation by the State Board of Examiners, September 24, 2013

For the Respondent-Appellant, Harold N. Springstead, Esq.

For the Petitioner-Respondent State Board of Examiners, Geoffrey Stark, Deputy Attorney General (John J. Hoffman, Acting Attorney General of New Jersey)

Appellant challenges the determination of the New Jersey State Board of Examiners (Board) that his actions warranted the revocation of his teaching certificate. As a threshold issue, appellant also challenges the Board's inclusion on the Statement of Items Comprising the Record (SICR) of certain items that were not admitted into evidence at the hearing in the Office of Administrative Law (OAL), and the Board's decision to deny his Motion to Settle the Record with respect to those items.[1]

Regarding the SICR, appellant argues that it was inappropriate for the Board to include police reports, photographs, witness statements, and a partial transcript of his criminal trial, since those items were not admitted into evidence at the OAL. The Board argues that, although not admitted into evidence at the hearing, the items in question were "sent to the Commissioner and were the underpinning of the Board's [Order to Show Cause]." The Board contends that the documents it

[1] While this appeal was pending, appellant filed with the Board a Motion to Settle the Record, which the Board denied. Appellant filed with the Commissioner a Notice of Appeal of that decision. The Commissioner notes that, pursuant to *N.J.A.C.* 6A:4-2.5(b), the proper procedure for seeking review of that decision is by way of motion.

reviewed when it decided to issue the Order to Show Cause (OTSC) are "clearly part of the Board's file in this case and must be included in the record."

Pursuant to *N.J.A.C.* 6A:4-2.5(a), "the record on appeal shall consist of all papers and exhibits, including audio and video recordings, on file with the Board of Examiners, together with all entries as to matters made on the record, any stenographic transcript, and all papers filed with the Commissioner." The clear and unambiguous language of the regulation requires inclusion on the SICR of all papers on file with the Board. The documents reviewed by the Board in determining to issue an OTSC to appellant fall squarely within that regulatory definition. Accordingly, the Commissioner finds that the documents in question are part of the record on appeal and were properly included in the SICR.

On the merits of the appeal, appellant argues that the Administrative Law Judge's (ALJ) factual findings, adopted by the Board, were based upon erroneous credibility determinations. The appellant further argues that the ALJ erroneously excluded from evidence certain documents he offered as evidence of his teaching ability. The appellant also contends that the Commissioner should reject the Board's decision revoking his certificate and impose a suspension of no more than two years.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute his judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a).

Initially, the Commissioner notes that the large majority of appellant's objections to the Board's decision are fundamentally rooted in his disagreement with the ALJ's credibility determinations and with the resultant weighing of testimonial and documentary evidence. The

standard of law with respect to objections of this type is well established,[2] and in the present instance, the Commissioner finds the ALJ's credibility and fact determinations, as adopted by the Board, to be both clearly explained in the Initial Decision and sufficiently supported by the record. The Commissioner further finds that appellant has offered nothing in his papers that would warrant disturbing the deference to which the ALJ – as the finder of fact who had the greatest opportunity to observe the demeanor of witnesses –is entitled in this regard. *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987).

Contrary to the appellant's assertions on appeal, the credible evidence in the record amply supports the Board's assessment of the appellant's conduct, which included a pattern of highly inappropriate and unprofessional behavior. Further, in light of appellant's serious and repeated lapses in judgment, the Commissioner finds that the revocation of appellant's certificate is the appropriate penalty. Consequently, the Commissioner finds no basis upon which to disturb the Board's decision.

Accordingly the decision of the State Board of Examiners is affirmed for the reasons expressed therein.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/25/14
Date of Mailing: 10/03/14

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[2] *N.J.S.A.* 52:14B-10(c) states in pertinent part:

> The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L.* 2008, *c.* 36.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATE OF	:	STATE BOARD OF EXAMINERS
BENJAMIN NORTON	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 1011-141

At its meeting of July 28, 2011, the State Board of Examiners (Board) reviewed information it had received from the Commissioner's office regarding Benjamin Norton. The information indicated that Norton had allegedly engaged in inappropriate conduct while chaperoning several student trips, two to Cape Cod and one to Florida. Norton's alleged conduct included drinking alcohol with students, purchasing beer for students and ignoring the fact that students were drinking alcohol and smoking marijuana. Norton also allegedly told sexually explicit jokes in class and whispered answers to test questions to one student. On one school sponsored trip, Norton allegedly tried to convince two female students, MF and NR, to take their tops off and told them a story about receiving oral sex under water. One female student alleged that while on a trip to Cape Cod, Norton drank alcohol with her and then sexually assaulted her. On all of the school trips Norton chaperoned, he did not have any female chaperones and allegedly misrepresented that a female chaperone scheduled for a trip had cancelled at the last minute. Norton used male college students to help him chaperone the trips. Norton currently holds a Teacher of Comprehensive Science certificate, issued in August 1993. Upon review of the above information, at its September 22, 2011 meeting, the Board voted to issue an Order to Show Cause to Norton as to why his certificate should not be revoked.

The Board sent Norton the Order to Show Cause by regular and certified mail on September 30, 2011. The Order provided that Norton must file an Answer within 30 days. Norton responded on October 24, 2011. In his Answer, Norton denied the allegations regarding his conduct and asserted that the false allegations came to the attention of law enforcement while a student was in therapy several years after the conduct had allegedly occurred. (Answer, ¶ 3). He noted that as a result of the sexual assault allegations, he was indicted in Massachusetts for rape, indecent assault and battery, and purchasing and delivering alcohol to minors. (Answer, ¶ 3). Norton stated that he was found not guilty of all charges and

added that "the charges as alleged in the Order to Show Cause are the result of either faulty memories or lies." (Answer, ¶ 3). Norton also admitted that one trip had only male chaperones and noted that the trips were arranged by a travel company. (Answer, ¶ 4). In the remainder of his Answer, Norton again denied the allegations in the Order to Show Cause and asked that it be dismissed or referred to the Office of Administrative Law for a hearing. (Answer, ¶ 5).

Since there were material facts in dispute, on December 5, 2011, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. Administrative Law Judge (ALJ) Carol I. Cohen heard the matter on November 14, 16, and 19, 2012 and February 28, 2013. The record closed on April 17, 2013, and the ALJ issued an Initial Decision on May 31, 2013. *In the Matter of the Certificate of Benjamin Norton*, Dkt. No. EDE 14576-11 (Initial Decision, May 31, 2013).

After assessing the witnesses' credibility and their direct knowledge of the events, ALJ Cohen concluded that Norton inappropriately fed test answers to certain students, including MF and NR. (Initial Decision, slip op. at 36-38). Although Norton testified that he merely asked the students guided questions to help them figure out the correct answer, the ALJ doubted his version, instead opining, "I got the impression that Norton wanted to be 'friends' with certain of his students, and the boundary between teacher and student was blurred." *Id.* at 38. ALJ Cohen also concluded that Norton behaved inappropriately by "choosing an untrained and inexperienced college student as the chaperone on the field trips and leaving the students in that individual's care while Mr. Norton went out drinking." *Id.* at 44. While the ALJ recognized that there was no policy requiring a certain type of chaperone, she noted that Norton's choice of a chaperone "who was barely an adult himself and who had no formal experience in dealing with children" demonstrated Norton's lack of good judgment. *Ibid.* This failure was compounded after Norton was aware that students had smoked marijuana on the field trip to Florida and still chose the college student to be the only other chaperone on the field trip to Cape Cod. *Ibid.* ALJ Cohen also found it "outrageous" that Norton expected the college student to notify the parents of students who had been drinking after the second Cape Cod trip. *Ibid.* As the ALJ noted: "The parents who allowed their children to take part in these trips had a right to expect that the children would be

properly supervised....The parents put their children's care in the hands of a teacher who did not provide proper supervision, which resulted in the children's safety and security being put in jeopardy. *Ibid.* ALJ Cohen also found that MF and NR's credible testimony, buttressed by exhibit pictures, proved that Norton allowed students to drink on the first trip to Cape Cod. *Id.* at 45-46. The ALJ further concluded that "Norton was involved in the purchase of alcohol and knew that students were drinking while in Key West." *Id.* at 47. As to the issue of discovering students smoking marijuana, the ALJ deemed Norton's testimony "particularly disturbing." *Id.* at 49. As ALJ Cohen observed, Norton "did not confiscate the drug, nor did he call the students' parents and tell them what had occurred and/or ask them to pick up their children....Further, even though he knew that these students had smoked marijuana, he sought them out to go on another filed trip to Cape Cod." *Ibid.* Moreover, when Norton discovered that some female students had gone to another hotel and gotten drunk on one of the Cape Cod trips, he picked them up and brought them back to their own hotel, but did not check on them the rest of the night. *Id.* at 49-50. When asked if he contacted the parents regarding the incident, Norton testified that he just "washed his hands of them." *Id.* at 50. ALJ Cohen found that "As their teacher, [Norton] was acting in *loco parentis*, and he had an obligation to provide for the children's safety and to inform their parents of what had occurred." *Ibid.* Accordingly, the ALJ found that the Board had proven that "Norton acted in an inappropriate manner by not reporting the drug and alcohol use and not properly supervising and disciplining the students." *Ibid.* Finally, "[a]fter observing the demeanor of the witnesses and developing a sense of the witnesses' candor," ALJ Cohen concluded that Norton had tried to convince MF and NR to take their tops off on the Florida trip, told them a story about having oral sex under water and had sexually explicit conversations with them. *Id.* at 51-53. As for the other allegations, ALJ Cohen determined that the Board failed to prove that: Norton sexually assaulted MF, misrepresented that a female chaperone scheduled for a trip had cancelled at the last minute, provided tequila to MF and her roommates, and made sexually explicit remarks in class. *Id.* at 38-43, 43, 47-48, 50-51. The ALJ also determined that, if Norton did tell students that Sandy Hook was New Jersey's only nude beach, the remark was a statement of fact and not inappropriate. *Id.* at 53. In assessing the appropriate penalty, ALJ Cohen noted that the Board "has

proved a number of charges of inappropriate conduct against" Norton and that "based on the severity of the charges that have been proved" the proper penalty was the revocation of Norton's teaching license. *Ibid.* Norton filed Exceptions to the Initial Decision.[1]

In his Exceptions, Norton argued that the ALJ's decision was arbitrary and capricious because she ignored inconsistencies in MF's testimony and obvious collaboration in the accounts given by MF and NR. (Exceptions, pp. 2-16). Norton also alleged that much of MF's testimony was fabricated, including her claims that another student told her Norton had had sex with a student from Lodi and that Norton had entered a hotel room where she was partying with other students. (Exceptions, pp. 13-17). Norton also disputed many of the ALJ's findings of fact, which he said "were completely refuted by the evidence," including Norton's reaction to students' marijuana use, Norton's purchase of alcohol for students and his knowledge of their alcohol use, Norton's comments asking MF and NR to take their tops off, Norton's improper sexual statements, and Norton's providing certain students with test answers. (Exceptions, pp. 18-27). Additionally, Norton argued that ALJ Cohen "erroneously excluded evidence of Norton's teaching abilities, character and relations with students, parents and colleagues." (Exceptions, pp. 31-33). Finally, Norton claimed that, since all findings regarding his alleged involvement with alcohol, explicit sexual comments and the claim that he whispered test question answers should be dropped as unproven, the revocation of his teaching certificate was far too severe a penalty and not warranted by the evidence. (Exceptions, p. 33).

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of July 25, 2013, the Board reviewed the Initial Decision and Norton's Exceptions. After full and fair consideration of the Decision and Exceptions, the Board voted to adopt the Initial Decision.

As noted above, the ALJ concluded that Norton's inappropriate conduct warranted the revocation of his teaching certificate. (Initial Decision, slip op. at 53). The Board agrees. "Teachers ... are

[1] The Deputy Attorney General representing the Board made a motion to file Reply Exceptions that were out of time. At its meeting of July 25, 2013, the Board voted to reject the Reply Exceptions. Accordingly, they were not reviewed as part of this decision.

professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, the Commissioner has long held that teachers serve as role models for their students. Norton's conduct amply demonstrates that he misunderstands his position as a role model. The record was replete with instances of behavior in which no teacher or any adult supervising children should engage. Even at a minimum, Norton's choice not to report students smoking marijuana or drinking proves his lack of judgment. Moreover, his sexually explicit conversations with female students and his feeding of test question answers to certain students is further evidence that he crossed the fundamental boundaries that should exist between teacher and student. The Board believes that the only appropriate response to Norton's breach is the revocation of his certificate. The Board therefore adopts the Initial Decision.

Accordingly, on July 25, 2013, the Board voted to adopt the Initial Decision and ordered to revoke Norton's certificate. On this 20th day of September 2013, the Board formally adopted its written decision to adopt the Initial Decision in this matter, and it is therefore ORDERED that Benjamin Norton's Teacher of Comprehensive Science certificate be hereby revoked effective immediately. It is further ORDERED that Norton return his certificate to the Secretary of the State Board of Examiners, Office of Licensure, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Robert R. Higgins, Secretary
State Board of Examiners

Date of Mailing: 9/24/13

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDE 14576-11

AGENCY DKT. NO. 1011-141

IN THE MATTER OF THE CERTIFICATES OF BENJAMIN NORTON, STATE BOARD OF EXAMINERS.

Geoffrey N. Stark, Deputy Attorney General, for petitioner State Board of Examiners (Jeffrey S. Chiesa, Attorney General of New Jersey, attorney)

Harold N. Springstead, Esq., for respondent Benjamin Norton (Springstead & Maurice, attorneys)

Record Closed: April 17, 2013 Decided: May 31, 2013

BEFORE **CAROL I. COHEN,** ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

On March 14, 2011, respondent Benjamin Norton was acquitted of charges of rape, indecent assault and battery, and procuring alcohol for a minor in Massachusetts. These charges were the result of a complaint made by M.F., who was a former student of Mr. Norton, when she attended Ramapo Indian Hills High School. On July 28, 2011, the Department of Education forwarded to petitioner State Board of Examiners information regarding the allegations of inappropriate conduct made against Benjamin

J. Norton. On September 26, 2011, the Department of Education forwarded to Mr. Norton an Order to Show Cause why his teaching certificates should not be revoked/suspended. On October 24, 2011, the respondent filed an Answer to the Order to Show Cause. On December 5, 2011, the file was forwarded to the Office of Administrative Law (OAL). On December 27, 2011, a pre-hearing conference was conducted and a discovery schedule was generated. The hearing was to begin on April 16, 2012, and continue on April 17, and 18, 2012. However, the parties asked for an adjournment of the hearing date because the State's main witness was unavailable, and the respondent claimed that he needed more time for discovery. The matter was rescheduled for October 2, 3, and 5, 2012. The first two dates of the hearing were adjourned at the request of the parties. The parties appeared on October 5 and the respondent made an oral application to have the transcripts of two experts, whose testimony was recorded during pre-trial depositions in the criminal case, admitted into evidence. Following oral argument, the parties were ordered to submit briefs, which they did on October 23, 2012. On November 1, 2012, I rendered a decision excluding the testimony of the two experts. The matter was heard on November 14, 16, and 19, 2012. A January 4, 2013, hearing date was adjourned because the respondent had made a motion in Superior Court to enforce the subpoena of Detective Taylor of the Bergen County Prosecutor's Office. The Superior Court judge ordered that Detective Taylor comply with the subpoena, and she testified on February 28, 2013. Following the close of testimony, there were objections by the State regarding the admission into evidence of certain documents introduced by the respondent, namely, R-13, Barbara Mauer's records; R-21(a), report of interview with A.P. by Edward Fitzgerald; and R-25, certification of R.L.[1] I allowed portions of R-13 into evidence because M.F. had identified the document as the notes of her social worker. I admitted R-21(a) and R-25 into evidence based on the fact that they were relevant and they were offered to impeach the testimony of M.F.[2]

[1] According to the Board of Examiners' brief, I reserved on Exhibits R-15, R-16, R-17, R-18, R-19, R-20, R-21, R-25 and R-35. The CD of that date reveals that I did not reserve on R-15, R-16, R-17, R-18, R-19 or R-35. Exhibits R-32 and R-35 were admitted subject to the residuum rule. Exhibit R-27 was admitted as to the top picture only.

[2] See discussion to follow.

ISSUES

1. Whether Mr. Norton acted inappropriately while chaperoning several student trips.

2. Whether Mr. Norton sexually assaulted (raped) M.F. in April 2003 on a trip to Massachusetts.

3. If the charges are proved, whether revocation or suspension of Mr. Norton's license is appropriate.

TESTIMONY

N.R.

N.R. testified that she is presently a student at Seton Hall University studying professional counseling. She graduated from Ramapo High School in 2004. She was and remains friendly with C.L. and M.F., whom she has known for thirteen years, although they have not gone out together for over a year. Mr. Norton was her chemistry teacher in 2001–2002.[3] He was also the advisor to the Environmental Club at the high school, of which she was a member. She said that Mr. Norton had a special group of students that he would allow special liberties. He would let them change their grades on his computer or fill in grades for assignments that they had not completed. In addition, if N.R. did not know the answer to a test question, she would raise her hand and Mr. Norton would come over and either point to the right answer or whisper the answer to her. N.R. described her experiences with the Environmental Club. She said that she would go with the group hiking in the Ramapo Reservation. She also took trips with the group to Cape Cod, Sandy Hook, and the Florida Keys. She said that there were about twenty-five students in the club. She did not recall there being regular club meetings. N.R. recalled that on a day trip to Sandy Hook, which took place in her sophomore year, in 2001–2002, Mr. Norton told the club members that this was the

[3] She received an "A" in the course.

only nude beach in New Jersey.[4] Also during that school year, the club took a trip to Cape Cod over a long weekend. There were between fifteen and twenty-five students on the trip. Mr. Norton organized the trip and handed out permission slips and collected money. The itinerary included a trip to the aquarium in Boston and whale watching in Cape Cod. N.R. said that the students had meals together, and at night would "hang out" in the hotel. M.F. and C.L. went on the trip also. Mr. Norton was the chaperone. She did not remember any other teachers being chaperones on the trip. N.R. said that tape was put on the doors at curfew time; students were not supposed to leave their rooms, and broken tape would indicate that the door had been opened. However, N.R. said that if a student left the room, Mr. Norton would put the tape back on the door. N.R. did not remember any rules on the trip. She said that there was drinking of alcohol by students. She drank in her and other students' hotel rooms and in the parking lot. Students also smoked. She said that students brought alcohol on the bus. N.R. testified that Mr. Norton was present while students were drinking in their rooms and in the hall. She saw Mr. Norton drinking beer. She did not know where he obtained the beer. She did not see the teacher giving beer to students.

When questioned about the Key West trip, which took place in the summer of 2002, after her sophomore year of high school, N.R. said that Mr. Norton told a few of his favorite students in class about the trip and gave them the itinerary and permission slips to fill out. M.F. and C.L. went on the trip along with her. The composition of the students on the trip was roughly the same as that of the students on the Cape Cod trip. The group flew into Miami. She thought that there were two vans that drove the students down to the Keys, and that Mr. Silverstein,[5] who was the only other chaperone besides Norton, drove one of the vans. N.R. said that on the way down they stopped at a few beaches and went swimming. There were about twelve to fifteen students on the five- or six-day trip. She said that there was drinking in the rooms every night.

N.R. said that while they were on the Key West trip Mr. Norton had a conversation with her that made her feel uncomfortable. They were at a beach that

[4] The weather was cold and the students did not go sunbathing on the beach.
[5] Marc Silverstein has alternately been referred to as Silverstein or Silberstein, but for consistency's sake, I will refer to him as Silverstein.

was somewhat secluded, while on the way to Key West. Mr. Norton told her and her friends that he loved the beach and had been on it with his wife on a prior occasion. He claimed that his wife gave him oral sex while the sun was setting. During this same conversation, he told M.F. and N.R. to take off their tops. N.R. said that this made her feel uncomfortable and she did not know what to do. She had never had an adult speak to her in that way and she did not know how to respond.[6] N.R. said that this was not the first time that she had had a conversation of a sexual nature with Mr. Norton. Norton told her that he had had an affair with a former student of his. He waited until she turned eighteen and then took her to the Ramapo Reservation and "took her virginity." He also told her that he had lost his virginity when he was thirteen years old, on the railroad tracks. She said that he would also comment about other girls, who had large breasts. One of the girls was a year older than she. Norton commented to her, "look at those knockers," or that he'd "better be careful or he would get hit by them." N.R. also stated that one of the parents was very upset when their child brought a parrot home because Mr. Norton had taught the bird to say "nice tits." She said that at the time she considered Mr. Norton as a friend, and she thought that it was cool to have an older person taking her on trips and allowing her to change her grades.

N.R. identified P-6, which is a picture in which she was "panting" Mr. Norton. When asked why she thought that it was okay to pull down a teacher's pants, she said that at the time she considered the relationship to be that of friends, not teacher/student. This was something that she would do with her friends as a joke. She did not think that Mr. Norton knew about the panting incident in advance. She said that while they were in Key West, Mr. Norton bought the students alcohol. One night they all went out to eat, and afterwards Norton took orders from students as to what alcohol they wanted. She went along with Norton on the ride to get the liquor. They went to a "quick mart" or a liquor store, and she waited in the van until he came out with the liquor. She was in the van with M.F. When Norton came out of the store he had the alcohol that they had requested, and they gave him the money to reimburse him.[7] They drank in the hotel rooms, around the pool, or in the hotel environs. She said that Mr.

[6] N.R. was fifteen years old at the time. While there were other students on the beach, she did not believe that they were in earshot when Norton made the remark.

Norton was aware that the students were drinking, because he was with them and was drinking beer, and the alcohol was out and in plain sight of the teacher. She identified P-5 as a picture of her and C.L. drinking vodka and orange juice in the hotel room. She said that she also used marijuana on the trip. Some guy that she and her friends met in Florida offered them marijuana, which they bought from him. They smoked it in the hotel room. Norton came to the room, and when he opened the door there were a couple of students sitting around a table smoking. Someone let Norton into the room. When he saw what they were doing, Norton was upset and said, "please don't smoke, it's illegal," and said that he could get into a lot of trouble. Norton told them to get rid of the marijuana. He never told their parents. She did not tell her parents about the marijuana and drinking, and she is not aware of any other students telling their parents.

N.R. said that Mr. Norton invited her to go on the trip to Cape Cod the following year. She did not go, because her boyfriend at the time did not want her to go.[8] A few months after the second Cape Cod trip, M.F. came to her and said that Mr. Norton had raped her.[9] She said that they were standing outside a store at the Menlo Park Mall when M.F. recounted that on one of the nights she drank more than usual. She remembered that she was out of it, and when she came to, Norton was inside her and on top of her. N.R. said that she became very angry after M.F. told her about the assault, and she called Mr. Norton on his home phone and cell phone.[10] Norton did not pick up. She left a message saying that she knew what he had done to M.F. and she did not want him talking to her or any of her friends ever again. If he tried to talk to her or any of her friends again, she would make sure that his children were taken away from him. She has not talked to him since that time. She said that she urged M.F. to go to the police, but M.F. refused. M.F. said that she wanted to put it out of her mind, and N.R. abided by her decision.

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[7] N.R. did not recall whether the trooper in Massachusetts had asked her about their drinking in Florida, and she did not recall if she testified about the drinking in Cape Cod on the first trip.

[8] She testified that she had told her boyfriend about their drinking, etc., on the earlier trip, and her boyfriend did not want her to go on the second trip to Cape Cod.

[9] She did not recall exactly when M.F. told her, and she did not recall telling the Massachusetts trooper that M.F. told her about the attack six months after it had occurred.

[10] According to N.R., Mr. Norton had given her his telephone numbers.

On cross-examination, N.R. was asked the procedure that was followed about grade changing. She said that she walked into class one day and saw older students on Mr. Norton's computer changing grades. She was upset, and they explained to her how they did it. She said that she went into the computer while the students were there. It was a laptop computer and it had a Microsoft Office Excel package on it, where you could input the student's name and the student's assignments and grades would come up. You could then go to the specific homework assignment that you wanted to change. She also said that Mr. Norton would give students answers during tests. A student would raise his or her hand and Mr. Norton would go over to the student and either whisper the correct answer or point to it. N.R. was questioned on whether she testified at the criminal trial about using marijuana on the Florida trip. She said that she did not recall being questioned about it at the criminal trial. She stated that she only used alcohol on the trip to Cape Cod, but she thought that M.F. smoked marijuana in Florida. She knew that M.F. had been hospitalized for drug use and that she had attended programs at High Focus, Silver Hill in New Canaan, Connecticut, and the Van Ost Institute in Englewood, New Jersey, as an outpatient. All of the drug institutionalizations occurred after high school. She said that M.F. had anxiety and post-traumatic stress disorder and she was using pills to not remember the rape. N.R. admitted that she had a heroin problem from the time that she was a junior in high school until she was twenty years old. She went to three inpatient programs, but she has been sober for five and a half years.

M.F.

M.F. testified that she is twenty-six years old. She graduated from Ramapo High School in 2004 and received a degree from Ramapo College in nursing. She said that Mr. Norton was her chemistry teacher in her sophomore year, in 2002. She received an "A" in his class, but she did not think that she deserved that grade. She said that as a teacher Norton goofed around a lot and told perverted jokes. She said that at the time she would laugh at his jokes. On one occasion, Mr. Norton hit his head on the table in the classroom and said that he had been up all night doing cocaine and that was why he was tired. She also testified that Mr. Norton allowed certain students to cheat. She

said that on two occasions she did not know the answers to questions; Mr. Norton came over and either whispered the answer in her ear or pointed to the right answer. In addition, he allowed her to change her grades in the computer.[11] She observed him doing the same thing with other students who were his favorites, which were mostly women. M.F. said that Mr. Norton allowed her to change her chemistry grade and was present when she did so. M.F. said that in addition to spending time with Mr. Norton during Environmental Club activities, she also had tutoring sessions with Mr. Norton.[12] When it came to announcing field trips, Mr. Norton would talk to his favorites about the trips. There were about five or six favorites in her class. She said that about twenty students went on the trips. When questioned about the trip to Sandy Hook, M.F. said that nothing occurred on the trip that made her feel uncomfortable.

The next trip she went on was to Cape Cod in the spring of 2002. She was fifteen years old at the time. The itinerary included going to Boston and visiting the aquarium and Quincy Market, and going whale watching. The trip was for two nights. The fifteen to twenty students who attended traveled by bus. Mr. Norton was the chaperone, and a man named Marc Silverstein, who was a senior when she was a sophomore, might have come along also. She roomed with three of her friends, N.R., C.L. and L.L. Technically, all of the students had to be in their rooms by 11:00 p.m., and the doors were thereafter taped. However, all of the students who wanted to go out of their rooms could do so, and Mr. Norton would re-tape the doors. In addition, there were no rules about students going into other students' rooms. M.F. said that Mr. Norton came into the students' rooms.

M.F. identified P-8, which was a photo of R.L., a student at Ramapo, and two girls who were in the grade above her. The man in the middle of the picture was Mr. Norton. P-9 was a picture of Mr. Norton and two students. M.F. was present when the two pictures were taken. M.F. identified P-10 as a picture of C.L. on the right and two other girls who were in the grade above her. She was present when the picture was taken. On the cabinet could be seen two beer cans. This picture was taken at the

[11] She said that the grades were on an Excel worksheet.

same time as P-8 and P-9. M.F. said that although Mr. Norton was not photographed in P-10, he was present in the room when the beer cans were visible and he had been in other rooms where there were beer cans. She said that on the first Cape Cod trip, there was a lot of alcohol being consumed by students. She drank five to six drinks on any given night. She said that this was not her first experience drinking. She started when she was thirteen with a glass of wine with dinner. She said that she did not start drinking to get drunk until she was in high school. She would also smoke pot at the same time. She experimented with other drugs during her junior and senior years of high school. She developed a dependency on drugs toward the end of her senior year. She tried becoming sober at eighteen, but she relapsed. She did not get sober until she turned twenty years old, when she entered a treatment facility. She said that she has been sober for over six years.

M.F. said that she also went on the Key West trip during the summer of 2002. Mr. Norton told her and about ten other students from Ramapo High School about the trip. That was the last year that Mr. Norton taught at Ramapo. After that he transferred to Lodi. She said that Mr. Norton organized the trip and was the only chaperone. The trip lasted five to six days. They flew down to Miami, and she sat with N.R. and C.L. on the plane. After a while, N.R. and she went back to where Mr. Norton was sitting and had a long conversation with him. Mr. Norton told them that in the past he had fallen in love with a student, when she was sixteen. When she turned eighteen, he took her to the Ramapo Reservation, brought wine and a blanket, and took her virginity. M.F. said that she did not know how to react. She had never had a conversation about a teacher's private life before. She said that she had had other conversations about sex with Mr. Norton. At one point, when they were on the beach in Florida, he told N.R. and her about how his wife had performed oral sex on the beach in the water. M.F. said that she did not know what to say to this revelation, so she smiled and laughed it off. Mr. Norton asked N.R. and her to take off their bathing suit tops. She said that the beach was not crowded at the time and she did not take off her top. Later that day they drank at the hotel. She said that Mr. Norton took orders, and then took the van and

[12] Mr. Norton claimed that M.F.'s parents were so happy with his tutoring services that they raised his pay from $60 to $80 per hour. Mr. Norton said that he stopped tutoring M.F. in December, because of other commitments.

went to purchase the liquor. She waited in the van while Mr. Norton went into the store. N.R. and some other students were there when Norton bought the alcohol. M.F. also mentioned that there was a girl on the trip named Jenny, who had large breasts. Mr. Norton commented, "look at those knockers." M.F. said that this was a normal comment coming from Mr. Norton. During the Florida trip Mr. Norton saw her drinking in the hotel and, according to M.F., Mr. Norton drank on this trip and on the trip to Cape Cod, as well. She said that in Florida, the students, including her, also smoked pot. M.F. said that Mr. Norton was aware of the pot smoking because he walked into the room while they were smoking. She asked him if he would like some. He told her "no," and said that he had never seen the pot. She said that she was never disciplined for the drinking or pot smoking.

After Mr. Norton left Ramapo High School, M.F. continued to have contact with him. They would e-mail each other and speak on the telephone. Norton was also her tutor in biology and would come to her house. Her mother was present at the time of the tutoring. She said that there were sexual innuendoes during the tutoring. For example, he would draw atoms and say that they reminded him of breasts. He told her that he did not smoke pot before he came to tutor her, but as a reward he would smoke after. She said that at the time she considered Mr. Norton a friend and trusted him. Outside of school she called him "Ben."

M.F. said that she went to Cape Cod again in her junior year. By then Mr. Norton was teaching in Lodi. While he was tutoring her, Mr. Norton told her about the Cape Cod trip and asked her if she and any of her friends wanted to go. C.L. and L.L. signed up for the trip, but N.R. told M.F. that her boyfriend did not want her to go. He did not like the relationship that N.R. told him she had with Mr. Norton. The chaperones on this trip were Mr. Silverstein and Mr. Norton. Mr. Norton told M.F. that he was going to have a female chaperone, but she never came. She said that between twenty and thirty students were on this second trip to Cape Cod; only three were from Ramapo. They traveled to Massachusetts by bus. She said that she drank on the trip as soon as she got to Massachusetts. The girls had asked a friend to purchase alcohol for them in New Jersey and they brought it up on the bus. M.F. identified P-1, which

showed four bottles of alcohol, which they had in their hotel room. Exhibit P-2 was a picture of herself and her friend L.L. in their hotel room. She said that Mr. Norton was aware that they were drinking because he saw them drinking, and he was drinking, as well. M.F. said that some boys from Ramapo also traveled to Cape Cod that weekend and stayed at a hotel next door. She went over to their hotel. She identified P-3, which was a picture of L.L., M.F. and three boys from the high school—A.C., R.L. and someone with the last name of P.—in their hotel room. She did not recall whether the girls called Mr. Norton to come over or Norton called them, but Mr. Norton came over to the boys' hotel to walk the girls back to their hotel. It was about a quarter-mile between the two hotels. By this point she had had six or seven drinks of beer and hard liquor. She was intoxicated and her vision was blurred and she was unsteady on her feet. Her friends were intoxicated as well. At some point on the trip back to the hotel, she noticed that Mr. Norton's hands were down C.L.'s pants and he was grabbing her butt. It did not appear to her that C.L. cared about what Norton was doing. Also, she noticed that he had lifted the top part of L.L.'s shirt and was looking down it at her breasts. However, she said that she was so intoxicated that what was happening did not register.

When they got back to the room, C.L., L.L., Mr. Norton and she entered the girls' room. Mr. Norton then said that he had great tequila shots, and left the room to get the tequila. When he came back with the bottle of tequila, M.F. and he went into the bathroom for about fifteen minutes. During that time she had three shots of tequila, and he had three shots of the liquor that she had brought into the bathroom. After that Mr. Norton left the hotel room. She also exited the room, and saw Mr. Norton at the soda machine. She thought that it would be funny to grab his behind, and she did. He told her that he had to get something in his room, and he asked her if she wanted to come to his room. She said "sure." There were two beds in the room, and she sat on the farther of the two beds. She sat down because she was too drunk to stand up. She noticed Norton fumbling around looking for something. At that point she had had more than seven or eight drinks. She was sixteen years old at the time, and this was a heavy night of drinking. When questioned about what she was wearing, she said that she had been wearing gray sweat pants and top at the time, and was wearing underwear. She

said that Norton faced her and removed her pants and underwear,[13] and before she knew it he was on top of her and raping her. He did not say anything to her during sex. She said that she did not consent to his removing her clothing or having sex. She was not sure how long the rape went on. She did not know if he was wearing a condom or if he ejaculated.[14] She thought that when he was on top of her, she was toward the head of the bed, but she was so intoxicated that she did not remember every detail. When intercourse ended, he got off her. She threw on her clothes and he said something about not telling anyone. After she went back to her room, she passed out. She did not remember what she said to her roommates. At some point she got sick and threw up. In the morning, when she woke up, she decided that she did not want to see Mr. Norton, because she was humiliated. She convinced her friends not to go whale watching. The rest of the day, they just sat around and drank. They met some local guys and invited them to their hotel room. They hung out with them and talked. Later Mr. Norton came into the room and kicked the guys out. She did not speak to Norton and he did not speak to her. She avoided him for the rest of the trip.

M.F. said that she told N.R. a couple of months later that Norton had raped her on the trip. N.R. became very upset and angry. N.R. called Norton and left a message. She said, "don't speak to any of my friends ever again." M.F. said that she communicated with Mr. Norton through e-mails a few months after the incident. She said that she was convinced that the rape was her fault because she should not have been drinking. Norton asked her to meet him at the reservation, but she did not go. N.R. told her never to communicate with him again, and she didn't. After the rape, she began using drugs more often because she wanted to forget what happened and thought it was her fault. She did not know how to handle her emotions.

On cross-examination, M.F. was questioned about her reporting of the rape to the Bergen County Police Department in 2006. She said that she talked to a Detective

[13] She thought that she was still wearing a shirt and a bra.

[14] On cross-examination, it was pointed out that when she gave a statement to the Bergen County Prosecutor's Office under oath, she said that she did not have underwear on, Norton was not wearing a condom, and he ejaculated into her vagina. M.F. said that when she went to the Prosecutor's Office, she told them that she was there to report a rape. Detective Taylor did not interview her before she gave her statement.

Taylor, who interviewed her. She did not recall if she told the detective about the remark by Norton in Florida regarding having oral sex, or about his telling her a story regarding having sex with a former student, or about her smoking marijuana. When questioned about her allegation that Norton allowed students to change their grades, she said that she could change any grade that she wanted. There was no password that she had to enter on the computer. She also said that she would never have gotten an "A" in the chemistry course if Mr. Norton had not helped her to cheat. She also said that Mr. Norton invited whomever he wanted to be in the club, and no one wanted to be in the Environmental Club who was not invited.

M.F. was directed to R-4, which was a roster that showed more chaperones than she said were on the Cape Cod trip. She responded that she did not see any other chaperones. M.F. was directed to P-16, her statement to the Bergen County Prosecutor. It did not mention that she was in Alcoholics Anonymous or that her drug use had escalated because of the rape. She also did not include the story about Mr. Norton's wife giving him oral sex in the water. In the interview, she said that Mr. Norton told her things that he did not tell other people, such as the story about his making love to his former student. She did not mention the fact that N.R. had also heard this story. Also in her statement to the Bergen County Prosecutor, she said that the telling of the story about the former student occurred on the return trip from Florida, while at the hearing she said that it happened on the flight down. When asked why she did not tell the Bergen County detective about Mr. Norton's walking into her room, she said that the interview was a question-and-answer format, and she only answered the questions put to her. However, when she was asked about why N.R. did not go on the second trip to Cape Cod, she did not say anything about her boyfriend not wanting her to go, but rather said that N.R. did not go because of Norton's telling them to take off their tops when they were in Florida. M.F. estimated that she had a total of eleven drinks on the night of the alleged rape. When questioned about the pictures in the State's exhibit book, she said that L.L. knew some older people and was able to get them to buy the liquor. It was pointed out that Mr. Norton was not in the picture with the beer cans, but M.F. said that he was there in the room. When asked where all the pictures came from, she said that after the trip the girls pooled the pictures together. When she went to

report the rape, she brought the pictures to the police. When asked if she ever mentioned to the Bergen County Prosecutor about Mr. Norton picking up L.L.'s shirt, she said no. That incident became part of the assault charges against him. She also did not mention Mr. Norton's grabbing her friend's butt. However, she said that she mentioned the butt and blouse incidents to the Massachusetts officer, Trooper Haywood.[15]

M.F. acknowledged that she had spent time at High Focus and Ramapo Ridge, both inpatient substance-abuse facilities. She also went to Silver Hill, for addiction to pain killers. She went to Renfrew in Ridgewood for an eating disorder. She said that she began drinking alcohol at age thirteen, and did not touch drugs until she was in high school at age fourteen. At the time of the rape, she did not consider herself an alcoholic. When questioned, M.F. said that she was not sure if she saw security guards on the first and second trips to Cape Cod. M.F. was questioned about her statement in P-16, page 165. At the time, she was asked if Mr. Norton said anything to her either during or after the rape. She said that he did not. However, during the testimony at the hearing she said that he told her not to tell anyone. When asked how she could explain this discrepancy, she said that she could not explain it, but this is what she remembered now. M.F. was asked about whether she smoked marijuana over the weekend of the trip. She said that she did, but not on the day of the assault. When asked about whether she told the Bergen County Prosecutor or the authorities in Massachusetts about Norton's buying liquor for the students in Florida, she said that she did not remember whether she told them and she did not know if she testified about it at trial. M.F. was questioned about the fact that there was no mention of Mr. Norton's putting his hands on her friend's butt or looking down her other friend's blouse in the Prosecutor's interview. She responded that it was a question-and-answer format, and there was no question posed that would have elicited that response.

When questioned about her testimony at the hearing that she did not go on the whale watch the day after the assault, because she did not want to see Norton, she

[15] In the Massachusetts criminal matter, M.F. denied grabbing Mr. Norton's butt, but during the hearing she admitted to doing so.

said that it was probably also true that she did not want to go whale watching because she was hung over. M.F. said that her memory is a blur regarding what occurred the next day. She did not remember eating breakfast, but she did remember going to Provincetown, and at one point meeting guys from the area. She said that she and two of her friends took a cab back from Provincetown. She might have gone on the bus to dinner that night. M.F. was referred to R-27, which was a picture of one of the local guys wearing L.L.'s bra and underwear. The picture was taken at some point on Saturday night, but she did not remember who took it. M.F. said that P-8 was a picture of Mr. Norton, R.L. and two girls from the grade above her. She did not remember whose room they were in at the time. She testified that all of the pictures that show students partying and having some form of alcohol were taken when Mr. Norton was in the room. M.F. was asked about P-11. She said that it was a picture of kids sitting on the floor in the hall. She is in the picture, but she did not remember why she was in the hall. She denied that it was customary for the students to hang out in the hall rather than in the rooms. In viewing P-13, which showed Mr. Norton putting tape on the door, she said that it was probably taken when Mr. Norton was re-taping the door, which had been untaped when the students broke curfew. She did not remember whether there was tape on the door when she came back from being with the boys at the other hotel. M.F. said that she could not remember whether she told the prosecutor in New Jersey or the troopers in Massachusetts about visiting the boys the first night or the boys at the party the second night. She said that the second night at the hotel, when the local boys were in the room, Mr. Norton came into the room and threw the "black guy" out. She said that Mr. Norton did not dump the alcohol out, as he alleged. He was angry, but she thought it was because there were other men in their room. She said that when Norton and she were in the bathroom, she had three tequila shots[16] and Mr. Norton drank her Bacardi.

M.F. was questioned about the sequence of when she told people about the rape. She said that she first told N.R. about the rape, then she told her mother and father about one and a half years later, and then during therapy, when she was in

[16] She testified that the shot glasses were in the bathroom before they went into the room.

rehabilitation, she opened up. She told Dr. Paine, her psychiatrist, and Barbara Mauer. She was about twenty years old at the time.

Lincoln A. Jividen

Mr. Jividen testified that he is a retired educator and works as a tour director for Curriculum Travel of America (CTA), which runs student tours. He said that his job involves getting together all the information to run a trip, including getting the manifest and making motor-coach checks. He has been working for CTA for twelve years and has run more than 200 trips. He thought that he had worked with Mr. Norton on three trips; for one or two of the trips he was the director, and for one of the trips he was the trainee. Mr. Jividen said that the typical focus of Cape Cod trips is whale watching, classroom at sea, and swamp studies. The trip that he was on with the Lodi group was a three-day trip, with the highlight being dolphin watching. He identified P-15 as the room list, which specified where each of the participants was staying. The rooms are assigned by the school, which gives him a copy of the layout. He does not assign students to their rooms. If the school requests security, CTA provides it through a company with which CTA is affiliated. CTA's primary responsibility is to work with the bus driver to make sure the students get to the venue at the right time and have the proper entry tickets. CTA does not provide supervision of the students on the trip. CTA also does not set the rules, which are the responsibility of the school and the chaperones. CTA is not involved in any disciplinary action involving students. If he saw a violation, he would relate it to the head teacher on the trip. Mr. Jividen was asked about the system of taping the doors. He said that CTA asks the school, once the security is in place, to have the doors taped at curfew time, so that they know that students will stay in their rooms.

When asked about the security company that CTA engages, he said that CTA sometimes has trouble getting security there on time in Cape Cod. Before he can get paid he is required to fill out a form saying that everything was done according to the schedule. He filled out such a form for the second Cape Cod trip. He was asked to look at a form (R-28) that the director was required to fill out. It was signed by Fred

Stillwagen, who he assumes was the trip director (Mr. Jividen assumed that he was therefore the trainee on that trip). He was not sure whether the form read "Guard both nights or Good both nights." He also identified R-29, which was the property layout of the hotel, and P-15, which indicated the room numbers. From the exhibit it was clear that the rooms were laid out on a straight line on either side of the hallway. Mr. Jividen did not recall if he stayed at the hotel during that Cape Cod trip. His name does not appear on the room list. He said that he did not recall being on the trip or having any security issues.

V.A.

V.A. was subpoenaed to testify. She is a high school biology teacher. She said that she was inspired to go to William Paterson College and become a teacher because of Mr. Norton. He is an old friend of the family and she has known him her whole life. She was in his AP science class and in the Science Club that he ran. She said that Norton was a wonderful teacher who cared about his students. If a student was having a bad day, he would help the student out. She said that she never felt uncomfortable in his presence. He never used profanity or told dirty jokes in class. She characterized him as a wonderful person and a great dad to his kids.

V.A. attended the Cape Cod trip (second trip). The class trip was very popular, and they went whale watching and to Provincetown. V.A. reviewed P-14, the itinerary. She said that the first night after they arrived, there was free time. She and her friends went to the pool. She did not see alcohol being consumed. She saw Mr. Norton the second night, because she had to go to his room. The toilet had gotten stuffed up in her room and she and one of her roommates, S.F., knocked on his door around midnight to ask for assistance. V.A. said that Mr. Norton was very upset. He said that he was aggravated because he had to take alcohol away from the Ramapo girls.

On cross-examination, V.A. said that she did not know M.F., L.L. or C.L. She was not in their rooms and did not go to the Days Inn. She was not present when

Norton went over to the Days Inn to meet up with those girls. She stayed with her own friends on the trip.

Benjamin Norton

Mr. Norton testified that he attended several colleges, and eventually graduated from William Paterson. He later went back for a teaching certificate and received his master's degree in educational technology from Ramapo College. He was a science teacher at Bergen County Technical High School, and was picked to be the science teacher for the business and medical academies of Bergen County. He said that he had helped to create the "Disney World of programs" at Bergen County Academies. He was later transferred to Bergen County Technical High School in Teterboro. He said that he was sent to Teterboro because the Ramapo School District wanted to form its own academies and had started a lawsuit claiming that they had a program of their own and did not have to send their students to Teterboro. In order to fight the suit, Teterboro had to show that they had a functional program. Eventually, he was hired by Ramapo as their science teacher. He said that he worked according to the philosophy of his mentor, John Greco. The program that he followed was called Coalition of Essential Schools, and was formulated at Brown University. The philosophy behind the program was to create a family experience among the teacher, the student and the parents. The program fostered a mentoring position with students and their parents.

Mr. Norton referred to letters of reference that he received from parents and that he forwarded to his attorney in the prior criminal matter.[17] Besides commenting favorably on his teaching, they praised his work in the Science Club and on the class trips that he arranged. He said that the Science Club, for which he was an advisor, met at least one time per week in a classroom after school. Anyone could join the club. There was no real roster and students attended when they were interested in the subject. N.R. and M.F. were part of the club. He said that the Environmental Club at Ramapo and the Science Club at Lodi ran field trips. When they went to Sandy Hook he worked with a man named Dave Grant, whom he met when he was an adjunct

[17] These letters were not admitted into evidence, based on a hearsay objection.

instructor at Brookdale Community College. He said that the Sandy Hook trip was designed to experience the topography of the land, vegetation, tides and currents in the area. The students went into the water with wading boots and dragged nets along the bottom to see what they would find. He said that he did not recall discussing with the students the fact that Sandy Hook had a nude beach. He said that he never went to a nude beach.

Mr. Norton pointed out that he had gotten excellent reviews on his teaching ability, and the comments were that the students were eager to use the computers that were in class and Mr. Norton was making effective and efficient use of various computer programs. He explained that he had an official grade book that was locked up in his office. He also had a spreadsheet on his hard drive. However, he thought that it was a good idea for students to get into the habit of keeping their grades and tracking them. He therefore had a separate system on the computer where the students could find their spot on the grid and record their grades. In that way they could see how they were doing. He said that the students were eager to work on the computer and input their grades and other information. However, those were not the official grades. When questioned on cross-examination, he said that students could put any grade in. A student could give himself or herself an "A" on a quiz, but if the student really got a "D," that was what would be in the official record.

Mr. Norton asserted that all of the trips he organized were open to any student who wanted to go. He would give the student a packet from CTA and the parents would fill out the permission slip and send the payment to CTA. Mr. Norton identified P-15, which he said was a list of the students who went on the Cape Cod trip in 2003. He explained that they did not have enough students attending from his school, so they decided to sell the back of the bus to another school district. He thought that he spread the word about the availability of seats through his tutoring. He said that he tutored M.F. and four or five other students. Mr. Norton said that the rules on the trip included no students in the room of a student of the opposite sex, no running down the halls and slamming doors, etc. He identified Marc Silverstein as the chaperone on both trips to Cape Cod. Mr. Norton described Marc as being a sharp college student. He said that

the kids would go into Marc's room and dance, or they would crash in the hallway. Mr. Norton referred to P-6, a photograph he said was taken on the beach in the Keys. He said that N.R. snuck up behind him and pulled down the back of his bathing suit. He did not know beforehand that she was going to do this. Mr. Norton said that P-8 was a picture of him and some other students dancing in Mr. Silverstein's room. He said that it was definitely a picture from the first trip to Cape Cod, because R.L. was in the picture, and he only came on the first trip to Cape Cod. Mr. Norton said that he never saw P-10, a picture showing students and cans of beer in one of the hotel rooms, before these proceedings. Exhibit P-11 showed students hanging out in the hall, which he said was very common. Mr. Norton asserted that nothing occurred on the first trip to Cape Cod and that, to his knowledge, no alcohol was consumed.

As for the trip to Florida, he set it up through a dive shop where a number of the students took diving lessons. Anyone could come on the trip. Mr. Norton said that he did not remember the flight to Miami. He did not remember whom he sat next to on the plane. He was emphatic that he did not tell M.F. or N.R. about taking the virginity of one of his students. Mr. Norton said that they rented one big van with benches and drove from Miami to the Keys. They traveled as a group, had their meals together, and stayed together at all times. Mr. Norton stated that he never went swimming alone with M.F. and N.R., never told them about having oral sex on the beach, and never said that they should take off their tops. He also asserted that he never purchased alcohol for anyone else. Mr. Norton described the layout of the motel in Florida. He said that the rooms were laid out around the pool. At one point he smelled marijuana coming out of the room where N.R., C.L. and M.F. were staying. He knocked on the door and they opened it. He told them to "lose it," or it would ruin the whole trip. One hour later they came to him and said that they had gotten rid of the marijuana. Mr. Norton never disciplined them for the marijuana and never told their parents about it. He denied ever talking to N.R. and M.F. about girls' breasts or using the term "knockers." He also denied ever telling dirty jokes to M.F. during tutoring sessions or discussing his own use of drugs.

In describing the second trip to Cape Cod, Mr. Norton said that the group traveled to Boston, and after dinner they headed out to the Cape. They got there at about 8 p.m. and had some free time. He said some of the kids went next door to the mall. He received a call at about 9–10 p.m. from the girls. They said that they had gotten lost and were over at the Days Inn. He walked over from the Marriott, where the group was staying, to the Days Inn on the other side of the mall to get them.[18] He said that he did not go into the room occupied by the boys. He picked the girls up in the parking lot at the Days Inn. He testified that the girls were very drunk. They acted silly until they saw how upset he was and then they got quiet. He denied looking down a student's blouse or touching another student's buttocks. Mr. Norton said that when he returned to the hotel with the girls sometime within the hour before the 11 p.m. curfew, there were kids all around. He escorted the girls to their room and shut their door. That was the last time he saw them. At 11:00 he called out their names while he was going room to room doing a check and taping the doors. He said that he knew they were asleep, so he did not check on them when they did not answer. While he did not remember specifically, he said that on every trip, as part of his routine, he says hello to the security guard and then goes to his room. The next morning, when the group was set to go to Provincetown, M.F., C.L. and L.L. said that they were not going on the bus because they were sick. The group went to Grace Point for a view of the Ocean and on to Provincetown and whale watching. Then they went back to Hyannis and out to dinner. The group went to a restaurant about a mile from the hotel. The girls took a cab over, and he believed that they ate with the group. When they returned to the hotel, one of the kids heard laughing and yelling coming from M.F.'s room. He went to investigate. When the door was opened, he saw a large black man in the room, along with another guy with a bottle of vodka. He identified R-27 as a picture of the first man he saw in the room. Mr. Norton entered the room and had barely said a word when the men said that they were out of there. He said that he was furious. He saw the bottle of vodka and poured it down the sink. He then said: "That's it; I'm washing my hands of you!" The next day he got up, had breakfast at the hotel, got on the bus and headed

[18] Mr. Norton contradicted the testimony given by N.R. and M.F. They both had said that they walked back through the rear of the mall parking lot. Mr. Norton said that they walked through the parking lot in the front of the mall, which abutted a main street.

south to the Mystic Aquarium. He did not talk to M.F. or C.L. on the ride back. After that, he never communicated with M.F. He did not speak to N.R. either.

Mr. Norton was asked about the allegation that he gave the students answers to test questions. He responded that if they raised their hands he would go over to them and would ask them questions to help them deduce the test answers. He said that he guided the questions to help them come up with the answers, but he never told them the answers. When asked if certain students were his favorites, he said that every student was his favorite. He said that he never discussed his virginity with any student, and never drank with students or purchased alcohol for them. Any alcohol he found, he poured down the sink; he never drank with students. He also asserted that he never told sexually explicit jokes in class, asked a student to take off her top, talked about oral sex on the beach, or assaulted a female student. He claimed that sometimes he had female chaperones on his trips, but said that he did not have female chaperones on the trips in question.

When questioned by the judge as to what responsibility he thought he had to report the marijuana and alcohol use to N.R.'s and M.F.'s parents, he said that he forgot about the marijuana incident in Florida, and therefore did not report it. As for the situation in Cape Cod, Mr. Norton said that he "just washed his hands of them."

On cross-examination, Mr. Norton was asked about the chaperones on the Cape Cod and Key West trips. He said that the other chaperone on the Key West trip was Marc Silverstein. He was a college student, whom Norton met when Silverstein was in high school. They became friends when Norton was teaching at Ramapo. Mr. Silverstein did not have a teaching certificate, and Mr. Norton did not do a background check to see if he would be a suitable chaperone. He said that Mr. Silverstein was "tight with the students' parents." They all lived in Franklin Lakes. However, Mr. Silverstein had no relationship with the school. Mr. Norton said that there was no female chaperone on the Cape Cod or Key West trips. When questioned about the marijuana incident in Key West, Mr. Norton said that he told the students to get rid of it. However, he did not ask M.F. and N.R. to produce the substance; did not see that it

was disposed of; and did not confiscate it himself. He never told the parents or the school about it.[19] He also never disciplined the students. He claimed that the girls were very apologetic afterwards and behaved well for the rest of the trip. Mr. Norton did acknowledge that both he and Silverstein each had a night off during the trip. On his night off, he had a few drinks when he went out. The students were left with Mr. Silverstein, who was not a teacher. Mr. Norton stated that the Coalition of Essential Schools, whose philosophy he ascribed to, talked about building a family with teacher, students and parents. It necessitated being friendly with the students. As part of the relationship, there was joking around. He said that he did not recall the incident where N.R. pulled down his bathing suit, but he knew that he did not discipline her or notify her parents about it. The students who were using drugs in Key West were the same ones who abused alcohol during the Cape Cod trip in 2003. When asked how M.F. and C.L. contacted him when they were at the Days Inn, he said that the girls had his cell phone number.[20]

Mr. Norton was questioned about the girls' demeanor when he picked them up at the Days Inn. He said that they were extremely intoxicated. He supposed that they were slurring their speech and acting drunk. However, they could walk on their own. He did not recall whether he went back to their room to check to see if they were okay. He assumed that they were asleep. He said that he was in the hallway before curfew that night and the girls' door was never opened. After that there was a security guard on duty, and he would have noticed if a door had opened. Mr. Norton said that the girls did not go to Provincetown. (He left them at the hotel, where there was no supervision for eleven hours.) Mr. Norton stated that when he kicked the local boys out of M.F.'s room and dumped the one bottle of liquor down the sink, he did not see any other liquor bottles. Mr. Norton admitted that while he had a strong relationship with M.F. and her friends and their parents before the trip to Cape Cod, he had no contact with them after the trip. When asked if, as he asserted, the story about the rape and other sexual matters was made up, why M.F. and N.R. would tell such a story, he said that he did not know.

[19] Mr. Norton said that he would not have notified the school since it was not a school trip. However, the students found out about the trip through the Environmental Club, for which he was the advisor.

Detective Cora Taylor

Detective Taylor said that she has been with the Bergen County Prosecutor's Office for sixteen years. She concentrates on cases involving domestic violence, sex crimes and child abuse. Detective Taylor said that her procedure in investigating allegations is to extensively question the alleged victim about the incident and then to follow up with a stenographic statement.[21] This was the procedure that she followed with M.F. Detective Taylor identified the case summary of the interview she conducted with M.F. She said that M.F. came with her parents to the Prosecutor's Office at 1 p.m. on October 13, 2006. She was not sure when the interview actually started, but the stenographic statement began at 2:30 p.m. and concluded at 3:15 p.m. Since it was clear from the interview that the alleged incident occurred in Massachusetts, the case was referred to the authorities in that state. On September 10, 2007, she received a telephone call from a trooper in Massachusetts wanting to know about L.L., who the trooper had been told had information about Mr. Norton's involvement with a Lodi high school student. Detective Taylor interviewed L.L. She said that Mr. Norton was a "touchy-feely type of guy," but denied having any type of sexual encounter with Mr. Norton and denied witnessing anything of a sexual nature between Mr. Norton and another student. L.L. said that she used to be friends with M.F., and claimed that M.F. did not always tell the truth.[22]

Edward Fitzgerald

Mr. Fitzgerald testified that he was employed as a private investigator with Strike Force Private Investigations. Prior to that he had worked as a police officer in Irvington and in the Prosecutor's Office. He retired in 2008. He identified R-15 through R-19, which were activity reports of his interviews with L.L., L.Y., Anna Marie Kuhn, L.A., Carol Lynn Zepatos and A.M. These people were either former students of Mr. Norton or colleagues. The students all said that Mr. Norton had never offered them liquor or

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[20] He claimed that he had given the number to M.F. when he was tutoring her and they had to make arrangements.

[21] In her testimony M.F. claimed that she was not interviewed prior to her stenographic statement.

[22] In the stenographic statement taken of M.F. by Detective Taylor, M.F. identified L.L. as the person who knew the name of the Lodi high school student who wanted to have sex with Mr. Norton.

been inappropriate. They confided in him when they had problems. Norton's colleagues believed that he was an excellent teacher and related well to his students. Mr. Fitzgerald said that he interviewed A.P., who said that Mr. Norton never came up to his room at the hotel in Cape Cod and he never met him there. The witness said that he tried to interview L.L. He set up an interview with her, but she cancelled it and said that she did not want to get involved. Mr. Fitzgerald interviewed R.L., and obtained a signed certification from him. In the certification he said that he went to Cape Cod in 2003. He stayed at a hotel, next to the one where the Lodi students were staying, with A.C. and A.P. He said that three girls from Ramapo High School visited their hotel room and partied with them. He was positive that Mr. Norton never came to his hotel room.

On cross-examination, Mr. Fitzgerald acknowledged that L.Y. indicated that she was not on the trip to Cape Code in 2002 or 2003 and she did not go to Key West. In addition, Ms Kuhn, aunt of L.Y., did not have any personal knowledge of what occurred in Cape Cod or Key West. Neither L.A., nor Carol Lynn Zepatos, nor A.M. had personal knowledge of what occurred in Cape Cod or Key West. As for A.P., Mr. Fitzgerald said that the former student never divulged the names of the girls that he partied with in Cape Cod. He said that at some point the girls left to go back to their hotel. Neither he nor R.L. expressed having any personal knowledge of what happened between Norton and M.F.

Mr. Fitzgerald also spoke with Marc Silverstein. His memory of the trips he chaperoned was not very clear. He did say that he never disciplined any of the students on a trip.

FINDINGS OF FACT

Joint Stipulation of Facts

The following facts were stipulated to by the parties:

1. Respondent is the holder of a Teacher of Comprehensive Sciences Certificate, issued in August 1993.

2. Respondent was employed as a high school teacher at Bergen County Technical High School during the 1993–1997 school years; Bergen County Academies during the 1997–1999 school years; Ramapo Indian Hills High School District during the 2000–2002 school years; and the Lodi High School District during the 2002–2007 school years.

3. N.R., M.F., and C.L. were students at Ramapo High School during the 2001–2002 and 2002–2003 school years.

4. During the 2001–2002 school year, M.F. was a student in the chemistry class taught by respondent.

5. Respondent chaperoned the following four trips:

   a. Sandy Hook, 2001–2002 school year.

   b. Cape Cod, in April 2002, during the 2001–2002 school year.

   c. Key West, summer between 2001–2002 school year and 2002–2003 school year.

   d. Cape Cod, in April 2003, during the 2002–2003 school year.

6. M.F. attended at least the following trips chaperoned by respondent:

   a. Cape Cod, in April 2002, during the 2001–2002 school year.

   b. Key West, summer between 2001–2002 school year and 2002–2003 school year.

c. Cape Cod, in April 2003, during the 2002–2003 school year.

7. N.R. attended at least the following trips chaperoned by respondent:

a. Cape Cod, in April 2002, during the 2001–2002 school year.

b. Key West, summer between 2001–2002 school year and 2002–2003 school year.

8. C.L. attended at least the following trips chaperoned by respondent:

a. Cape Cod, in April 2002, during the 2001–2002 school year.

b. Key West, summer between 2001–2002 school year and 2002–2003 school year.

c. Cape Cod, in April 2003, during the 2002–2003 school year.

9. Marc Silverstein was a chaperone on the following trips organized by respondent:

a. Cape Cod, in April 2002, during the 2001–2002 school year.

b. Key West, summer between 2001–2002 school year and 2002–2003 school year.

c. Cape Cod, in April 2003, during the 2002–2003 school year.

10. The 2003 trip to Cape Cod included three students from Ramapo High School—M.F., C.L., and L.L.—and the rest of the attendees were from Lodi High School.

11. During the April 2003 trip to Cape Cod, the group of students chaperoned by respondent stayed at a Marriott Courtyard Hotel.

12. During the April 2003 trip to Cape Cod, M.F., L.L. and C.L. left the Marriott Courtyard and visited fellowclassmates who were staying in the nearby Days Inn hotel.

13. During the April 2003 trip to Cape Cod, either M.F., L.L., or C.L. called respondent on his cell phone and asked him to escort them from the Days Inn to the Marriott Courtyard.

14. During the April 2003 trip to Cape Cod, respondent walked with M.F., L.L., and C.L. from the Days Inn to the Marriott Courtyard.

15. The parties entered into a consent order whereby respondent consented to the voluntary suspension of his certificate without any admission as to the truth of the allegations contained in the Order to Show Cause pending the final agency decision in this matter. The Examiners approved the consent order on May 17, 2012.

Based on the testimony presented and the exhibits marked into evidence, I **FIND** the following **FACTS**:

1. Mr. Norton was a faculty advisor for the Ramapo High School Environmental Club. M.F. and N.R. were members of the Environmental Club.

2. After Mr. Norton transferred to the Lodi school system, he continued to have contact with M.F. He tutored her at her home for several months during the 2002–2003 school year. During the tutoring session he described atoms looking like a woman's breast.

3. Mr. Norton subscribed to a philosophy of teaching in which he considered the students, parents and teacher as part of a "family" who should work together for the benefit of the students' education. He would be a mentor to the students.

4. For the out-of-town field trips that Mr. Norton arranged for his students, he employed a company called Curriculum Travel of America (CTA), which provides educational-field-trip services to schools. CTA provides a tour director and a bus driver for the trips. CTA is not responsible for disciplining students; that is the responsibility of the teachers and school administrators on the trip. The rules for the trip are also set by the school representative.

5. While Mr. Norton was chaperoning a dive trip to Key West between the 2001–2002 and 2002–2003 school years he smelled marijuana emanating from the motel room of M.F. He knocked on the door and saw students smoking marijuana. He was angry, and told the students that marijuana was illegal and he could get into a lot of trouble if it were discovered that he allowed them to smoke it. He told the students to get rid of the marijuana. He did not discipline the students, nor did he report their behavior to their parents or the school. According to his testimony, following the incident "he forgot about it." He asked these same students to go on a subsequent field trip to Cape Cod even though he was no longer teaching at Ramapo High School.

6. While on the trip to Florida, Mr. Norton purchased alcohol for underage students and was aware that they were drinking during the trip.

7. Marc Silverstein, who accompanied Mr. Norton on the three out-of-state trips, was a college student. He did not have any teaching credentials and did not go into the field of teaching after he graduated from college. During the trip to Florida, Mr. Norton took a night off and left Mr. Silverstein in charge of the students. There were no other adult chaperones on the three trips.

8. During the second trip to Cape Cod, two male students from Ramapo stayed at the Days Inn near the hotel where Mr. Norton's group was staying. However, these students were not on the trip with Mr. Norton.

9. After being contacted by M.F. and walking her and another student back from the Days Inn, Mr. Norton stated that he did not check on the girls the rest of the night, even though he knew that they were highly inebriated.

10. According to Mr. Norton, M.F., C.L. and L.L. did not accompany the rest of the group on their excursion to Provincetown and whale watching on the second day of the trip. He allowed them to remain at the hotel completely unsupervised. The girls picked up some local boys and had a party in their room while Mr. Norton was with the rest of the group in Provincetown.

11. During the trip to Cape Cod in April 2003, Mr. Norton saw M.F. and other underage students drinking alcohol. He did not report their behavior to the school or the students' parents, nor did he take any disciplinary actions against them. Instead, he testified, he "washed his hands" of them.

12. During the two trips to Cape Cod in 2002 and 2003 Mr. Norton allowed underage students to drink at parties in their rooms.

13. On the trip to Key West in 2003, while at the beach, Mr. Norton asked M.F. and N.R. if they would remove their bathing suit tops. The girls declined to do so. Mr. Norton also commented that one of the students had "a set of knockers."

14. Mr. Norton told the same girls a story that his wife had performed oral sex on him in the water at the beach. He also told them about an incident when he took a former student of his to the Ramapo Reservation and had sex with her.

15. On a number of occasions, while M.F. and N.R. were taking tests, they called Mr. Norton over and asked him for help on their tests. Mr. Norton gave them the test answers either by whispering the answer or pointing to the correct answer on the test page.

LEGAL ANALYSIS AND DISCUSSION

Admission of Certain Exhibits

The Board argued that certain exhibits, regarding which I had reserved a determination on admission, should not be admitted into evidence. The Board's objection was that the documents were hearsay, and while the rules of evidence are relaxed in administrative proceedings, under N.J.A.C. 1:1-15.5(b) there must be a residuum of legally competent evidence to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. See Weston v. State, 60 N.J. 36, 51 (1972). The Board asserted that the reports and certifications, which were presented via the testimony of a private investigator, were self-serving, and meant to bolster respondent's case without subjecting a witness to cross-examination by the Examiners. The only testimony that could arguably support the inclusion of the exhibits was that of Norton himself or that of the investigator that he hired. Except for the certification of R.L., the objectionable exhibits represent hearsay within hearsay. The Examiners also questioned why R.L.'s statement was certified, while the other statements were not. They queried whether this meant that the other people interviewed refused to certify their statements.

Mr. Norton argued that the statements of R.L., A.P. and Silverstein should be admitted into evidence.[23] He reasoned that R.L., A.P. and Silverstein were all designated as Board witnesses during the discovery process and, according to these former students, R.L. and A.P. had been interviewed by the petitioner. The respondent could not call them as witnesses since they were all out of state and not subject to

[23] Mr. Norton erroneously stated that I reserved on Mr. Silverstein's statement. At the hearing, I stated that I allowed the statement into evidence, subject to the residuum rule, and would give it the weight that I thought was appropriate.

subpoena. Norton also argued that the testimony of these witnesses was relevant and therefore was admissible under N.J.R.E. 401 and 402. Further, these students had been listed by the Board as having relevant evidence against Norton. As such, their statements could be considered admissible under N.J.R.E. 803(b)(3), since they are statements by persons authorized by the Board to make such statements. They should also be deemed adoptive admissions, since the statements' content was adopted by the Board, which had a manifest belief in the truth of the statements. N.J.R.E. 803(b)(2). In addition, the statements by these witnesses are admissible because they are against the Board's interest, or that of M.F., under N.J.R.E. 803(c)(25). Finally, Norton argued that the statements were admissible under the residuum rule because there is competent evidence from Norton, as well as from V.A., that there was no alcohol on the second Cape Cod trip. The statements of the Board's listed witnesses verify this and corroborate Norton's testimony, and disprove M.F.'s and N.R.'s testimony.

The first document on which I reserved was the therapy notes of Barbara Mauer (R-13). There is no doubt that the notes are hearsay. In a prior Order I ordered that the testimony of Mauer and another expert at the criminal trial should not be admitted into evidence under the hearsay rule. (See Order attached.) At the hearing, in her testimony, M.F. recognized R-13 as the notes of Ms. Mauer and said that she had seen them before. However, when asked about the pre-printed forms in the notes, on which M.F. was to circle the correct answer, she had no memory of doing so. Based on my prior rulings and the fact that M.F. did not recognize the pre-printed part of the report, I will only consider the portion of the notes that M.F. acknowledged that she was familiar with (i.e., not going whale watching on the second day in Cape Cod, playing drinking games, going to the pool and seeing Mr. Norton there, drinking tequila shots; and "grabbing Mr. Norton's ass").

There is no doubt that the statements of R.L. (R-25) and A.P. (R-21) are hearsay. The fact that they may be relevant does not overcome the hearsay objection. I do not find persuasive the respondent's argument that the statements are admissible because they were authorized by the Board or adopted by the Board. The fact that in

discovery the Board mentioned R.L. and A.P. as possible witnesses does not mean that they are somehow agents of the Board or that their statements can be attributed to the Board. They are not employees of the Board and not associated with the Board in any way. Just because the Board listed them as possible witnesses, it is not bound to call them as witnesses or bound by out-of-court statements that they may have made. Similarly, just because witnesses are beyond the subpoena power of either party does not mean that their out-of-court statements are admissible. The statements of A.P. and Marc Silverstein (which I admitted into evidence subject to the caveat that they were hearsay statements subject to the residuum rule) are hearsay within hearsay. In other words, Mr. Fitzgerald testified that these were statements that he elicited from them during an interview and they were not subject to cross-examination. The only difference as to R.L.'s statement was that he signed a certification; the certified statement also was not subject to cross-examination. There is validity to the Board's argument that the statements are self-serving and designed to buttress the testimony of Mr. Norton. On the other hand, if I find Mr. Norton's testimony on various issues to be credible, then the certifications are admissible under the residuum rule. I will therefore admit the statements of A.P. and R.L., as I previously allowed the statement of Silverstein, into evidence, subject to the residuum rule.

Legal Analysis

N.J.S.A. 18A:6-38 authorizes the State Board of Examiners to revoke teaching or administrative certificates under the rules and regulations prescribed by the State Board of Education. N.J.A.C. 6A:9-17.5 provides the grounds for the revocation and suspension of certification:

> The Board of Examiners may revoke or suspend the certificate(s) of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause.

The Board bears the burden of proving, by a preponderance of the credible evidence, that the certificate holder has exhibited unbecoming conduct. In re Certificate of

Papadaniil, EDE 8821-00, Initial Decision (March 13, 2002), adopted, State Bd. of Examiners (May 9, 2002), <http://njlaw.rutgers.edu/collections/oal/>.

It is well established that teachers are held to a high standard, because they have such influence over their students in shaping their minds and attitudes toward society. See In re Certificate of Bradley, 92 N.J.A.R.2d (EDE) 5, 13; In re Certificate of Fargo, 91 N.J.A.R.2d (EDE) 1. Therefore, it has been held that school authorities have the right and duty to screen employees as to their fitness, in order to maintain the integrity of the schools in particular and society in general. In the final agency decision in In re Tenure Hearing of Sammons, School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302, 321, the Commissioner stated:

> [T]he teachers of this State . . . are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.

There are no specific guidelines in the statute or the regulations that are required to be followed in deciding whether revocation or suspension is the appropriate remedy. The decision is to be made on a case-by-case basis depending on the individual facts. See Fargo, supra, 91 N.J.A.R.2d (EDE) at 3. Conduct unbecoming can encompass a wide range of behavior. In the extreme it can involve acts of physical violence. It can also involve a series of incidents that create a pattern of behavior, or a single instance of egregious behavior. See In re Tenure Hearing of Zofchak, EDU 146-02, Initial Decision (August 26, 2002), modified, Comm'r (October 15, 2002), adopted, State Bd. of Educ. (June 4, 2003), <http://njlaw.rutgers.edu/collections/oal/>. As ALJ Reiner pointed out in State Board of Examiners v. Toler, EDE 5946-02, Initial Decision (September 23, 2004), <http://njlaw.rutgers.edu/collections/oal/>, teachers act as role models for their students. "Conduct unbecoming a teacher" is not specifically defined in the statutes or regulations. However, there is case law that has defined the term. This

conduct was defined by the administrative law judge in In re Tenure Hearing of Motley, EDU 7421-97, Initial Decision (May 5, 1999), modified, Comm'r (August 4, 1999), aff'd, State Bd. (December 1, 1999), <http://njlaw.rutgers.edu/collections/oal/>:

> "Unbecoming conduct" is an elastic term broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and [confidence] in the operation of [public] services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon a violation of any particular rule or regulation, but may be based merely upon a violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann v. Police Dep't of Ridgewood, 258 N.J. Super. 22, 40 (App. Div. 1992). Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. den., 65 N.J. 292 (1974).

Inappropriate sexual comments to a student or discussion of the teacher's personal experiences or sexual activities can be considered conduct unbecoming. See In re Tenure Hearing of Mujica, EDU 10130-00, Comm'r (September 7, 2001), <http://njlaw.rutgers.edu/collections/oal/>. In addition, a pattern of inappropriate communications with a student can warrant revocation of a teaching certificate. See In re Certificates of Mantone, 96 N.J.A.R.2d (EDE) 5.

In re Fulcomer, 93 N.J. Super. 404, 422 (App. Div. 1967), set down a number of guidelines that could be used in deciding the penalty that should be imposed, stating:

> Such penalty should be based upon the Commissioner's findings as to the nature and gravity of the offenses under all the circumstances involved, any evidence as to provocation, extenuation or aggravation, and should take into consideration any harm or injurious effect which the teacher's conduct may have had on the maintenance of

discipline and the proper administration of the school system.

Arguments of the Parties

1. Changing grades and giving answers to test questions

The respondent argued that M.F.'s and N.R.'s claims that they were permitted to change their grades in chemistry class was absurd and fabricated. The women stated that they physically went into Mr. Norton's personal laptop, with his permission, and changed their grades. M.F. asserted that Mr. Norton had the only computer in the classroom, and when they used his laptop to change the grades, they were changing the official grade book. They claimed that in 2002, students did not have their own computers in the classroom and, therefore, did not keep track of their grades on their personal computers. Mr. Norton pointed out that in an unannounced observation of M.F. and N.R.'s chemistry class on March 26, 2002, the observer mentioned students working on a PowerPoint presentation, and "[t]he students were eager to work on the computers and do their research on the Internet." (R-23.) In another observation on April 29, 2002, the observer stated, "Mr. Norton continues to make effective and efficient use of the iBook computer in his classroom as well as providing opportunities for student laptop computer usage." (R-23b.) Mr. Norton testified that every student had a section on the server under his name where they could keep their own grades. He asserted that he had set up a spreadsheet so that students could keep track of their grades, but the only official record was the one that he kept, which the students could not access.

The Board relied on the testimony of M.F. and N.R. that Mr. Norton let them and certain other favored students alter their grades in his computer, and both contended that they would not have received the good grades that they got in the chemistry course unless they were allowed to doctor their grades.

It is not clear that each of the students in the chemistry class had access to a computer and therefore could keep their own records of their grades. Both M.F. and

N.R. claimed that they could not have received the high grades that they received without doctoring their final grades. On the other hand, it is clear that Mr. Norton did not have the only computer in the class. While M.F. and N.R. might have believed that they were able to change their grades, the weight of the evidence is not sufficient to prove this charge.

M.F. and N.R. also charged that Mr. Norton gave them answers to test questions in their chemistry class. They claim that they would raise their hands when they did not know an answer and Mr. Norton would come over to them and either whisper the answer in their ear or point to the correct answer on a multiple-choice test. He would do this with the students whom he was "very friendly" with. Mr. Norton claimed that, if the student raised her hand, the respondent would ask the student guided questions, and in that way help her figure out the correct answer. If this were the case, I have my questions about this method, since those students who did not raise their hands would not have the benefit of being "guided" to the correct answer. In this case, it comes down to whether I believe M.F.'s and N.R.'s claims that they were fed the correct answers, or Mr. Norton's explanation that it was a form of pedagogy.

Determinations often turn on credibility. Credibility is the value that a finder of the facts gives to the testimony of a witness. The process of evaluating the credibility of witnesses entails: (a) observing demeanor; (b) evaluating the ability to recall specific details; (c) considering the consistency of the testimony under direct and cross-examination; (d) determining the significance of any inconsistent statements or evidence; and (e) otherwise developing a sense of the witness's candor. This requires an overall assessment of the witness's story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. See Carbo v. U.S., 314 F.2d 718 (9th Cir. 1963), cert. denied sub. nom. Palermo v. U.S., 377 U.S. 953, 84 S. Ct. 1625; 12 L. Ed. 2d 498 (1964).

In evaluating the weight, trustworthiness and reliability of the evidence, factors such as motive, bias, confirming witnesses or statements, corroborative evidence, and common sense must be considered. Frequently, the trier of fact relies on the innate

sense of whether the testimony has the ring of truth. M.F.'s and N.R.'s statements that they would not have received the grades they received were, in a sense, statements against their own interest. They are saying that the science grades they received in high school were false. Mr. Norton's statement that it was a pedagogical method of teaching is disturbing, in that it leaves certain students at a disadvantage in the testing process. I also noted that Mr. Norton testified that the method of teaching he subscribed to was treating the students and their parents like family.[24] I got the impression that Mr. Norton wanted to be "friends" with certain of his students, and the boundary between teacher and student was blurred. Based on the testimony of M.F. and N.R. and that of Mr. Norton, I **CONCLUDE** that Mr. Norton inappropriately fed test answers to certain select students.

2. Sexually assaulting M.F.

Mr. Norton argues that M.F.'s charge that he sexually assaulted her is false and was concocted as an excuse to explain why she became addicted to drugs. To demonstrate that the charges are false, Mr. Norton points to a number of inconsistencies in M.F.'s statements. M.F. testified that she was not interviewed before she gave her sworn statement to the Bergen County Prosecutor's Office. The stenographic statement under oath just consisted of questions posed by Detective Taylor and answers that she gave. If she was not asked a specific question, then there was no opportunity to discuss other issues involving, for instance, things that occurred on the Florida trip or the first Cape Cod trip. Mr. Norton pointed out that this assertion was contradicted by Detective Taylor's testimony. Taylor testified that prior to the sworn statement, she spoke with M.F. for an extended period of time, asking questions about what occurred in Massachusetts and related issues.

Mr. Norton also pointed out inconsistencies between M.F.'s testimony that the respondent retrieved the girls from the boys' hotel room at the Days Inn, and the statement she made to Trooper Heywood in Massachusetts in which she said that the other two girls were affected by alcohol consumption and lost their sense of direction

[24] This will be discussed further below.

once they were outside the boys' hotel. She had told the trooper that the girls were not sure how to get back to their hotel room, and called Norton between 9:45 and 10:00 p.m.; Norton met them outside the Days Inn and escorted them back to their hotel. However, during the hearing M.F. claimed that now she remembered Norton's coming into the boys' hotel room to get the girls and escort them back to their hotel. Both A.P. and R.L., who were the boys at the Days Inn, made statements to Investigator Fitzgerald denying that Mr. Norton ever came to their hotel room. While those statements are hearsay, under the residuum rule they may be considered, because there is a residuum of credible evidence to support the statements, namely, M.F.'s contradictory statements and Mr. Norton's denial of going to the boys' hotel room.

The respondent pointed out other inconsistencies surrounding the allegations of sexual assault. M.F. claimed that on the way back from the Days Inn, Mr. Norton grabbed C.L.'s rear and pulled out the front of L.L.'s shirt. However, in her interview with Trooper Heywood M.F. did not mention this incident. Mr. Norton also asserted that the Board could have enforced the subpoena it issued for C.L. to appear to testify, when she failed to appear at the hearing; instead, it decided not to enforce the subpoena.

A negative presumption cannot be inferred from the fact that the Board did not move to enforce the subpoena. The only evidence that I can consider is the testimony of M.F. at this hearing, her prior testimony at trial, her answers to questions during interviews, and the testimony of Mr. Norton.

The respondent also sought to debunk M.F.'s assertion that L.L. told her that Norton had sexual contact with a student at Lodi High School. Norton pointed out that on August 17, 2007, Trooper Heywood asked Detective Taylor to interview L.L. regarding her knowledge of the respondent's involvement with the Lodi student. In Detective Taylor's report she said that L.L. characterized the respondent as a "touchy-feely type of guy," but denied knowing anything about Norton doing anything inappropriate to a student while at Ramapo High School. In the interview, L.L. denied

having told M.F. that Norton was involved with a student. L.L., who was on the second Cape Cod trip, denied witnessing any type of sexual assault.

The interview recorded by Detective Taylor does not bear out the allegation that Mr. Norton had sexual contact with a student at Lodi High School. In fact, L.L. denied having told M.F. that Norton was involved with any student. Therefore, I **CONCLUDE** that the charge of sexual contact with another student cannot be sustained.

Mr. Norton presented a timeline that he asserted proved that the allegations of drinking and sexual assault were "bogus." He pointed out that M.F. and the other girls were picked up by Norton at the Days Inn at approximately 9:45–10:00 p.m. Since the Days Inn was a short distance from the Marriott Hotel, where the girls were staying, they would have arrived back at the Marriott long before the 11:00-p.m. curfew. There would not have been a security guard present when they returned, since he did not come on duty until 11:00 p.m. At the criminal trial, M.F. testified that her hotel-room door was taped after she returned to her room. The next morning, when she went to leave the room, there was tape on the door. Since there was no tape when she got to the hotel, the tape must have been placed on the door after she went in the room. Norton testified that after he brought the girls back to the room M.F. never left that night. Norton asserted:

> Here, M.F. and her roommates went to their rooms before curfew and before the taping. No one left and of course the tape was still on the door in the morning as stated by M.F. Therefore, M.F. never left her room to go to Norton's room; Norton never returned to M.F.'s room with Tequila; and there was no sexual assault by Norton.

Norton also pointed out inconsistencies in M.F.'s statement regarding Norton giving her tequila to drink. She told Detective Taylor at the interview at the Bergen County Prosecutor's Office that she and the students from Ramapo High School had been drinking in the hotel room. Norton entered the room and brought a bottle of tequila with him. Then M.F. went into the bathroom and consumed the tequila. At the criminal trial, M.F.'s testimony was full of inconsistencies regarding whether she had

been at the pool on the night of the attack and met Norton there, or she was at the pool the next night. She did not have any memory about "grabbing Norton's ass," but she testified to this at the OAL hearing. She also presented conflicting testimony at the criminal trial about meeting Norton at the soda machine. At the hearing at the OAL she testified about meeting Norton at the soda machine and "grabbing his ass."

As for the description of the alleged sexual assault, M.F. told Detective Taylor that when they got to Norton's room he did not say anything; he took off her pants and started having intercourse with her. He did not remove any other underwear, since she had nothing else on. She said that Norton was not wearing a condom, and she felt him ejaculate into her vagina. M.F. said that Norton did not engage in any other form of sex with her. M.F. said that after the alleged assault, she got up, pulled up her pants and left the room. She went back to her room. Norton never said anything else to her about the incident, and did not say anything to her about not telling anyone. Norton pointed out that at the OAL hearing M.F. testified that she was wearing a bra and underpants; she was not sure whether Norton was wearing a condom when they had sex; and she did not remember whether he told her not to say anything to anyone about what happened.

Mr. Norton also pointed out that M.F. changed her story about what she did the next day. At the OAL hearing M.F. testified that she decided not to go on the whale-watching trip. Instead, they "pretty much just sat around and drank." They got some breakfast at some point and started drinking again. Sometime during the day, while the students from the trip were gone, M.F. and her girlfriends met "some local guys and hung out with them" at their hotel room. At the criminal trial, M.F. testified that she and her friends went to Provincetown with the group on a shuttle, shopped around and had lunch while the students were whale watching, and then went back to the hotel by cab.

Mr. Norton also attacked the allegation of the sexual assault by pointing out a discrepancy regarding the length of time after the alleged rape and M.F. reporting the incident to her friend and contacting Norton. The respondent stated that when M.F. first reported the sexual assault to Detective Taylor, she claimed that she did not mention

the event to N.R. until three or four months later. When she told N.R., N.R. called Norton on his cell phone, yelled at him, and told him never to talk to M.F. or any of her friends again. Yet, during an interview with Trooper Heywood, M.F. admitted that she e-mailed Norton a week or two after the alleged rape. She said that she did it because she thought that she was at fault for the assault and was confused. Norton pointed out that, if M.F.'s testimony at the hearing was correct, that she told her friend N.R. about the rape three to four months after the event, then she would not be apologizing to Norton about the phone call from her friend a week after the assault. At the OAL hearing, M.F. claimed that the e-mail she sent "right afterwards," or one or two weeks later, could mean several things, and she was not sure what "right afterwards" meant. At the hearing, she also said that she did not recall ever telling anyone that she called Norton to apologize for N.R. calling him. Norton submitted that the truth was that the e-mail was never sent, and there was no cell-phone call.

The Board's position was that M.F.'s rendition of the facts during direct examination at the hearing was a true picture of what occurred, and that Mr. Norton took advantage of an underage and obviously drunk student. M.F. blacked out and awoke to find Mr. Norton on top of her. Due to the traumatic nature of the event and the fact that she "blamed herself" for getting drunk and letting it happen, the true facts did not surface until the time of the hearing.

While the traumatic nature of the event, M.F.'s feeling of guilt, her years of drug and alcohol abuse, and psychological issues may have affected her memory and contributed to the changes in her testimony, there are too many inconsistencies to credit the veracity of her statements. As pointed out by the respondent, M.F. changed her testimony regarding the location where Mr. Norton picked up the girls at the Days Inn; made inconsistent statements about Mr. Norton bringing tequila to her room or meeting him by the soda machine and going back to his room; and "grabbing Norton's ass by the soda machine." More telling was her contradictory testimony at the hearing that she did not know if Mr. Norton was wearing a condom, and her very descriptive statement at the criminal trial that he was not wearing a condom and she felt him ejaculate into her vagina. M.F. also changed her story about what she did and where

she went the next day. In addition, there was definitely contradictory testimony about when she told her friend about the alleged rape and her contacting Mr. Norton. Based on the extent of the contradictory testimony, I **CONCLUDE** that the Board has failed to establish by a preponderance of the credible evidence that the respondent sexually assaulted M.F.

3. Misrepresenting that a female chaperone scheduled for the trip had cancelled at the last minute

The respondent pointed out that there was no testimony on this issue at the hearing. In reviewing the testimony, I can find no evidence to substantiate the charge, and therefore I **CONCLUDE** that the Board has failed to meet its burden on this charge.

4. Using male college students to help him chaperone

The respondent argued that there was no testimony concerning whether a female chaperone was required by the company that ran the tour, nor was any policy submitted into evidence from the boards of education for the schools that the students attended stating that a certain type of chaperone was required. The Board, on the other hand, argued that Norton acted irresponsibly by not having a trained professional as a chaperone. Marc Silverstein, the chaperone, was not a teacher, nor did he have any educational credentials. He was a college student who later became a lawyer. Yet, Mr. Norton allowed Silverstein to be in charge of the students for an evening while the respondent took the night off.[25] While Norton testified that he did not report the students' drinking on the second Cape Cod trip to the parents or school, he believed that Silverstein contacted the parents, since Silverstein was close with and highly regarded by the parents of the Ramapo students. The Board argued that it would have been wholly inappropriate for Norton to abdicate such an important responsibility as student discipline to an untrained, uncertificated college student. In addition, Investigator Fitzgerald's report of his interview with Silverstein made it clear that

[25] Mr. Norton testified that he took a night off when they were in Florida, and went out and had some beers.

Silverstein was unaware of the students' drinking. Therefore, he would not have been able to notify the parents or the school about inappropriate behavior.

While it may be true that there was no Board policy stating that a certain type of chaperone was required, Mr. Norton showed a lack of good judgment in choosing one chaperone, who was barely an adult himself and who had no formal experience in dealing with children, to accompany him on the field trips. Even after he admitted that students smoked marijuana on the trip to Florida, he chose a young and inexperienced student to be the only other chaperone on the trip to Cape Cod. In addition, Mr. Norton admitted that during the trip to Florida he left Mr. Silverstein alone in charge of a large group of teenagers, while he took the night off to go out for some drinks. Mr. Norton's testimony that he expected Mr. Silverstein, after the second Cape Cod trip, to notify the parents that their children had been drinking, because Silverstein was friendly with a number of the families, is outrageous. Besides the fact that Mr. Silverstein stated in his interview with Fitzgerald that he never saw students drinking and therefore would not have had anything to report, the fact that Mr. Norton would leave this task in the hands of a college student is highly suspect. The parents who allowed their children to take part in these trips had a right to expect that the children would be properly supervised. CTA employees made it clear that they were not responsible for supervising the students. The parents put their children's care in the hands of a teacher who did not provide proper supervision, which resulted in the children's safety and security being put in jeopardy. I therefore **CONCLUDE** that the Board has sustained the charge of inappropriate behavior on the respondent's part in choosing an untrained and inexperienced college student as the chaperone on the field trips and leaving the students in that individual's care while Mr. Norton went out drinking.

5. Reason that N.R. did not go on the second Cape Cod trip

Norton asserted that N.R. inaccurately claimed that she did not go on the second trip to Cape Cod because the respondent had asked her to take off her top when they were on the trip to the Florida Keys. She claimed that she told her boyfriend about this, and he did not want her to go because he did not like the relationship that M.F. and

N.R. had with Norton. In his brief, Norton submitted that the real reason N.R. did not go on the second Cape Cod trip was her personal conduct in her junior year, namely, using heroin and going in and out of rehab.

From the testimony, it appears that there may have been several reasons, including N.R.'s boyfriend's jealousy, to explain why N.R. did not attend the second Cape Cod trip. N.R. testified that she told her boyfriend that Norton had asked her to take off her top and her boyfriend disapproved of this. She also alluded to her boyfriend not liking the relationship that she had with Norton. The boyfriend did not testify. Therefore, whether and why the boyfriend asked N.R. not to go to Cape Cod, as well as the respondent's "explanation" of why N.R. did not attend the second trip, is is just speculation. In any case, I do not find that a decision on this issue is germane to the resolution of this matter.

6. Drinking alcohol with students and purchasing beer for students

Norton argued that aside from M.F.'s statement that Norton purchased beer for "the boys," there was no confirming testimony for this assertion. Besides Norton denying this allegation, he pointed to the testimony of V.A. and a string of statements elicited by Investigator Fitzgerald from former students stating that they had never seen Norton supply alcohol to students. He also pointed to character statements attesting to the respondent's never acting inappropriately with a student.

In response to the testimony of M.F. and N.R. that there was heavy drinking on the first trip to Cape Cod and that Mr. Norton drank along with the students, the respondent asserted that M.F. did not mention this to Detective Taylor during the interview, or to the Massachusetts authorities, or at the criminal trial. Norton claimed that their testimony was suspect because V.A., who was a student at Ramapo and attended the first Cape Cod trip, testified that she saw no alcohol consumption. Further, in their statements to Mr. Fitzgerald, Marc Silverstein, L.L. and R.L., who were on the trip, denied any alcohol consumption. As far as the pictures showing beer cans, Mr. Norton argued that neither he nor M.F. was in any of those pictures, and he was not

present in the rooms where those pictures were taken. The picture showing Mr. Norton and two girls dancing and R.L. in the foreground does not show any alcoholic beverages. Norton claims that M.F.'s memory of Norton being in the room with the beer cans was concocted.

The Board asserted that the testimony of M.F. and N.R. and the pictures of open beer cans in the hotel room point to the fact that Mr. Norton not only condoned the drinking, but participated in it on the first trip to Cape Cod. M.F. and N.R. testified that they were drinking in the rooms at the hotel, and that Mr. Norton not only allowed the drinking, but took part in it himself. While Mr. Norton argued that there are no pictures of him in the room where the beer cans are on display, there are other pictures of him in the room dancing and looking like he is having a "good time." It appears from the pictures that the partying went beyond the bounds of just having a good time. It is possible that V.A. was not present in the rooms where the drinking took place and therefore did not know that there was drinking occurring, but it seems clear from the testimony and pictures that Mr. Norton was aware that certain of the students on the trip were drinking, and he allowed it to continue. I therefore **CONCLUDE**, based on the testimony of M.F. and N.R., which I find to be credible, buttressed by the exhibit pictures, that the Board has sustained the charge against Mr. Norton of allowing students to drink alcohol on the first trip to Cape Cod.

M.F. and N.R. made similar allegations of drinking by students and Mr. Norton during the dive trip to the Florida Keys. Norton alleged that the two women lied and that their testimony was rehearsed. Norton pointed to M.F.'s statement to Detective Taylor in which she said that she and other students consumed alcohol while in Florida and that Norton knew about it because he saw it in their rooms and bought alcohol for the guys. M.F. and N.R. also asserted that Norton did nothing to deter the use of alcohol on the trip. Norton responded that M.F. never stated that Norton was drinking with the students and never identified the "guys." Nor did she give any details about where the beer was purchased or the beer drinking. Norton pointed out that when M.F. was questioned at the Bergen County Prosecutor's Office about whether Norton purchased alcohol for the girls in Florida as well, M.F. responded "no." At the criminal trial M.F.

was asked if Norton ever bought alcohol for her or any other girls, and she responded "no." However, at the OAL hearing M.F. testified that Norton bought alcohol for the students. The students wrote down what they wanted and gave Norton money and he went to the store and bought the alcohol. M.F. stated that while Norton went into the store, M.F., N.R. and some guys were waiting in a van outside. The respondent pointed out that in N.R.'s testimony she claimed that after Norton took the alcohol order there were two vans. One van went back to the hotel; she and M.F. were in the other van, which dropped kids off at the hotel, and then they went to some place like a "quick mart" or a liquor store, where Norton bought liquor. Norton asserted that this change in testimony was a result of collusion between the two friends.

The Board pointed to the testimony of M.F. and N.R. and the picture of two students drinking what appears to be vodka and orange juice as proof that the respondent bought alcohol for underage students and permitted them to drink on the trip.

There are discrepancies between the renditions of the story about M.F. and N.R. accompanying Norton to buy alcohol. One version has there being two vans, and one van being taken by Norton, M.F. and N.R. to the store to buy alcohol; the other version talks in terms of there being one van. Then there is the contradiction between the testimony that said that Mr. Norton only bought liquor for the guys and the one that said that he bought liquor for M.F. and N.R. Under either circumstance, as the witnesses pointed out, the students could not have transported the liquor on the plane, and it therefore had to be purchased in Florida. The students were all under the legal drinking age, and therefore would have had to have someone else purchase the liquor. The picture of the girls drinking gives credence to M.F. and N.R.'s testimony that there was alcohol on the trip. I therefore **CONCLUDE** from the testimony that Mr. Norton was involved in the purchase of alcohol and knew that students were drinking while in Key West.

As for the second Cape Cod trip, Mr. Norton argued that M.F. claimed that her roommates (C.L. and L.L.) were present when Norton supposedly came back to their

room with tequila, and C.L. may have drunk some.[26] C.L. refused to testify, and in her statement to Fitzgerald, L.L. denied drinking. Norton emphatically denied drinking with any students or buying liquor, and claimed that his version of the facts was corroborated by Silverstein's statement to Fitzgerald and R.L.'s certification that he had never been offered alcohol by Ben Norton, nor did the teacher purchase alcohol for him or his friends on any trip. In addition, Norton pointed out that in her interview with the Bergen County Prosecutor's Office, L.L. stated that Norton had never acted inappropriately with her or any other student. In her telephone conversation with Investigator Fitzgerald she advised him that she was never supplied with liquor by Norton and never observed Norton drinking. Mr. Norton also pointed out that V.A. testified at the hearing that she did not observe any alcohol being consumed by anyone. She said that she went to Norton's room after midnight because her toilet was overflowing. She said that Norton said that he was upset because he had to take alcohol away from the Ramapo girls.

Previously, I discussed the fact that M.F. admitted that she was very drunk when she came back from her visit with the boys at the Days Inn. She said that at a certain point she blacked out. Her heavy level of intoxication and the lack of corroboration lead me to **CONCLUDE** that the Board has not carried its burden of proving that Mr. Norton provided tequila to M.F. and her roommates.

7. Allowing students to smoke marijuana and drink alcohol while on school trips and ignoring the fact that students were drinking alcohol and smoking marijuana

Mr. Norton argued that the only credible testimony concerning his ignoring the students' drinking or smoking marijuana was that he was upset and angry about it. He claimed that aside from M.F. and N.R., there was no evidence of drinking or marijuana use on the first Cape Cod trip. Norton pointed to testimony in the criminal case when M.F. was asked if she smoked marijuana the night of the alleged assault. She said that

[26] A review of M.F.'s testimony revealed that she stated that she did not know if L.L. and C.L. overheard Norton's remark that he had great tequila and he wanted M.F. to try it. M.F. did not testify that C.L. may have drunk some of the tequila.

she did not, and said that she did not see Norton smoking marijuana on that trip either. However, Norton pointed out that at the criminal trial, when she was questioned about her statement to Trooper Heywood that Norton was aware that students were smoking marijuana and he did nothing to discourage it, M.R. responded that at this time her memory was that she did not see him smoking marijuana on the second Cape Cod trip. Norton also cited testimony of M.F. and N.R. in which they said that when Norton discovered that they were smoking marijuana on the Florida trip, he was upset. According to Norton, he told them to get rid of it, and an hour or two later M.F. and N.R. came to him and told him that they had gotten rid of it and were sorry. Similarly, Norton was upset with the girls being intoxicated on the first and second nights of the Cape Cod trip. Norton claimed that he threw the two men who were partying with the girls out of the room and poured a bottle of alcohol down the drain.[27] Norton argued that based on his reaction, he did not ignore the alcohol or marijuana use by the Ramapo girls, and therefore could not be found guilty of the charge.

I find Mr. Norton's testimony on these issues particularly disturbing. Mr. Norton admitted to discovering that some of the students were smoking marijuana. What was his reaction? He said that they (and he) could get in a lot of trouble and told them to get rid of it. He did not confiscate the drug, nor did he call the students' parents and tell them what had occurred and/or ask them to pick up their children. Despite his testimony that he adhered to a philosophy that the teacher, the student and the parents were part of one "family," he did not find it necessary to inform the parents of these children that they were abusing drugs. Further, even though he knew that these students had smoked marijuana, he sought them out to go on another field trip to Cape Cod.[28]

Mr. Norton testified that on the second Cape Cod trip, when he went to pick up the girls at the Days Inn they were very drunk. However, even if I accept the respondent's version of the events of that night, he acknowledged that he never went back to the girls' room to check on them the whole night. This behavior was entirely

[27] M.F. denied that Norton poured liquor down the drain.

irresponsible. In addition, when I asked Mr. Norton whether he contacted the parents to tell them about their children's drinking, he said that he just "washed his hands of them." As their teacher, he was acting *in loco parentis*, and he had an obligation to provide for the children's safety and to inform their parents of what had occurred. In addition, the fact that the girls were able to leave the hotel unsupervised and go to another hotel, where they got drunk, speaks to the completely inadequate level of supervision that occurred on the trip. Mr. Norton was the only teacher and adult on the trip. It was his responsibility to supervise the students so that this type of behavior did not occur. Mr. Norton compounded his unprofessional behavior by leaving the girls unattended the following day. Whether I believe M.F.'s or Mr. Norton's version of the next day's events in Cape Cod, it is clear that Mr. Norton, knowing that the girls had gotten drunk the night before and were hung over, allowed the girls to remain at the hotel for some period of time unsupervised. During this period they managed to pick up some local boys, and entertained the boys in their room. I therefore **CONCLUDE** that the Board has proven by a preponderance of the credible evidence that Mr. Norton acted in an inappropriate manner by not reporting the drug and alcohol use and not properly supervising and disciplining the students.

8. Telling explicit jokes in class

Mr. Norton claimed that M.F.'s assertion to Detective Taylor that Norton would tell perverted jokes in chemistry class and her statements at the hearing that he would read jokes off the internet of a sexual nature and told perverted jokes flew in the face of Norton's denial and V.A.'s testimony that she never heard Norton tell dirty jokes.

This issue involves a "she said, he said" type of situation. In this case, it is M.F. and her friend N.R. versus Mr. Norton and his family friend, V.A. M.F. and N.R. asserted that Mr. Norton made off-color remarks in class, and Norton and V.A. said that this did not occur. M.F. and N.R. both testified that Mr. Norton had his group of favorite students, and gave them more liberties than other students. Mr. Norton's own

[28] Mr. Norton was no longer teaching at Ramapo High School. The second Cape Cod trip was for Lodi students. He testified that he asked the Ramapo students to come along because there was room on the bus and he wanted to fill up the trip.

testimony seems to indicate that he considered his relationship with his students to be more friends than teacher/student. In this respect, I can envision him making remarks to ingratiate himself with certain of his students. The fact that he knew V.A. and her family might have made him leery of acting in a more flirtatious way with her. Having weighed these factors and assessed the credibility of M.F. and N.R., the evidence on this point appears to be in equipoise. Since the Board of Examiners has the burden of proof on this issue, I must **CONCLUDE** that the Board has failed to prove that Mr. Norton made sexually explicit remarks in class.

9. Trying to convince two female students to take their tops off; telling them a story about receiving oral sex under the water; and having sexually explicit conversations with M.F. and N.R.

Mr. Norton argued that M.F.'s and N.R.'s testimony that Norton told them that they should take their tops off while they were on a beach in Florida was a fabrication. He asserted that their statements that there were not many people on the beach at the time were untrue. He pointed to his own testimony denying making the statement and asserting that the beach on which the incident allegedly occurred was a busy one and the whole group of students from the trip was on the beach at that time.

As for the allegation regarding his telling them about having oral sex under the water, Norton denied this as well, and pointed out that M.F. did not mention this story when she was interviewed by Detective Taylor and Trooper Heywood. He claimed that it was just another made-up story by M.F. and N.R. He also denied making remarks to them about another student having "big knockers."

The respondent also claimed that there were holes in M.F.'s and N.R.'s story about Norton's telling them a story regarding taking a former student's virginity. Mr. Norton argued that M.F. portrayed herself to Detective Taylor as having a special relationship with her chemistry teacher, claiming that he would tell her things that he did not tell other students. One of the examples was telling her about falling in love with one of his students and taking her, once she turned eighteen, to the Ramapo

Reservation and having romantic sex with her. She did not mention that N.R. was also present during the telling of this tale. However, Norton argued that in order to make the story more believable at the OAL hearing, M.F. had to bring N.R. into it. He also pointed out that according to M.F.'s testimony at the OAL hearing, the telling of this story supposedly took place on the plane ride down to Florida, while at the criminal trial M.F. said that it occurred on the plane ride back. Norton claimed that this distinction was significant because "N.R. and M.F. would remember sexually explicit stories by Norton at the start of a trip as opposed to the end."

In sum, Mr. Norton argued that M.F. and N.R. lied about so much of their testimony that their claims against Norton should not be believed. According to his theory, M.F. and N.R. were best friends. M.F. had substantial drug, alcohol and psychiatric problems, and she believed that her drug abuse increased after the second Cape Cod trip. M.F. convinced her friend to back her up. Mr. Norton argued: "M.F. consistently lied and N.R. swore to it. Then, N.R. lied consistently and M.F. swore to it. There is not a single independent witness or piece of evidence to support their claims."

I do not find that the inconsistencies pointed out by Mr. Norton prove that M.F. and N.R. were misrepresenting the truth. The fact that Mr. Norton told more than one student a particular story does not negate the impression that M.F. or N.R. might have gotten that they had a "special relationship" with Norton. In addition, considering the amount of time that has passed since the Florida trip, it is not surprising that there might be a discrepancy regarding when Mr. Norton told them about his sexual encounter. Whether he told them on the way to Florida or back from Florida does not affect their credibility. In addition, the fact that there were other students on the beach at the time that Mr. Norton suggested that the girls should take off their tops does not prove that he did not make the statement. He did not testify that the other students were sitting next to M.F. and N.R. at the time the statement was made. Mr. Norton's general demeanor appeared to be casual when it came to his interaction with his students. He wanted them to be his friends. He appeared to blur the line between teacher and student, and I could see him making these types of remarks, whether his stories were true or not, to make himself appear to be "cool" and "one of the guys." After observing the demeanor

of the witnesses and developing a sense of the witnesses' candor, I **CONCLUDE** that Mr. Norton made the statements alleged by M.F. and N.R.

10. Making inappropriate remarks on the Sandy Hook field trip

The Board asserted that during a day trip to Sandy Hook with members of the Environmental Club at Ramapo High School, Mr. Norton told the students that Sandy Hook was the site of New Jersey's only nude beach. Both M.F. and N.R. testified that Norton made this remark. Mr. Norton denied ever making this statement on the trip. There were no charges of any drinking or other inappropriate conduct on the trip.

I **CONCLUDE** that, if the remark was made, it was a statement of fact[29] and not inappropriate. Therefore, as to this allegation, the Board has failed to sustain the charge of inappropriate conduct.

CONCLUSION

Based on the above findings of fact and analysis of the law, I **CONCLUDE** that the Board of Examiners has proved a number of charges of inappropriate conduct against the respondent. Based on the severity of the charges that have been proved, I **CONCLUDE** that the proper penalty is revocation of his teaching license.

ORDER

It is hereby **ORDERED** that the respondent's teaching license be revoked.

I hereby **FILE** my initial decision with the **STATE BOARD OF EXAMINERS** for consideration.

This recommended decision may be adopted, modified or rejected by the **STATE BOARD OF EXAMINERS**, which by law is authorized to make a final decision in this

[29] Sandy Hook does have a section for nude bathing.

matter. If the State Board of Examiners does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **SECRETARY OF THE STATE BOARD OF EXAMINERS, 100 Riverview Plaza, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 31, 2013

DATE

CAROL I. COHEN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

APPENDIX

WITNESSES

For Petitioner:

M.F.
Lincoln Jividen
N.R.

For Respondent:

V.A.
Edward Fitzgerald
Benjamin Norton
Cora Taylor

EXHIBITS

Joint:

J-1	Stipulation of Facts
J-2	Same as R-32c–e, R-32f–l and P-16

For Petitioner:

P-1	Picture of bottles in room
P-2	Picture of M.F. and L.L. with bottles
P-3	Picture of M.F. and L.L. in boys' hotel room, CC2, with beer
P-4	Picture of bottles in room – nearly empty
P-5	Picture of C.L. and N.R. drinking in hotel
P-6	Picture of N.R. pulling on Norton's bathing suit
P-7	Not in evidence
P-8	Picture of Norton dancing in hotel room

P-9	Picture of Norton in hotel room after dancing
P-10	Picture of beer in hotel room
P-11	Picture of Norton in hallway with students
P-12	Not in evidence
P-13	Picture of Norton taping doors
P-14	Itinerary
P-15	Room manifest
P-16	Statement of M.F.

For Respondent:

R-1(a-c)	Indictments against Norton by Commonwealth of Massachusetts
R-2(a)	Not in evidence
R-3(a-c)	Not in evidence
R-4	CTA room assignments, 2002
R-5(a-c)	Jury Verdict Sheet – not guilty on all counts
R-6	Photo of beer cans in boys' hotel room
R-7	Not in evidence
R-8(a-o)	Not in evidence
R-9(a-x)	Letters of reference submitted on behalf of Benjamin Norton
R-10(a-c)	Not in evidence, except Adamski statement
R-11(a-c)	Not in evidence
R-12(a-c)	Affidavit of Trooper Haywood
R-13	Barbara Mauer records in evidence (see ruling in opinion)
R-14	Résumé of Investigator Edward Fitzgerald, Strike Force Private Investigations, LLC
R-15	Report of Interview with L.Y. by Edward Fitzgerald, May 19, 2012
R-16	Report of Interview with Anna Marie Kuhn by Edward Fitzgerald, June 22, 2012
R-17	Report of Interview with L.A. by Edward Fitzgerald, May 19, 2012
R-18	Report of interview with Carol Lynn Zepatos by Edward Fitzgerald, June 26, 2012
R-19	Report of interview with A.M. by Edward Fitzgerald, August 10, 2012

R-20	Report of interview with Marc Silverstein by Edward Fitzgerald August 27, 2012
R-21(a)	Report of interview with A.P. by Edward Fitzgerald August 17, 2012 (in evidence see ruling in opinion)
R-22(a-ap)	Partial transcript of trial testimony of M.F., Mass. Superior Court, Mar. 9–10, 2011
R-23(a-j)	Ramapo High School observation-performance reports
R-24(a-j)	Lodi High School Annual Summaries and Evaluations
R-25	Certification of R.L. dated September 27, 2012 (in evidence, see ruling in opinion)
R-26(a)	Résumé of Benjamin Norton
R-27	Two pictures (top picture only)
R-28(a)	Field trip director's evaluation 4/24/03–4/26/03
R-29	Property layout of rooms
R-30(a-b)	CTA room list
R-31	Diagram of Marriott and Days Inn
R-32(a-k)	Reports of Lt. Taylor, Bergen County Prosecutor's Office, subject to hearsay/residuum rule
R-33(a-l)	Interrogatory questions and answers (partial)
R-34(a-d)	Not in evidence
R-35	Strike Force Report

SPRINGSTEAD & MAURICE, ESQS.
Court Plaza South, East Wing
21 Main Street, Suite 304
Hackensack, New Jersey 07601
201-343-0003
Attorneys for Plaintiff

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IN THE MATTER OF THE CERTIFICATES OF BENJAMIN NORTON

BEFORE THE COMMISSIONER OF EDUCATION

PROOF OF SERVICE

I, **CHRISTINA RASSEL** of full age, hereby certify and say:

1. I am a Paralegal employed by the firm of Springstead & Maurice, Esq., attorney for the BENJAMIN NORTON.

2. On October 17, 2013 I filed an original of the within NOTICE OF APPEAL along with Proof of Service on the Commissioner of Education, Bureau of Controversies and Disputes, NJ State Dept. of Education at 100 Riverview Plaza, Trenton, New Jersey 08625. I also served the State Board of Examiners, NJ Dept. of Education at 100 Riverview Plaza, Trenton, New Jersey 08625, and DAG Stark, Esq., Dept. of Law and Public Safety, Division of Law at 25 market Street, Trenton, New Jersey 08625 **by Lawyers Service.**

I certify that the foregoing statements made by me are true. I am aware that if any statements made by me are willfully false, I am subject to punishment.

Dated: October 17, 2013

CHRISTINA RASSEL

408-14

408-14L

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

CHRIS CHRISTIE
Governor
KIM GUADAGNO
Lt. Governor

DAVID C. HESPE
Acting Commissioner

September 29, 2014

Mark G. Toscano, Esq.
Comegno Law Group, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057

Patrice Daley, *Pro Se*
[redacted]
Trenton, New Jersey 08609

Re: *Board of Education of the City of Trenton, Mercer County v. Patrice Daley, Agency Docket No. 166-7/14.*

Dear Parties:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the respondent's purported answer to the petition.

Upon such review, I have determined to exercise my discretion to decline the request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1, and instead direct that the matter shall proceed as a petition of appeal pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*

Accordingly, petitioner's request for declaratory ruling is declined and this matter shall be transmitted forthwith to the Office of Administrative Law.

Sincerely,

David C. Hespe
Acting Commissioner

c: County Superintendent
State Law Library

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406-14

K.F. on behalf of minor children T.B. and K.B.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed the determination of the respondent Board that her children, T.B. and K.B., were not entitled to a free public education in Hunterdon Central Regional High School (HCRHS) during the 2011-2012 and 2012-2013 school years. The Board contended that petitioner and her children were domiciled during the period in question in Martinsville, which is outside of respondent's district. Petitioner conceded that she and her children were residing in Martinsville during 2011-2012 and 2012-2013, but argued that the Board abused its discretion by failing to credit extenuating circumstances under *N.J.A.C.* 6A:22-6.3, and that the children should have been permitted to remain in school without paying tuition. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the facts in this matter are not disputed; in May 2010, petitioner relocated from a house she owns in Whitehouse Station to a home in Martinsville in order to live with J.R.; thereafter, T.B. and K.B. were enrolled in the Bridgewater-Raritan School District for the 2010-2011 school year; T.B. did not adjust well to her new school, and was seen by a psychotherapist in March 2011; subsequently, petitioner represented that she planned to return to her home in Whitehouse Station, and reenrolled the children in respondent's district using that address; however, petitioner had leased her house to tenants who remained in it until they were evicted in February 2013; petitioner's family did not thereafter relocate back to Whitehouse. The ALJ determined that there was no merit to petitioner's contentions that the Board ignored extenuating circumstances – including her intent to return to Whitehouse Station, the depression T.B. allegedly suffered as a result of changing schools, and the loss of K.F.'s job in December 2012 – in determining not to permit her children to continue in the district; further,it was petitioner's voluntarily acts which created her misfortune. Accordingly, the ALJ concluded that the respondent Board's decision to dismiss T.B. and K.B. and to assess tuition was within its authority, and ordered the petitioner to reimburse the Board in the amount of $63,182 for tuition for the period of T.B. and K.B.'s ineligible attendance.

The Commissioner found, *inter alia*, that: petitioner's move to Martinsville in 2010 gave every indication of being a voluntary domicile change; petitioner claimed that she intended to move back to her former home in respondent's district, but her actions suggest otherwise; petitioner bore the burden of proving that her children were entitled to a free public education in HCRHS, but failed to do so. The Commissioner concluded that T.B. and K.B. were not domiciled within the respondent's district, and were therefore not entitled to attend HCRHS free of charge. Summary decision was granted to the respondent, and petitioner was ordered to pay the Board tuition in the amount of $63,182. The petition was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

Issued 10/03/14

OAL DKT. NO. EDU 4833-13
AGENCY DKT. NO. 63-3/13

K.F. on behalf of minor children T.B. and K.B.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
RESPONDENT.	:	

Before the Commissioner is a challenge to respondent's determination that petitioner owes it tuition for a period of two years during which petitioner's minor children attended school at Hunterdon Central Regional High School (HCRHS) while residing in Martinsville, a town in Somerset County which is outside respondent's district. The Commissioner has carefully and independently reviewed the record and Initial Decision of the Office of Administrative Law (OAL), and adopts the Administrative Law Judge's (ALJ) conclusion that there are no grounds for a reversal of respondent's determination and consequent assessment of tuition.[1]

Prior to May 2010, petitioner and her children resided within respondent's district – in Whitehouse Station. It is undisputed that they moved to Martinsville in May 2010 to live with J.R. Martinsville is within the Bridgewater-Raritan School District, and the children were enrolled in that district for the 2010-2011 school year. Petitioner related that her elder child did not adjust well to the change. She alleged that, in March 2011, a therapist diagnosed the child as

[1] Petitioner filed exceptions to the Initial Decision but does not appear to have served said exceptions on respondent. An attempt was made to contact petitioner concerning same, to no avail. In any event, the Commissioner finds petitioner's exceptions to be without merit.

severely depressed and recommended to petitioner that she return the child to school in respondent's district.[2]

In 2011, petitioner still owned the house in Whitehouse Station where she and her children had previously lived, but it was occupied by tenants to whom she had leased the premises. Nonetheless, in August 2011 petitioner used the Whitehouse Station address to reenroll her children in HCRHS for the 2011-2012 school year. Notwithstanding the fact that the family was living in Martinsville, petitioner's children attended HCRHS for that entire year and the first semester of the 2012-2013 school year as well. In January 2013, respondent learned that petitioner and her children had not been living in its district.[3]

The record contains a letter (and email) dated January 21, 2013 from Suzanne Cooley, HCRHS principal, advising petitioner that her children would be removed from school as of January 29, 2013. This advice was reiterated by District Superintendent Christina Steffner in an email dated February 2, 2013, and by Cooley in an email dated February 3, 2013. The children were not allowed to attend HCRHS on February 4, 2013, but were allowed to return on February 8, 2013, pending a hearing before the Board of Education (Board) about their status.[4]

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[2] As the ALJ noted, the record indicates that petitioner's elder child was seen only once by the therapist. Petitioner provided no expert report or other evidence which would allow the ALJ to find as fact said alleged diagnosis and recommendation. (Initial Decision at 3)

[3] An anonymous call triggered an investigation. District Superintendent Christina Steffner went to the Mullen Road address listed in the files for petitioner's children, and was told by the inhabitants that petitioner had not lived there for years. On or about January 14, 2013, T.B. advised HCRHS Principal Suzanne Cooley that she lived in Martinsville, and had been living there since 2010. On or about February 1, 2013, K.B. told Steffner the same.

[4] A relative who lived in respondent's district emailed Steffner and Cooley on Sunday, February 3, 2013, stating that petitioner's children could live with her; but that proposal never came to fruition. Petitioner alleged that Cooley and Steffner refused the proposal. The Commissioner finds that the email did not meet the standards of *N.J.S.A.* 18A:38-1(b)(1). Further, petitioner admitted that her purpose in arranging for her children to stay with the relative was the benefit of free public educations in the HCRHS district. (Answer 15 to respondent's requests for admissions)

In a registered letter dated February 7, 2013, Cooley informed petitioner as follows:

> If the Board determines at the hearing on February 25, 2013, that T.B. and K.B. are not domiciled in the Hunterdon Central Regional School District, you will be assessed tuition for this school year, prorated to the time of T.B.'s and K.B.'s ineligible attendance in the Hunterdon Central Regional School District.
>
> Alternately, in order to avoid a hearing before the Board, you may choose to withdraw T.B. and K.B. from the Hunterdon Central Regional School District.
>
> (Exhibit 8 to February 4, 2014 certification of Suzanne J. Cooley)

Petitioner chose not to withdraw her children from the district and participated in the February 25, 2013 hearing before respondent's Board. On the date of the hearing the Board voted to disenroll petitioner's children and directed the administration to pursue tuition reimbursement for the 2011-2012 school year and September through February 25 of the 2012-2013 school year.

At the outset, it is petitioner's burden to prove by a preponderance of the competent and credible evidence that her children were entitled to a free public education in respondent's district.[5] The gravamen of petitioner's appeal is her contention that her children should have been treated as though they were domiciled in respondent's district. The justifications which she offers are 1) she owns and pays property taxes on a house in the district, 2) the family once lived in the house, and 3) the family was prevented from returning to the house by unruly tenants who resisted eviction and by the damage caused by the tenants, which damage had to be remediated before the house could be inhabited. On its face, petitioner's account could support a reasonable argument that her family's domicile was Whitehouse Station. However, the record contains facts which suggest otherwise.

---

[5] If petitioner seeks to invoke respondent's discretionary authority to allow the children to attend tuition free pursuant to *N.J.S.A.* 18A:38-3, then she must prove that respondent's decision was arbitrary, capricious, or unreasonable.

A person's domicile "is the place where a person dwells and which is the center of his domestic, social and civil life." *In re Unanue*, 255 *N.J. Super.* 362, 374 (Law Div. 1991), *aff'd*, 311 *N.J. Super.* 589 (App. Div.), *certif. denied*, 157 *N.J.* 541 (1998), *cert. denied*, 526 *U.S.* 1051 (1999) (quoting *Citizens Bank and Trust Co. v. Glazer*, 70 *N.J.* 72, 81 (1976). For domicile to be established, it must be shown that: 1) an actual and physical taking up of an abode has occurred; 2) there is an intent to make a home in said abode permanently or least indefinitely; and (3) there is an intent to abandon the previous domicile. *Id.* at 376. A court must evaluate all of the facts of the case to determine the place in which there is the necessary concurrence of physical presence and intent to make that place one's home. *Ibid.* In the instant case, it is appropriate to conduct a domicile analysis both with regard to petitioner's move from Whitehouse Station to Martinsville in 2010, and her later allegations that she intended to move back to Whitehouse Station.

The Commissioner finds that petitioner's move from Mullen Road in Whitehouse Station to Washington Valley Road in Martinsville bore the indicia of a domicile change. It is undisputed that in May 2010 petitioner took up abode in J.R.'s Martinsville home and brought her children with her. An intent to remain in Martinsville on more than a temporary basis is evidenced by petitioner's admission that she moved to Martinsville to be with her "partner." (Answer 19 to respondent's first set of interrogatories) Further, upon moving to Martinsville petitioner enrolled her children in the Bridgewater-Raritan school district. (Answer to respondent's Request for Admission #8) Petitioner's intent to abandon domicile in Whitehouse Station may be inferred by the fact that, as of the end of November 2013, notwithstanding that the tenants had long been evicted from her Whitehouse Station property,

petitioner and one of her children still lived with J.R. in Martinsville.[6] (Answer 50 to respondent's first set of interrogatories)[7]

The facts in the record indicate that in August 2011, when petitioner enrolled her children in HCRHS (Answer to Request for Admissions #9), Martinsville remained the domicile of petitioner and her children. At that point in time, they indisputably still resided with J.R. in Martinsville. Indeed, J.R. was listed as the children's guardian on emergency contact forms. (Exhibit 1 to Certification of Superintendent Christina Steffner) And despite petitioner's representations to respondent's employees that she and her family intended to move back to Whitehouse Station, answers to respondent's Requests for Admissions #9 and #10, she took no steps at that time to evict her tenants from her Whitehouse Station property. The record instead shows that the tenants remained on the property,[8] and petitioner and her children remained in Martinsville with J.R. for the next year and a half while the children were attending school at HCRHS. These actions speak louder than the assertions petitioner had made to respondent's staff about her intentions when she enrolled her children in HCRHS for the 2011-2012 school year. More specifically, they strongly suggest an intention to maintain domicile in Martinsville.

In summary, it is undisputed that petitioner's two children attended HCRHS during the 2011-2012 school year and the 2012-2013 school year. The Commissioner concurs with the ALJ that petitioner and her children were not domiciled in respondent's district during those two school years. The children were consequently not entitled to free public educations at

---

[6] The other child had gone to live with her father in New York.

[7] The Commissioner notes that in petitioner's most recent filing she maintains that she and her family resumed living in the Whitehouse Station house in July 2013 and continue to reside there. This clearly contradicts her answer to question #50 of respondent's first set of interrogatories, and detracts from her credibility

[8] Petitioner took no legal action against her tenants until late December 2012, when she instituted eviction proceedings for non-payment of rent and other fees. (Answer 21 to respondent's second set of interrogatories; Answer to Request for Admission #14)

HCRHS during that period of time. In its counterclaim to the petition, respondent identified the annual tuition for 2011-2012 as $15,215 per student and the annual tuition for 2012-2013 as $16,376 per student. These figures were not rebutted by petitioner.

Accordingly, summary disposition is granted to respondent, petitioner is ordered to pay respondent tuition in the amount of $63,182, and the petition is dismissed.

IT IS SO ORDERED. [9]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/03/14

Date of Mailing: 10/03/14

[9] This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L.* 2008, *c.* 36, *N.J.S.A.* 18A:6-9.1.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4833-13
AGENCY DKT. NO. 63-3/13

K.F. on behalf of minor children, T.B. and K.B.,

Petitioners,

v.

BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT,

Respondent

Michael A. DeSapio, Esq., for petitioner

John Comegno, III, Esq., for respondent (Comegno Law Group, attorneys)

Record Closed: August 15, 2014 Decided: August 26, 2014

BEFORE **SOLOMON A. METZGER**, ALJ t/a:

This matter arises out of a determination by Hunterdon Central Regional Board of Education that petitioner was not domiciled in the District during the 2011-2012 and 2012-2013 school years and thus that her children, T.B. and K.B., were not entitled to a free public education, N.J.S.A. 18A:38-1; N.J.A.C. 6A:22-3.1. Petitioner filed an appeal

before the Commissioner of Education and the District counterclaimed for reimbursement. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1-to -13. The matter has been submitted on cross-motions for summary decision, N.J.A.C. 1:1-12.5; Brill v. Guardian Life Ins. Co. of Amer.,142 N.J. 520 (1995).

The facts are undisputed. In May 2010, petitioner and her two children T.B. and K.B. relocated from their home on Mullen Road in Whitehouse Station to a home on Washington Valley Road in Martinsville. The first location is within the school district and the second outside of it. Petitioner moved to Martinsville to live with J.R. For the following school year T.B. and K.B. were enrolled in the Bridgewater-Raritan School District, Somerset County. T.B. did not adjust well to her new environment and in March 2011, was seen by Felicia Oberti, a psychotherapist.

In August 2011, petitioner represented to the District that she planned to return to the Mullen Road house and her children were reenrolled for the 2011-2012 school year. Multiple District records reflect the Mullen Road address for the family. In January 2013, the District learned that petitioner and her children had not relocated to the Mullen Road house and continued to reside at the Washington Valley Road location. Formal notice was given to the effect that the children could not continue in the District tuition-free and a hearing was convened before the School Board on February 25, 2013. The Board voted to remove the children from school and directed the administration to seek reimbursement. The total amount sought was $63,182 for both students over the course of two school years.

Petitioner owned the home on Mullen Road and on relocating to Martinsville in May 2010, leased the property to tenants. By letter dated May 30, 2011 petitioner gave notice to the tenants that late rent payments were unacceptable and that other charges were owing. In September 2011, she wrote again concerning rent delinquency and failure to sign a new lease; petitioner threatened eviction proceedings. On December 27, 2012, petitioner initiated eviction proceedings and in January 2013 obtained a judgment. A warrant of removal was executed on February 25, 2013. There was some

cleanup required at the property, but the family did not thereafter relocate to the home. This is the substance of the record.

Petitioner has conceded that she did not reside in the District during the 2011-2012 and 2012-2013 school years. Neither does she dispute the tuition calculation for the two years. Petitioner argues instead that the Board abused its discretion by failing to credit extenuating circumstances under N.J.A.C. 6A:22-6.3, and that the children should have been permitted to remain in school without paying tuition. I disagree.

Boards of Education enjoy wide latitude in the exercise of discretion, Kopera v. West Orange Bd. Of Ed., 60 N.J. Super. 288 (App. Div. 1960), and N.J.A.C. 6A:22-6.3 is generally consistent with that policy. Petitioner asserts that she intended to return to her home on Mullen Road, but needed first to terminate the existing tenancy there. T.B. was suffering from severe depression as a result of the move away from the district and this needed to be addressed. Petitioner states that she lost her job in December 2012. In February 2013, when all else failed, petitioner arranged for the children to live temporarily with a great-aunt within the district. In her view these factors taken together should have moved the Board to a different result.

Under Brill, assertions are not automatically treated as facts. Although petitioner states that her daughter was clinically depressed, it appears T.B. was seen by a therapist one time. There is no expert report and we know nothing of the details. As to the tenants at Mullen Road, eviction proceedings did not commence until approximately one-and-one-half years after the children were enrolled in the district. Petitioner's correspondence with the tenants during that period is focused on collecting rent and other payments. The temporary living arrangement suggested in the winter of 2013 did not come to fruition and thus weighs lightly if at all. The loss of employment could be a factor in the right setting. Taken together no meaningful equitable circumstances emerge. Petitioner misreads support in C.H. o/b/o Bd. of Ed. of Bloomfield Twp., OAL Dkt. No. EDU 5181-07 (NJ Admin. Jan. 22, 2008). That matter involved sympathetic facts that were not self-created. In our case petitioner set her misfortune in motion.

Based on the foregoing, I **CONCLUDE** that the decision of the District to dismiss T.B. and K.B. and to assess tuition was well within its authority. It is **ORDERED** that petitioner reimburse the District in the amount of $63,182.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

August 26, 2014
DATE

SOLOMON A. METZGER, ALJ t/a

Date Received at Agency: 8/26/14

Date Mailed to Parties: 8/26/14

mph

410-14

AGENCY DKT. NO. 283-11/13

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	ORDER
V.	:	
M.J., on behalf of minor children, C.J. and C.J.,	:	
RESPONDENT.	:	

On July 18, 2014, a final agency decision was rendered in this matter, wherein the Commissioner granted summary decision to the Board on its complaint seeking reimbursement from respondent M.J. for the cost of tuition pertinent to the period of ineligible attendance of C.J. and C.J. in the public schools of the Hamilton Township School District from September 5, 2012 to June 20, 2013. Respondent had been directed to submit an answer to the Board's complaint and was informed that if no answer was submitted, each count of the complaint would be deemed admitted and the matter could then be decided on a summary basis. As no answer was subsequently submitted, the Commissioner granted summary decision in favor of the Board, and ordered respondent to remit to the Board tuition in the amount of $24,408.00. The Board subsequently notified the Commissioner that the respondent has failed to comply with his decision, and requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Respondent offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Markeda Jones is now subject to entry of a judgment by the court in the amount of $24,408.00, which represents the payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/07/14

Date of Mailing: 10/09/14

AGENCY DKT. NO. 282-11/13

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	ORDER
V.	:	
S.B., on behalf of minor child, C.B.,	:	
RESPONDENT.	:	

On August 8, 2014, a final agency decision was rendered in this matter, wherein the Commissioner granted summary decision to the Board on its complaint seeking reimbursement from respondent S.B. for the cost of tuition pertinent to the period of ineligible attendance of C.B. in the public schools of the Hamilton Township School District from October 1, 2012 to June 20, 2013. Respondent had been directed to submit an answer to the Board's complaint and was informed that if no answer was submitted, each count of the complaint would be deemed admitted and the matter could then be decided on a summary basis. As no answer was subsequently submitted, the Commissioner granted summary decision in favor of the Board, and ordered respondent to remit to the Board tuition in the amount of $12,204.00. The Board subsequently notified the Commissioner that the respondent has failed to comply with his decision, and requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Respondent offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Sonya Blue is now subject to entry of a judgment by the court in the amount of $12,204.00, which represents the payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/07/14

Date of Mailing: 10/09/14